

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In the matter of
Russell City Energy Center

)
) PSD Appeal No. 08-01
)
)
)

**BAY AREA AIR QUALITY MANAGEMENT DISTRICT’S RESPONSE TO
PETITIONER’S “OPENING STATEMENT”**

Respondent the Bay Area Air Quality Management District (“District”) submits this Response to the “Opening Statement of Rob Simpson” (hereinafter, “Petitioner’s Further Brief”) filed by Petitioner on March 31, 2008, in the above-captioned matter. To the extent the Board allows Petitioner’s untimely Further Brief to be considered, the District responds to the additional points Petitioner raises as follows.

I. To The Extent That The Environmental Appeals Board Allows Petitioner To Submit Untimely New Arguments After He Filed His Reply Brief, It Should Allow The District To Respond To Them

The January 8, 2008, letter from the Clerk of the Environmental Appeals Board setting forth the briefing schedule for this proceeding established that apart from the District’s Response Seeking Summary Dismissal and Petitioner’s Reply, “[n]o further briefing will be allowed except by order of the Board.” Clerk’s January 8, 2008, letter at p. 3.¹ In Petitioner’s Further Brief, Petitioner now seeks to submit additional factual and legal arguments outside of this established briefing schedule. To the extent that the Environmental Appeals Board considers the additional points Petitioner raises in his untimely Further Brief, the Board should in fairness allow the District to respond to them.

¹ On February 14, 2008, the Board ordered the District to submit further briefing on certain issues, but it made no provision for any additional filings by Petitioner.

II. Petitioner's Further Brief Highlights How Petitioner Cannot Blame Alleged Defects In The Notice Of The Draft Permit For (i) His Failure To Comment And (ii) His Failure To Appeal Within 30 Days

Petitioner's Further Brief offers new information, including several new exhibits from the California Energy Commission's ("CEC's") licensing process, concerning the CEC's air quality assessment for the project and a workshop that the CEC held in April of 2007 to discuss air quality issues. These submissions are of little relevance to the factual issues concerning the public notice that was provided for the draft PSD permit. The District has provided its factual information regarding how 40 C.F.R. Section 124.10 was complied with in this case, and it has nothing further to add to its earlier submissions in response to Petitioner's Further Brief. (The District will, however, be participating along with the CEC in the telephone conference scheduled for April 3, 2008, to answer the Board's questions on this issue and provide any additional information that may help shed further light on them).

What Petitioner's Further Brief does highlight is the lack of prejudice that Petitioner can reasonably claim to have suffered to the extent that there were any defects in the public notice as he now asserts. That is, the Further Brief underscores the fact that Petitioner cannot blame any purported defects in the notice for (i) his failure to comment on the draft permit or otherwise participate in the PSD permitting process and (ii) his failure to file his appeal within 30 days of notice of issuance of the final permit, as the District explained in detail in its earlier submissions.

First, with respect to Petitioner's lack of standing resulting from his failure to comment, Petitioner's points about the CEC's workshop² on air quality and other issues—a workshop he did not attend, even though it addressed the air quality issues he now claims to be concerned with—highlights the real reason that Petitioner did not file comments on the draft PSD permit. The real reason is not that the District may have been deficient in some way in its efforts to comply with 40 C.F.R. Section 124.10, it is because Petitioner's concerns about this project have developed only at the very end of the permitting process, and as a result Petitioner was not in a position to have commented on the draft PSD permit last summer even if the District had done

² As is clear from Petitioner's submission, this workshop was not a formal public hearing or an opportunity for the public to submit formal comments into the record, as no official record was kept of what was discussed. *See* Petitioner's Further Brief at p. 2. As testimony from the CEC has established, the CEC did not hold any formal public hearings during the comment period on the PDOC/Draft PSD permit.

everything exactly as Petitioner claims it should have done. Petitioner's lack of participation in the CEC's April 25, 2007, workshop is simply further evidence of this fact. Had Petitioner truly been interested in the environmental issues that he now raises in his Appeal and which were part and parcel of the CEC's comprehensive environmental review—and in particular, in the PSD-related air quality issues at issue in the permit before the Board, which were the subject both of the CEC's general environmental review and the Air District's EPA-delegated PSD permitting process—he would have been participating in workshops such as this one, as well as in formal public hearings on air quality issues, in order to make his concerns known to the appropriate decision-makers. Given the extensive public outreach and the high level of community awareness at the time regarding this project,³ the only reasonable explanation for Petitioner's failure to participate in workshops such as this one or otherwise to raise his concerns in the CEC process was because he was not concerned with these issues at the time (or at least, not sufficiently engaged with respect to this project to participate). And the only reasonable conclusion to draw from these facts is that the same situation was present in the PSD permit process as well: Petitioner would not have been in a position to participate in the District's proceeding on the draft PSD permit last summer no matter what level of public notice had been provided because he was not sufficiently engaged, and so he cannot belatedly blame his failure to comment on the purported defects in the notice that was given. Petitioner simply has no credible argument that his failure to comment at the time—and his resulting lack of standing to appeal—should be excused on the grounds that it was somehow the District's fault that he was unaware that the PSD permit process was going forward.⁴

³ See generally discussion in the District's March 6, 2008, Response Brief at pp. 3-5.

