

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

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In re: :
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Russell City Energy Center : PSD Appeal No. 08-01
: :
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ENV. APPEALS BOARD

Washington, D.C.
Thursday, April 3, 2008

The above-entitled matter came on
for STATUS CONFERENCE at approximately 1:09
p.m. at the Environmental Protection Agency,
1341 G Street, NW, Washington, D.C.

BEFORE:

EDWARD E. REICH

Presiding Judge

2

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 19 ALSO PRESENT:
 20 Eurika Durr
 B. Stanley Ross
 21
 22 * * * * *

4

1 will be a transcript made of the proceeding,
 2 and it will be part of the record as a
 3 proceeding before the Board. So in that
 4 sense, it is somewhat of a formal process.
 5 The primary process is to allow us
 6 to get a better understanding of the
 7 interplay between the PSD proceeding and the
 8 broader CEC proceeding. Some of the
 9 questions that I ask will likely go to
 10 process in general; some may be specific to
 11 Russell City. In the first instance, I just
 12 want to have a better understanding of how
 13 those processes dovetail.
 14 I do understand that there are a
 15 number of issues that were raised in the
 16 petition and in the response and for the
 17 briefing that go beyond the notice that you
 18 are focusing on this morning. I assure you
 19 we haven't lost sight of those issues. But
 20 for purposes of this call, our focus really
 21 is to get a better understanding of the
 22 notice process, particularly with respect to

3

1 PROCEEDINGS
 2 MS. DURR: The Environmental Appeals
 3 Board of the United States Environmental
 4 Protection Agency is now in session for a
 5 hearing in reference to Russell City Energy
 6 Center, PSD Appeal No. 01 -- I'm sorry, 08-01.
 7 The Honorable Judge Edward Reich
 8 presiding.
 9 JUDGE REICH: Good morning, everybody.
 10 SPEAKER: Good morning, Your Honor.
 11 JUDGE REICH: I welcome everybody.
 12 Thank you all for making yourselves available
 13 for the purposes of this hearing. Let me
 14 briefly just discuss the nature of this
 15 proceeding as it -- as I tried to emphasize in
 16 my order, it's not an oral argument. We're not
 17 really expecting or really looking for argument
 18 on legal issues. I think the parties have
 19 advertently covered that in their briefs.
 20 It's not an evidentiary hearing,
 21 but it is an on-the-record proceeding in the
 22 sense that we do have a court reporter, there

5

1 the proposed PSD permit.
 2 During the course of this
 3 conference call, I may ask questions that
 4 ultimately turn out not to be legally
 5 relevant. I would suggest you not overly
 6 analyze the questions. My guess is there's a
 7 tendency in Washington -- whenever there's a
 8 Supreme Court case, to analyze in great
 9 detail the questions which are raised -- what
 10 they say about where the judge is coming
 11 from. Save yourself the trouble, because I
 12 don't know where I'm coming from.
 13 I'm just trying to understand what
 14 we're dealing with here. And as I said, my
 15 questions, we may ultimately conclude the
 16 answers to have no bearing on what we're
 17 trying to decide. I'd rather a fuller
 18 picture now when I have everybody available.
 19 Rather than having everybody kind
 20 of recite who's on the line, let me for
 21 simplicity recite who I understand to be on
 22 the line, and correct me if I'm not accurate

6

1 in that.

2 I believe we have essentially four

3 participants: one being Rob Simpson, the

4 Petitioner in this matter; the second,

5 Alexander Crockett, representing the Bay Area

6 Air Quality Management District, the

7 permitting authority for the PSD permit; the

8 third, Richard Ratliff, representing the

9 California Energy Commission; and fourth,

10 Jeffrey Harris, who represents Russell City.

11 Is there anybody else

12 participating?

13 REPORTER: Yes. Stan Ross, the court

14 reporter.

15 JUDGE REICH: And the court reporter.

16 Thank you, Mr. Ross.

17 REPORTER: You're welcome.

18 MR. SIMPSON: Sir, this is Rob

19 Simpson. We do have an audience here at Chabot

20 College consisting of faculty, students,

21 representatives of environmental and legal

22 groups.

7

1 JUDGE REICH: I have no problem with

2 that as long as there isn't background noise

3 that interferes with the call. Otherwise,

4 that's fine. They're welcome as well.

5 MR. SIMPSON: Okay. Thank you.

6 JUDGE REICH: Let me just go into one

7 preliminary matter before we get into the

8 substance of the call.

9 We did receive from Mr. Simpson

10 something styled "opening statement of Rob

11 Simpson." We also received a Bay Area Air

12 Quality Management District response to

13 Petitioner's opening statement, urging that

14 if we accept Mr. Simpson's opening statement,

15 that we accept their response.

16 Because there is something in

17 Mr. Simpson's statement that I will want to

18 ask a question about, we are going to accept

19 it, but we will also accept the Bay Area

20 response. I do want to emphasize, however,

21 prospectively, that there should be no

22 further briefing on this matter unless it's

8

1 either invited by the Board or approved by

2 the Board.

3 In terms of approval by the Board,

4 if there is something you feel that we

5 absolutely have to know, then submit a

6 motion. Do not include what you're proposing

7 to file along with your motion. Just submit

8 the motion, tell us why it is, tell us why

9 it's relevant, and tell us why it could not

10 have been filed earlier, and the Board will

11 rule on that motion.

12 If we accept it, we will allow you

13 to file it, and we will allow a response.

