

- (ii) Was Mr. Simpson prejudiced by the way the draft permit was noticed such that he should be excused from the threshold timeliness requirement of having filed his appeal within 30 days of notice of the final permit?

With respect to the standing issue, the record shows that Mr. Simpson was not prejudiced by the way the draft permit was noticed, as he was not in a position to have participated in the District's proceeding no matter what level of notice was given. As the District has explained in its briefing to date, despite Mr. Simpson's keen interest in this permit now, last summer when the Russell City project was undergoing its extensive environmental review before the District and the California Energy Commission Mr. Simpson was simply not engaged on these issues at any level. *See Response To Petitioner's Opposition To Request For Summary Dismissal*, at pp. 6-9 (discussing, *inter alia*, the Board's holding in *In re J&L Specialty Products Corp.* that absent a showing of prejudice a petitioner cannot establish standing based on a failure to send a copy of the notice to someone else). It can therefore make no difference to Mr. Simpson's standing argument whether or not a notice of the draft PSD permit was actually mailed to the County. Either way, Mr. Simpson would not have filed comments as his track record with this project demonstrates. Indeed, even if the District had hand-delivered a copy of the notice and draft permit to each member of the County's Board of Supervisors and sat down and briefed them individually on the minutiae of the PSD permitting process, that still would not have induced Mr. Simpson to participate, given his lack of engagement at the time.² Accordingly, the County's brief regarding notice to the Board of Supervisors bears no relevance to the issue of whether Mr. Simpson can demonstrate prejudice sufficient to establish standing under the standard set forth in *J&L Specialty Products Corp.*

² The District notes that although the notice of the draft PSD permit was not mailed to the County's Board of Supervisors, the Board of Supervisors was well aware of the project and what it entailed. In fact, the Board of Supervisors even approved an agreement with the City of Hayward regarding how property tax revenues from the project site would be allocated. *See Order Denying Petitioners For Intervention and Denying Petitions For Reconsideration, Etc., In re Amendment to Application for Certification of the Russell City Energy Center Project*, Proceeding No. 01-AFC-7C (Cal. Energy Comm'n Nov. 7, 2007), Exhibit A to District's Request For Official Notice, at p. 6. The Board of Supervisors has apparently taken an interest in the permitting process for the project at this late stage because of the County's involvement in another project that is currently being proposed nearby, the Eastshore Energy Center, which has proved far more controversial than the Russell City project was when it was being permitted in the summer and autumn of 2007. *See Motion* at p. 3, ll. 6-19.

With respect to the timeliness issue, there is no way that anything related to the notice of the *draft* permit can excuse Mr. Simpson's failure to file his appeal within 30 days of receiving actual notice of the *final* permit, as the District has explained in its briefs. *See* Response To Petitioner's Opposition To Request For Summary Dismissal, at p. 13. Nothing in the brief the County proposes to file bears any relevance at all to this issue.

The Board should therefore deny the County's Motion for lack of relevance.

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Respectfully Submitted

BRIAN C. BUNGER, ESQ.
DISTRICT COUNSEL
BAY AREA AIR QUALITY
MANAGEMENT DISTRICT

_____/s/_____
By: Alexander G. Crockett Esq.
Assistant Counsel