⁴ That Petitioner has come to this process only belatedly and cannot blame any purported notice defects for his failure to participate is also highlighted by the fact that the documents he submits in his Further Brief expressly discuss the District's draft permit and the public comment period provided for it. For example, the quotes from filings by the project applicant discuss the public's right to make its air quality concerns known to the District during the 30-day comment period. See Further Brief at p. 1. Indeed, those filings even provide a proposed schedule for the permitting of the project that included an approximately timeline (which in hindsight was remarkably accurate) for the issuance of the draft permit and the opportunity for the public to comment. See Petitioner's Exhibit #27, p. 11 line 10 and fn. 11. Petitioner could not possibly have been unaware of his opportunity to submit his comments to the District if he had been interested in this project at the time to the extent he now claims in this Appeal. These filings obviously do not substitute for the notice that was provided when the draft permit was actually issued, but to the extent that Petitioner wants to bring them to the Board's attention, they simply

Second, with respect to Petitioner's failure to appeal within 30 days after notice of issuance of the final permit, any defects in the notice on the draft permit cannot excuse Petitioner's failure to appeal within 30 days after he received actual notice of the final permit, as the District explained in its March 6, 2008, Response Brief at p. 13. There is obviously some uncertainty as to whether the 30 days ran from the day notice was given to those entitled to it (e.g., those who commented on the draft permit) at the beginning of November, 2007, or from the day Petitioner himself received actual notice towards the end of November, 2007. But either way, the 30-day appeal period ended by the end of December, 2007, at the latest, and so Petitioner's appeal in January, 2008, was untimely. Petitioner cannot avoid this fatal defect in his case either by blaming lack of notice on the draft permit or by pointing to a notice published in the newspaper, which is irrelevant both under the clear language of 40 C.F.R. Section 124.19(a) and under the equities in this case where Petitioner failed to act within 30 days even though he had actual notice of the permit and of the applicable appeal deadline.

Petitioner attempts to draw attention away from these fundamental flaws in his Appeal by suggesting that the Board's inquiry focus not on the notice that was provided to him (as he was not actually a person who was entitled to notice under 40 C.F.R. Section 124.10), but on the notice that was provided to other entities. *See* Petitioner's Further Brief at p. 3. But the central inquiry on the threshold jurisdictional issues before the Board at this stage must focus not on other entities who are not parties here, but on the Petitioner who seeks to pursue this Appeal. The Board's inquiry must determine whether Petitioner can establish that he himself should be excused from not having commented and from not having appealed within 30 days based on the purported defects in notice he alleges.⁵ On both of these points, Petitioner has failed to carry his burden to show that he satisfies the jurisdictional prerequisites for appeal. To the extent that there were any defects in the public notice process as Petitioner alleges, Petitioner cannot reasonably blame them for his failure to have commented where he has a demonstrated track

highlight the fact that Petitioner's claimed unawareness of the draft permit and his opportunity to comment was the result of his own inattention to the process, not because of purported defects in the notice.

⁵ *See generally* discussion in the District's March 6, 2008, Response Brief at pp. 6-9, addressing *inter alia* the Board's holding in *In re J&L Specialty Products Corp.*, 5 E.A.D. 31 (EAB 1994) that standing cannot be based on a failure to provided notice to *someone else* under 40 C.F.R. Section 124.10, unless the Petitioner can show that *he himself* was prejudiced in his opportunity to comment by the failure to do so.

record of standing by and not participating on environmental issues related to this project in any capacity no matter what level of public notice was provided. And he cannot reasonably blame his failure to have filed his appeal within 30 days after notice of the final permit where it is undisputed that he had actual notice of the issuance of the permit, of his right to appeal, and of the applicable time limit more than 30 days before he filed. For both of these reasons, even if Petitioner is correct that the notice for the draft permit may have failed to comply with one of the requirements of 40 C.F.R. Section 124.10 in some way, Petitioner has still failed to demonstrate that the Board has jurisdiction over his Appeal.

III. Conclusion

The District reasserts its arguments in its earlier briefing as to how the notice for the draft permit in this case complied with the applicable regulatory requirements. The District further submits that Petitioner’s Further Brief only highlights the fact that, even if the notice was defective in some way, Petitioner has not shown that any such defect was the cause of his failure to comment or his failure to appeal within 30 days of receiving actual notice of the final permit. For all of these reasons, this Appeal should be dismissed for failure to satisfy the jurisdiction prerequisites for Environmental Appeals Board review.

Dated: April 2, 2008

Respectfully Submitted

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

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