14 And obviously, the Board is not interested in

15 anything that is repetitious of things filed

16 today.

17 So with that, let me also suggest

18 that if you're responding to something other

19 than the question directed specifically to

20 you, you may need to identify yourself for

21 purposes of the court reporter being able to

22 accurately attribute comments to the right

9

1 people.

2 With that, let me turn to what to

3 me is the area I need to understand better,

4 and that's the interplay between the PSD

5 process and the CEC process. My

6 understanding is that the way it typically

7 works, at least as to issues that would be

8 relevant to the PSD process, is that the Bay

9 Area Air Quality Management District develops

10 a draft permit in -- and there's also PDOC.

11 It is put out for public comment,

12 although I understand the notice of public

13 comment is actually handled, in most respects

14 at least, by CEC. But I am assuming, and let

15 me know if this assumption is correct,

16 Mr. Crockett, that to the extent that there

17 are comments, the comments come to the Bay

18 Area Air Quality Management District.

19 The Bay Area Management District is

20 the one that would make a determination as to

21 the comments, then put together the final

22 permit, and put together a response to the

<p style="text-align: right;">10</p> <p>1 comments document that goes hand in hand with 2 a PSD permit. And then this document in the 3 form of an FDOC then goes over to the 4 California Energy Commission. 5 Is that generally correct? 6 MR. CROCKETT: That is generally 7 correct, Your Honor, and that is what happened 8 in this case. The notice inviting written 9 public comment suggested that, or stated that 10 the comment be sent to Weyman Lee, the district 11 permitting engineer, and that is what happened. 12 And then as you are assuming, the process went 13 forward, and an FDOC was prepared and a final 14 PSD permit was also issued. 15 JUDGE REICH: Okay, thank you. When 16 it gets to the CEC -- and I guess this question 17 would go to Mr. Ratliff -- does CEC have a 18 formal comment period analogous to what we do 19 with PSD, where there is a formal opening date, 20 then a formal closing date, and people who want 21 to comment have to comment within that time 22 frame?</p>	<p style="text-align: right;">12</p> <p>1 that are in the PSD permit which are 2 federalized. 3 So yes -- but in terms of the 4 comment period, we actually allow public 5 comment on these issues right up until the 6 final decision. So people can comment and 7 seek changes in the Commission's final 8 decision right up to the date that the 9 decision is adopted. So there is no final 10 cutoff that -- such as the one that the 11 District uses, or such as is typical among 12 many agencies which give 45-day comment 13 periods for environmental impact reports. 14 There is a much more generous comment period. 15 JUDGE REICH: Can a member of the 16 public comment on issues that were within the 17 scope of the PSD process? 18 MR. RATLIFF: Yes. You can comment 19 really on anything that's in the FDOC or 20 anything that isn't in the FDOC. There's no 21 limitation on that. 22 JUDGE REICH: Now, if you comment on</p>
<p style="text-align: right;">11</p> <p>1 MR. RATLIFF: This is Dick Ratliff 2 speaking. Actually, it's a little bit different 3 from that. The Energy Commission process is 4 iterative. There is a preliminary staff 5 assessment which usually comes out after the 6 PDOC, and usually describes the staff -- the 7 Energy Commission staff's comments on the -- not 8 only the PDOC, but on air quality issues that go 9 beyond that, including construction impacts and 10 so forth. 11 JUDGE REICH: Is that in the window 12 between the PDOC and the FDOC? 13 MR. RATLIFF: Yes, typically. 14 JUDGE REICH: Uh-huh. 15 MR. RATLIFF: And then secondarily 16 after that, when the final FDOC comes out, the 17 staff publishes its final analysis which 18 reflects all of the requirements that will be 19 placed into the Energy Commission permit, which 20 is all of the dicta to implement the permit, 21 which would include all of the conditions which 22 are in the FDOC, with the exception of those</p>	<p style="text-align: right;">13</p> <p>1 something that was part of the PSD process, what 2 happens to those comments? Who analyzes those 3 comments? Who makes the determination as 4 to -- and if there's a determination that a 5 change is appropriate, does it then go back to 6 the Bay Area Air Quality Management District to 7 reopen the project, or how does all that work? 8 MR. RATLIFF: Well, the District has 9 its own parallel process which has a comment 10 period and a final determination of compliance 11 which becomes the PSD permit in effect -- 12 JUDGE REICH: Well, I guess I'm asking 13 about a comment that might come to you after the 14 FDOC is issued, and therefore, that process has 15 presumably runs its course, but you're still 16 dealing with the broader -- 17 MR. RATLIFF: That's right. I mean, 18 you know, I'm not really sure how to answer 19 that. I -- you know, people -- our staff 20 frequently comments on things without really 21 trying to discriminate between things that are 22 PSD and non-PSD. Likewise, I think we would</p>

<p style="text-align: right;">14</p> <p>1 consider comments on -- we just consider 2 comments on the entire final determination of 3 compliance. 4 We don't really attempt to 5 determine whether these are FDOs -- whether 6 these are PSD comments or not. We just 7 consider the entire FDOC document. 8 JUDGE REICH: So do you have the 9 authority to change what was in the FDOC as it 10 would impact PSD requirements? 11 MR. RATLIFF: No, we don't. If it's a 12 PSD issue and a PSD requirement, that's a 13 federal permit requirement, where the District 14 stands, as you know, in the role of EPA. And 15 so, we don't have the authority to change a PSD 16 condition. That really is a District authority. 17 And if it -- you know, came to a conflict, I 18 think we would have to yield to the District for 19 that reason. 20 MR. CROCKETT: If I can clarify, I 21 think that it's an EPA authority. The District 22 is exercising that authority under a delegation</p>	<p style="text-align: right;">16</p> <p>1 PSD regulation. 2 And they come up with an FDOC and 3 it goes to CEC, and CEC gets comments on air 4 quality issues, which include issues related 5 to PSD. Is it the CEC staff that makes a 6 determination as to whether there's any 7 validity to those comments? And if it's --if 8 there is validity, does it then somehow go 9 back to the Bay Area? I mean, what I'm 10 trying to understand is how meaningful the 11 ability to comment on PSD-related issues is 12 if the CEC can't make changes to the PSD 13 permit. How all that works. 14 MR. RATLIFF: Well, usually, I think 15 in these areas where you have PSD-type issues, I 16 think that there's been no -- to my knowledge, 17 there -- in the cases that I've had, there has 18 been no conflict with the air district. If 19 there was conflict with the air district or if 20 we have something to take up with the air 21 district, we take it up with them during the 22 comment period for the PDOC.</p>
<p style="text-align: right;">15</p> <p>1 agreement. It's actually a federal authority 2 for this. 3 MR. RATLIFF: That is correct. 4 REPORTER: Excuse me. The last person 5 who spoke, could you identify yourself, please? 6 MR. CROCKETT: I'm sorry, that's 7 Alexander Crockett for the Bay Area Air Quality 8 Management District. 9 REPORTER: Thank you, sir. 10 JUDGE REICH: Thank you. 11 MR. RATLIFF: Dick Ratliff speaking 12 again. I agree with that, that -- I misspoke if 13 I said something different. 14 JUDGE REICH: All right. But let me 15 just pursue this a little bit further, though. 16 I assume that -- and take this apart from 17 Russell City -- I mean, this is just a generic 18 sort of discussion -- assume that there's a 19 facility that undergoes PSD review and it's also 20 a power plant that would implicate CEC, that it 21 goes through whatever notice and comment process 22 required by the District in satisfaction of the</p>	<p style="text-align: right;">17</p> <p>1 And we have done that before, and 2 we try to see that the questions get answered 3 in that period in the District's process. 4 But I believe that when you have an 5 EPA-issued permit, the Energy Commission 6 could not overwrite or change the nature of 7 that permit. Those issues are determined by 8 the air district acting for -- as, I should 9 say, EPA. 10 JUDGE REICH: So is it fair for me to 11 view this as -- say, as concluding that even 12 though there's an extended CEC process that 13 comes after the FDOC, and even though that may 14 entail getting comments on air quality issues, 15 and even though as you said earlier, staff 16 doesn't necessarily distinguish between PSD and 17 non-PSD issues, nonetheless, if it's something 18 that affects the PSD permit, it really comes too 19 late to affect what ultimately gets issued, 20 because you don't really view yourselves as 21 having the authority to vary the PSD permit as 22 it was adopted by the Air Quality Management</p>

<p style="text-align: right;">18</p> <p>1 District?</p> <p>2 MR. RATLIFF: I think that's basically</p> <p>3 correct, but we don't -- like I say, we don't</p> <p>4 distinguish in terms of the comments that we</p> <p>5 make to the District. And we often comment on</p> <p>6 the District's PDOC. We did in this case.</p> <p>7 JUDGE REICH: Yeah. No, I wasn't</p> <p>8 thinking so much about comments that you or your</p> <p>9 staff might make so much as how you handle</p> <p>10 comments coming from the public. Is there any</p> <p>11 involvement of the District staff in the CEC</p> <p>12 proceedings?</p> <p>13 MR. RATLIFF: Yes.</p> <p>14 JUDGE REICH: Does that involvement</p> <p>15 include involvement after the FDOC?</p> <p>16 MR. RATLIFF: Yes.</p> <p>17 JUDGE REICH: So if there's like a</p> <p>18 hearing or a meeting, are they represented</p> <p>19 there?</p> <p>20 MR. RATLIFF: Yes, the Energy</p> <p>21 Commission holds workshops on particular issues</p> <p>22 that are -- where it needs more information or</p>	<p style="text-align: right;">20</p> <p>1 preserve the air quality of the District.</p> <p>2 I can actually find the statutory</p> <p>3 provision if you would like. But anyway,</p> <p>4 they have to certify to this, and generally</p> <p>5 do so at the adoption hearing that's</p> <p>6 final --</p> <p>7 JUDGE REICH: Let me go ahead and ask</p> <p>8 the one question that I indicated I did want to</p> <p>9 ask that was prompted by Mr. Simpson's opening</p> <p>10 statement. Relative to the April 25, 2007</p> <p>11 workshop, was there staff from the Bay Area Air</p> <p>12 Quality Management District at that staff -- do</p> <p>13 you know -- does Mr. Crockett know?</p> <p>14 MR. CROCKETT: This is Alexander</p> <p>15 Crockett. I do not know. I was not present.</p> <p>16 Mr. Ratliff, I understand that you were present.</p> <p>17 Maybe you could answer that question.</p> <p>18 MR. RATLIFF: I think they were</p> <p>19 present, but I can't actually remember for</p> <p>20 certain. The principal dialogue at that</p> <p>21 workshop was between -- on the issue of air</p> <p>22 quality was entirely between the Energy</p>
<p style="text-align: right;">19</p> <p>1 where it needs to see if it fully understands or</p> <p>2 can work out an issue with an applicant. These</p> <p>3 things -- these workshops are public discussions</p> <p>4 that are noticed -- publicly noticed and</p> <p>5 publicly attended.</p> <p>6 And at those meetings, the District</p> <p>7 usually -- we usually invite the District to</p> <p>8 have a representative, particularly if we are</p> <p>9 concerned with the issue of air quality at</p> <p>10 that meeting. So the District typically</p> <p>11 attends those meetings, and the District</p> <p>12 typically attends all hearings, and has in</p> <p>13 this case I believe attended all hearings.</p> <p>14 And is required ultimately to -- by</p> <p>15 our state statute, is required to certify</p> <p>16 that the offsets -- well, that the</p> <p>17 certified -- I believe two things, one that</p> <p>18 the application complies with all air quality</p> <p>19 laws enforced by the District, and</p> <p>20 secondarily, that -- I believe that the</p> <p>21 offsets which are offered by the applicant</p> <p>22 would resolve any air quality issues or</p>	<p style="text-align: right;">21</p> <p>1 Commission staff and the applicant. We had a</p> <p>2 lot of questions that our staff (inaudible) sit</p> <p>3 with the applicant at that meeting. And I</p> <p>4 believe the District was present, but I -- you</p> <p>5 know, I simply can't be certain.</p> <p>6 JUDGE REICH: Okay.</p> <p>7 MR. CROCKETT: You might also want to</p> <p>8 add, Mr. Ratliff -- it might be helpful what you</p> <p>9 explained to me yesterday about what other</p> <p>10 members of the public were present and what</p> <p>11 testimony was made by them on air quality.</p> <p>12 MR. RATLIFF: Yes. At the April 25th</p> <p>13 workshop the -- the workshop was noticed for</p> <p>14 three issues. One issue was air quality; one</p> <p>15 issue was land use; and the third issue was</p> <p>16 traffic and transportation, which was the issue</p> <p>17 of aviation safety.</p> <p>18 And at the workshop, most of the</p> <p>19 people in attendance -- I would say the</p> <p>20 majority were either the representatives, the</p> <p>21 applicant's representatives of the city or</p> <p>22 the representatives of the Energy Commission</p>

22

1 staff, and the Energy Commission's staff had
2 a dialogue on air quality with the applicant
3 over a number of issues that we had concerns
4 about.
5 And the staff -- the public that
6 were present did not really express interest
7 or ask questions on that issue. They were
8 there for other issues -- primarily the
9 traffic and transportation issues. So there
10 really was no public participation on the air
11 quality issue by the public.
12 No one really wanted to comment on
13 that. I think people were focused on
14 different issues that were of importance to
15 them. I might also add that, so far as any
16 of us have been able to ascertain, the
17 petitioner in this particular EAB proceeding
18 was not present and did not participate at
19 that workshop or at any prior or subsequent
20 meetings in any of the hearings or workshops
21 held by the Energy Commission.
22 JUDGE REICH: I will explore that with

23

1 the Petitioner in a little bit.
2 Let me shift ground a little bit
3 and get a better understanding of the process
4 for issuing notice for a proposed PSD permit.
5 One thing that I found surprising -- if I
6 understood it correctly -- a footnote in the
7 Bay Area HUMD brief that the CEC does not
8 actually keep records confirming that they
9 issue notice to people -- I know there are
10 lists of people that they presumably are
11 supposed to issue notice to, but it didn't
12 seem to be an independent confirmation other
13 than that that's their practice, that this in
14 fact was issued to these particular people on
15 this particular date. Is that accurate?
16 MR. CROCKETT: This is Alexander
17 Crockett for the District. As far from the
18 District side as far we have been able to
19 determine, that is accurate. We have provided,
20 with our brief, the evidence that we do have
21 that the mailing went out. And from our
22 perspective -- you know, the indication is that

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1 it's the pattern and practice of the (inaudible)
2 to mail documents like this.
3 There was no indication that it
4 wasn't mailed out, so that's the evidence
5 that we've been able to come up with here,
6 which suggests that it was -- at least more
7 likely than not mailed out. But maybe I
8 should turn the question over to Mr. Ratliff
9 as a representative of the Energy Commission,
10 to -- you know, to discuss from the Energy
11 Commission's side what evidence there is of
12 the mailing, and answer the Judge's question
13 here about a record being kept.
14 MR. RATLIFF: This is Dick Ratliff. I
15 think Mr. Crockett is essentially correct. It
16 is -- we made some effort here to try to
17 reconstruct exactly what happened and who was
18 notified and what evidence there is to establish
19 that, and what we -- the only thing we really
20 have that -- which is as concrete as it is or
21 isn't -- is that the -- you know, we have
22 particular lists that we use that we accumulate

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1 for various groups who have either participated
2 or are otherwise known to be interested parties,
3 or have attended any of our proceedings. And
4 those people are on the mailing lists, and we
5 have several lists for those people.
6 And the public adviser who is the
7 particular -- there's an office of the public
8 adviser at this agency, and there -- and they
9 are given the responsibility for public
10 outreach and for making sure that people
11 receive notices of Energy Commission events
12 and siting cases.
13 And in this instance, they have
14 said very clearly that they have mailed it
15 out -- that notice out to the lists that were
16 implied by this proceeding. But I don't
17 think there's any further documentation of
18 that, at least that I have been able to get
19 my hands on.
20 JUDGE REICH: You may want to think
21 about that for future purposes. Well, let me
22 ask about those lists. In your declaration as

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1 Exhibits A through C, you had three lists,
2 Exhibit A being interested agency; Exhibit B
3 being property owner, and Exhibit C being a
4 general list.
5 It seems like each of the property
6 owner lists would be facility-specific,
7 because it seems to deal with proximity to
8 this site. Are A and C also
9 facility-specific or are those general lists
10 that get used?
11 MR. RATLIFF: Well, they're neither.
12 One list is -- like you say, the property list
13 and that is entirely site-specific. The other
14 list is a list of interested agencies. That is
15 to some degree site-specific -- inasmuch as we
16 file notice with the local agencies, we provide
17 notice to -- for instance, San Francisco
18 Regional Quality Control Board rather than to
19 the state water quality control board, or
20 to -- you know, the central valley ones. But we
21 also would provide notice I believe to other
22 agencies just as a general matter, such as DPSC

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1 usually.
2 And so it is somewhat localized,
3 but not entirely so. And then the third one
4 is one which is comprised -- in this
5 instance, since this was an amendment
6 proceeding, it was comprised of those
7 agencies and those persons who had
8 participated in the earlier proceeding and
9 had not requested to have their names
10 removed, as I understand it, and comprised of
11 other people who had expressed interest or
12 had attended any event or commented in
13 writing on the project.
14 That's a cumulative list that just
15 kind of grows as the proceeding continues.
16 JUDGE REICH: Thanks for that
17 clarification. If somebody requested to be kept
18 advised of the status of the proceeding, should
19 they have made it on to that last list?
20 MR. RATLIFF: Yes.
21 JUDGE REICH: In looking at -- let me
22 ask this -- in terms of the lists -- the purpose

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1 of giving notice of the PSD proceeding that is
2 it is a PDOC so that stage -- is it any
3 different than the process you have described
4 here? Are the lists any different or -- how do
5 those two relate to each other?
6 I am not really clear if there's a
7 different list or a process for when you're
8 doing it -- in a sense a service to the
9 District versus doing it for your own
10 proceeding.
11 MR. RATLIFF: We are doing it for our
12 own proceeding.
13 JUDGE REICH: When -- for instance,
14 the Bay area says that they provide the PDOC to
15 you and then you give notice, is this the notice
16 they are talking about?
17 MR. RATLIFF: I'm not sure -- the
18 District -- you know, provides its own notice
19 and then we provide our own notice --
20 JUDGE REICH: Let me ask the District,
21 for purposes of satisfying 124.10.9 -- for
22 instance, notifying persons who request to be on

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1 an area list, who provides that notice? Do you
2 provide that or is that what you expect the CEC
3 to provide?
4 MR. CROCKETT: We rely on the CEC to
5 do the publication. So it is the latter. And
6 we sent the -- the draft PSD permit and PDOC to
7 the Energy Commission, and then have them sent
8 it out to the interested parties that they sent
9 it out to. So it's the latter, in answer to
10 your question.
11 JUDGE REICH: Do you provide them any
12 lists of parties to be notified, or do you just
13 assume that they can do it from the lists that
14 they have, based on what Mr. Ratliff has
15 described?
16 MR. CROCKETT: It's the latter. We
17 don't provide a list. We rely on the outreach
18 that the Energy Commission does. And as we have
19 explained in our briefs, we believe that's
20 substantial compliance at least with 124.10, the
21 mailing requirements.
22 I think that we would concede and

1 have conceded that there may not be an
2 absolute overlap -- you know, a perfect match
3 between exactly what might be done under
4 124.10 and what the CEC does in their broad
5 outreach.

6 But the point that we have been
7 making is that there was a huge amount of
8 outreach for this project and for this
9 process, and the Petitioner did not speak up
10 and was not engaged as a result of that
11 outreach.

12 So even if there may be some
13 technical differences between what was done
14 by the CEC with respect to mailing of notice
15 and what may additionally have been required
16 for technical compliance with 124.10, that
17 does not provide an excuse for Petitioner's
18 failure to comment here, since he simply
19 wasn't engaged in the process at any level
20 back last summer when the notice period
21 occurred.

22 JUDGE REICH: While not commenting on

1 it, I do understand that's your argument. Let
2 me examine another aspect of 124.10, if I could.
3 There is this obligation for notifying -- and
4 I'm reading now from 10C, 9C I
5 guess -- notifying the public of the opportunity
6 to be put on the mailing list for periodic
7 publication in the public press and in such
8 publications as regional and state-funded
9 newspapers, environmental bulletins or state law
10 journals.

11 Who carries out that function?

12 MR. CROCKETT: This is Alexander
13 Crockett again. I'm not sure that that function
14 has been explicitly carried out. Obviously,
15 there was outreach in newspapers and so forth
16 for this project towards interested parties.
17 But specifically for this project, I'm not aware
18 of anything additional -- or I should say in
19 general regarding creation of lists and so
20 forth.

21 I'm not aware of anything that the
22 District or the CEC has explicitly done in an

1 attempt to comply with that section. But I
2 would go to my earlier statement about
3 substantial compliance, and the fact that
4 there may have been some minor technical
5 defects here, but that's where we are at this
6 point.

7 JUDGE REICH: If somebody participates
8 in the PSD process and provides a comment, and
9 that's all they do -- how does the CEC know to
10 put them on the list? Do they get that
11 information for purposes of who they provide
12 comment to per se the final permit?

13 MR. CROCKETT: I believe we were
14 proceeding under the assumption that because
15 their outreach efforts are so broad, that all
16 interested parties would be swept up in that,
17 and so we've essentially relied on the breadth
18 of their process to satisfy the requirements of
19 124.10 for notifying all these -- this large
20 group of interested or potentially interested
21 parties.

22 JUDGE REICH: Was there a lot of

1 interest in the CEC proceedings for this
2 particular facility?

3 MR. CROCKETT: Initially, there was
4 not -- during -- last summer when the proceeding
5 was essentially in its main public phase and we
6 were having comment periods here at our agency
7 and starting to have workshops and so forth at
8 the Energy Commission, there was not a lot of
9 public interest in what was happening.

10 Later on, there was a great deal
11 more public interest towards the end of the
12 process, and I believe that the main reason
13 for that was that there was another project
14 not too far away from this project known as
15 Eastshore Energy Center, and that was a much
16 more controversial project, and the
17 interest -- the public interest in that
18 project sort of spilled over towards this
19 project at the end of the project here.

20 And if you look at some of the
21 declarations that the Petitioner submitted in
22 Exhibit 25 with his -- in his response to our

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1 request for summary dismissal, you can see
2 what some of the interested parties have to
3 say about that when they talk about when they
4 became interested in which project and when
5 they become interested in the Eastshore
6 project, which was the other project.
7 So the short answer was that during
8 the comment period, there really wasn't a
9 great deal of public interest, although
10 obviously at this late stage in the game,
11 there's a good deal more public interest.
12 JUDGE REICH: Let me --
13 MR. CROCKETT: Mr. Ratliff, I don't
14 know if you have anything to add to that --
15 MR. RATLIFF: I think that's exactly
16 the way it was. Initially, there was not that
17 much interest in this proceeding, which I would
18 add was an amendment proceeding to amend an
19 earlier life (?) that had been granted in 2001.
20 This was an amendment proceeding
21 to -- maybe 2002, I'm sorry -- it was an
22 amendment proceeding to change slightly the

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1 location of that original project. I think
2 that may have reduced the amount of interest
3 or participation in the project, but as
4 Mr. Crockett indicates, as the public
5 interest in the other project increased, it
6 began to spill over into this project. And
7 by the time we got to public hearing on this
8 project, there was a great deal of interest
9 and a large attendance of the public.
10 JUDGE REICH: Was there a lot of
11 interest in that proceeding that culminated in
12 2002?
13 MR. RATLIFF: That proceeding was
14 well-attended. It was a process that lasted I
15 think about 11 months or a year. There were a
16 number of comments in that proceeding -- the
17 areas of interest were not so much air quality
18 as other issues, such as visual impacts or
19 potential impacts on the nearby marshlands.
20 And I might just add, just to give
21 you a little more context, the reason for
22 this amendment was to try to avoid those

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1 impacts and move the project slightly so it
2 would not take a small wetland and would not
3 have the same visual impacts of the earlier
4 project.
5 JUDGE REICH: Let me refine my
6 question. Was there a proposed PSD permit in
7 the earlier proceeding, and was there
8 significant comment on the proposed PSD permit
9 as opposed to maybe a broader CEC process?
10 MR. RATLIFF: You know, since we don't
11 consciously -- when we get the FDOC, we comment
12 to the District on the things that are of
13 interest to us -- either we comment formally or
14 we question them informally. I don't recall any
15 major issues with the original permit.
16 I assume that included the PSD
17 conditions -- that it included a PSD permit,
18 but I would have to ask Mr. Crockett if that
19 was the case. The air quality issues from
20 that proceeding were not big ones; they were
21 rather small. And they didn't raise either
22 public comment or much staff attention

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1 either.
2 JUDGE REICH: Let me just redirect
3 that to Mr. Crockett.
4 Is that your understanding as well?
5 MR. CROCKETT: Yes. That actually was
6 before my time at the agency, and it hasn't been
7 an issue yet raised in this proceeding, so I
8 haven't investigated it here with my staff.
9 JUDGE REICH: That's fine.
10 MR. CROCKETT: I do know that no one
11 claimed to be dissatisfied with the process back
12 then.
13 JUDGE REICH: That's fine. I don't
14 think we need to pursue it further. Let me ask
15 a few questions to Mr. Simpson, if I could.
16 Mr. Simpson, I assume, because
17 there's no indication to the contrary, that
18 this appeal is filed by you individually,
19 that you have not filed it on behalf of HAPA.
20 Is that correct?
21 MR. SIMPSON: I filed the appeal
22 before the HAPA board meeting, so I didn't have

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1 the authorization of the board to file on their
2 behalf. So yes is the short answer.
3 JUDGE REICH: Did you -- and I am
4 trying to distinguish between you personally as
5 opposed to anyone you think was representing
6 HAPA -- did you personally participate in any of
7 the proceedings that the CEC conducted this time
8 through?
9 MR. SIMPSON: Yes.
10 JUDGE REICH: And what did you
11 participate in?
12 MR. SIMPSON: I am a member of the
13 board of directors for the Hayward Area Planning
14 Association. I also serve on the City of
15 Hayward's Clean and Green task force. I also
16 served as the director of the City of Hayward's
17 sustainability committee.
18 JUDGE REICH: How did you participate?
19 MR. SIMPSON: I -- when I found out
20 about the process, which was late in the
21 process, because -- when the community found out
22 about the process, it wasn't a lack of interest;

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1 it was a lack of awareness of what was going on
2 here that precluded public comment at this
3 period. And when I found out about the process,
4 I looked at the PDOC, the FDOC, I tried to get
5 information from Mr. Monasmith which I have
6 given records of the e-mails, communications
7 with Mr. Monasmith. I tried to get on the CEC
8 lists. A number of people tried to get on the
9 CEC lists, and we haven't gotten a response.
10 JUDGE REICH: When did you first learn
11 about the PSD part of this process?
12 MR. SIMPSON: I learned about the PSD
13 part of the process after the CEC staff
14 assessment -- after the review of the CEC staff
15 assessment, I reviewed the Bay Area Air Quality
16 Management District assessment, and so I'd have
17 to say it would be in the range of August.
18 JUDGE REICH: Were the CEC proceedings
19 still ongoing at that point?
20 MR. SIMPSON: Yes, sir.
21 JUDGE REICH: Did you at that point
22 file any comments with them? Did you attempt to

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1 file any comments with them? I am asking you
2 individually as opposed to HAPA.
3 MR. SIMPSON: No, we got the lawyer,
4 Jewel Harpelrudd (?) and she was representing us
5 in that process, but we apparently missed the
6 deadline for it.
7 JUDGE REICH: Okay.
8 MR. SIMPSON: We were denied
9 intervention.
10 JUDGE REICH: Okay.
11 MR. CROCKETT: May I just interject,
12 they were denied intervention because the
13 license had already issued before Ms. Harpelrudd
14 was even employed or filed anything with the
15 Commission.
16 I will reiterate Mr. Monasmith's
17 declaration that there is no record at all of
18 Mr. Simpson's having ever attended any of the
19 functions of the Energy Commission, or having
20 ever provided any comment on any issue
21 individually.
22 JUDGE REICH: Apart from the question

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1 of attendance, is that a correct statement, as
2 to the participation, Mr. Simpson?
3 MR. SIMPSON: I did attend the CEC
4 meeting in Sacramento, and I did attend -- but
5 again, that -- it is correct that that was after
6 the decision was made when we discovered what
7 was going on.
8 JUDGE REICH: You attended but did not
9 comment at that proceeding -- I don't know what
10 the nature of the proceeding was, but there's a
11 difference between attending and actually
12 speaking, and I gather you're talking about
13 attending.
14 MR. SIMPSON: Correct, and we had our
15 lawyer there to do the speaking.
16 JUDGE REICH: Right. HAPA.
17 MR. SIMPSON: Yes.
18 JUDGE REICH: Okay. I think this has
19 been really useful. I think we've really
20 covered what we were setting out to trying to
21 cover. I think I do have a better understanding
22 of the process and the Board at this point.

1 We'll take the information that we have and
2 various documents, plus the transcript of this
3 call and determine what the appropriate response
4 will be.

5 Because this is a PSD proceeding,
6 we'd like to, if possible, try to get out a
7 decision fairly quickly because we do
8 understand that essentially a facility is on
9 hold until this matter gets resolved. So we
10 will give it I think priority attention, but
11 our overriding concern is to make sure that
12 we are comfortable with the substance of our
13 response. But again, I would like to thank
14 everybody for making themselves available. I
15 think this was quite useful and --

16 MR. SIMPSON: Sir, this is Rob
17 Simpson.

18 Can I make some comments on what
19 has been discussed here?

20 JUDGE REICH: If they relate to the
21 facts of what was discussed, yes, sir, you may.

22 MR. SIMPSON: Absolutely. These lists

1 that's already covered by your briefs, because
2 believe me, we have read them and we will read
3 them, so I just want to make sure that anything
4 you're raising now is in response to the
5 additional information --

6 MR. SIMPSON: Yes, sir. We see that
7 this item from Bay Area Air Quality Management
8 District was addressed to the docket unit. The
9 item above it shows that it was addressed to the
10 group of service lists. The item below it shows
11 that it was addressed to the interested parties.
12 Two above says outside agencies, so this shows
13 who -- this gives evidence of who this
14 information was sent to. It doesn't show that
15 it was sent to the group of service list, the
16 interested parties, outside agencies or anyone
17 else, or the chief executives of our city or
18 county, the people who asked to be involved in
19 this process.

20 MR. CROCKETT: If I can respond to
21 Mr. Simpson's argument here, the testimony of
22 Mr. Monasmith is that documents like this when

1 that have been presented, there's been no
2 contention that the PSD notice or permit was
3 sent to any of these lists except the service
4 list. Now, the contention that this was sent to
5 the service lists was what was declared in the
6 Mr. Monasmith's declaration, and he attaches a
7 copy of the docket log.

8 JUDGE REICH: Right.

9 MR. SIMPSON: If we can look at that
10 docket log for a moment, which I believe is
11 Exhibit A of Mr. Monasmith's declaration, it
12 shows the docket logs -- the date, who the item
13 was addressed to, who it was from, and the
14 subject.

15 Now, as it gets to the entry --

16 MR. CROCKETT: On page 19, this is
17 Alexander Crockett.

18 MR. SIMPSON: On page 19. Thank you,
19 Mr. Crockett. This demonstrates -- are you
20 there?

21 JUDGE REICH: I am there, but what I
22 don't want is you basically to tell us stuff

1 they are sent to the docket unit are then sent
2 out to all the people who they are sent out to.
3 The reason why we attached this document to
4 Mr. Monasmith's declaration was to show that
5 Mr. Simpson had not filed any -- had not filed
6 any comments himself. The docket entry list
7 obviously shows that the PDOC draft PSD permit
8 was submitted to the docket unit, and then we
9 have the testimony of Mr. Monasmith as to the
10 practice of the docket unit.

11 And that's the evidence that we've
12 presented to show that this was mailed out,
13 and we never contented that the document was
14 sent by the District to all the people who it
15 was sent to. Our contention is and always
16 has been that the document was sent to the
17 docket unit, and then the docket unit turned
18 around and mailed it out to the people they
19 sent it to.

20 JUDGE REICH: Mr. Simpson, do you have
21 actual knowledge that suggests that this was not
22 in fact sent to the people on the lists mor are

1 you simply asserting that there is no documented
2 record that it was.

3 MR. SIMPSON: I'm saying that the only
4 contention has been from Mr. Monasmith that this
5 was sent to the service lists. There has been
6 no contention that it was sent to any of the
7 other lists that was provided to you.

8 JUDGE REICH: Okay. Is there anything
9 else you would like to add?

10 MR. SIMPSON: Yes. I would like to
11 point out that this information did not become
12 available to the public until 31 days later.
13 When you search on the CEC's website and you
14 pull up the PDOC, the document automatically
15 opens to the second page. It skips the notice,
16 and it's posted on May 3rd, which was after this
17 air quality hearing, or workshop, as they call
18 it. So this information was not available.

19 The workshop was on April 25th.
20 The air quality workshop that asked for
21 comments from the public -- the PDOC was not
22 posted on the CEC website until after that.

1 And when you open it, you don't get to the
2 notice -- the notice does not comply; it does
3 not give us the information that the staff
4 assessment gives us, which is the information
5 that we need to know, the effect on the air
6 quality.

7 The notice gives us these number of
8 pounds or tons of pollutant, but it doesn't
9 show the effects on the air quality, which is
10 what is required, to my
11 understanding -- by the federal law or we
12 don't know what to comment about.

13 JUDGE REICH: Let me just comment that
14 in terms of reviewing notice under 124.10, that
15 we have not in the past looked to notice given
16 on the website as -- satisfying the requirements
17 of 124.10. So I think what we are going to need
18 to look at is whether 124.10 has been complied
19 with, and I think looking at the website may not
20 turn out to be a significant factor in that.

21 MR. CROCKETT: It might -- this is
22 Alexander Crockett. It might also be useful to

1 have Mr. Simpson state when he first tried to
2 get that document off the website.

3 JUDGE REICH: You want to respond to
4 that, Mr. Simpson? You sort of opened the door
5 to it.

6 MR. SIMPSON: I know I looked at the
7 PDOC at least 50 times on the website, and it
8 never backed up from where it opened to the page
9 before where the notice was. I always opened it
10 expecting it to open to the first page and it
11 went forward, so I never saw the notice until
12 these proceedings started.

13 Now, the proof of service lists
14 does not include the chief executives of
15 Hayward; it doesn't include U.S. Fish and
16 Wildlife, with jurisdiction over the adjacent
17 protected species and protected habitat; it
18 does not include the San Francisco Bay
19 Conservation Development Commission, with
20 jurisdiction over the adjacent waterways, the
21 shellfish; it does not include California
22 Department of Fish and Game, with

1 jurisdiction over the onsite waterway. It
2 doesn't include the people who have to be
3 included in the process, like Communities for
4 a Better Environment.

5 JUDGE REICH: I think at this point we
6 are really basically covering stuff that you
7 have put in your opening statement. So I don't
8 think we need to continue, since we have your
9 opening statement -- I have accepted your
10 opening statement as well as the response to it.

11 I'm going to bring this proceeding
12 to a close. Again, thank you for
13 participating and wish you all a good
14 afternoon.

15 MR. CROCKETT: Thank you, Your Honor.

16 REPORTER: Hello, Mr. Crockett --

17 MR. SIMPSON: This is Rob Simpson
18 speaking.

19 JUDGE REICH: Yes, sir.

20 MR. SIMPSON: Will we be discussing
21 the District's authority under the delegation
22 agreement?

1 JUDGE REICH: We are not going to be
2 discussing anything on this call beyond what we
3 have already discussed. It doesn't mean that
4 the Board won't consider it. There is obviously
5 lots of issues that were raised that we haven't
6 talked about. But for the purposes of this
7 call, that's not an issue we were planning to
8 get into.

9 MR. SIMPSON: Because it seems like
10 the delegation to the authority is a
11 prerequisite to the notice.

12 JUDGE REICH: I understand what you
13 are saying. And again, I think that for
14 purposes of what the Board needs, I think we
15 have covered what the Board needs at this point.

16 MR. SIMPSON: Thank you. May I know
17 if the permit has been suspended during these
18 proceedings?

19 JUDGE REICH: By operation of federal
20 regulations, the permit does not go into effect
21 while this proceeding is before the Board.

22 MR. SIMPSON: Thank you, sir.

1 JUDGE REICH: Good morning, gentlemen
2 and -- thank you bye, bye.

3 MR. CROCKETT: Thank you.

4 (Whereupon, at approximately 2:05
5 p.m., the HEARING was adjourned.)

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