

Environmental Law and Justice Clinic

March 15, 2010

U.S. Environmental Protection Agency
EPA Docket Center, EPA West
Docket ID No. EPA-HQ-OAR-2009-0517
Mailcode: 2822T
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

**SUBJECT: PROPOSED TAILORING RULE FOR PSD AND TITLE V
GREENHOUSE GASES - CALIFORNIA ENERGY
COMMISSION'S LETTER TO THE EPA**

To the Administrator:

I am writing on behalf of Citizens Against Pollution (CAP), a grassroots community group in California concerned with environmental pollution and its deleterious health effects.

On October 27, 2009, EPA published its proposed Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule in the Federal Register. 74 Fed. Reg. 55292 (Oct. 27, 2009). This rule is important because EPA will soon promulgate regulations under the Clean Air Act (CAA) of greenhouse gas (GHG) emissions, and this rule "would phase in the applicability thresholds for both the PSD and title V programs for sources of GHG emissions." *Id.* The rule aims to relieve state permitting agencies of inundation by new and previously unrequired permit applications. *Id.* The public commenting period closed on December 28, 2009, before which time the California Energy Commission (CEC) submitted its letter to EPA opposing the proposed tailoring rule in favor of a more "staged" approach. CEC Letter to EPA, Dec. 24, 2009, Document ID: EPA-HQ-OAR-2009-0517-4786.1. ¹

CAP learned of the existence of the CEC's comment letter after the close of the public comment period. CAP is writing to correct some inaccuracies in that letter in case EPA in its rulemaking relies on some of those inaccurate statements or others cite to the inaccuracies in other contexts, to the detriment of the important public participation requirements set forth in the PSD and Title V provisions of the CAA. The inaccuracies relate to an EAB proceeding that the CEC mentions in its letter, a proceeding in which CAP participated and has firsthand knowledge.

Mailing Address:
536 Mission Street
San Francisco, CA
94105-2968

Offices:
62 First Street
Suite 240
San Francisco, CA
tel: (415) 442-6647
fax: (415) 896-2450
www.ggu.edu/law/eljc

¹ Available at
<http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a711d1>.

The CEC states that the tailoring rule will result in delay in permitting which will be “exacerbated by the fact that EAB is overburdened and not subject to time requirements for its decisions.” *Id.* at 4. In support, the CEC points to a single instance in which this appeal process took a lengthy period of time as conclusive evidence that all such appeals are likewise so time consuming and will therefore create a “gridlock” if the EPA’s proposed tailoring rule is accepted. Specifically, the CEC states:

In one recent and typical example, a defective PSD permit notice for a California power plant led to a 7-month EAB proceeding, followed by an opinion more than 40 pages in length, and finally required remand of the permit to the air district. It has taken the delegated air district more than 16 months to reissue a permit meeting all PSD requirements (in fact, as yet the permit is still not issued). The new permit is almost certain to be contested once again at the EAB when it is finally issued.

CEC letter at 4, n. 4.

The particular case that the CEC refers to without mentioning the name is *In re Russell City Energy Center* (EPA Environmental Appeals Board), PSD Appeal No. 08-01, available at [http://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Filings%20By%20Number/EA6F1B6AC88CC6F085257495006586FB/\\$File/Remand...50.pdf](http://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Filings%20By%20Number/EA6F1B6AC88CC6F085257495006586FB/$File/Remand...50.pdf). In that case, a citizen successfully challenged a PSD permit based on the faulty notice that had been provided for the PSD permit proposed for the Russell City Energy Center (RCEC). As the EAB succinctly put it, “the [Bay Area Air Quality Management] District delegated to CEC the bulk of its 40 C.F.R. part 124 notice and outreach responsibilities with respect to the draft PSD permit for RCEC.” The EAB observed that it remains “incumbent upon the delegated agency [BAAQMD] to ensure strict compliance with federal PSD requirements.” This was unfortunately not the case, and thus the EAB remanded the permit to BAAQMD for correction of the notice deficiencies. *In re Russell City Energy Center* at 39, 42. The EAB noted that the District’s outreach efforts “fell significantly short of [federal PSD] section 124.10’s requirements in numerous important respects.” *Id.* at 38. To correct the deficiency, which the EAB characterized as a “complacent compliance approach,” the EAB stated that, “the District must scrupulously adhere to all relevant requirements in section 124.10 concerning the initial notice of draft PSD permits (including development of mailing lists), as well as the proper content of such notice.” *Id.* at 38, 39. The EAB emphasized that the notice deficiencies were not “harmless error” as BAAQMD contended, noting “the pivotal importance to Congress of providing adequate initial notice within EPA’s public participation regime.” *Id.* at 38.

The case was before the EAB for seven months, as the CEC correctly notes. The amount of time the case took to be resolved was due in large part to BAAQMD’s

contentions that were ultimately resolved by the EAB in the citizen's favor. When faced with the contention that the PSD permit had been improperly noticed, the Air District filed a Request for Summary Dismissal² disputing whether the notice was actually deficient. This factual dispute resulted in the EAB ordering a video-conference hearing to be scheduled to determine what notice had actually been given.³ The Air District, in insisting that proper notice had been given⁴, relied on a statement in the declaration of one of the CEC Siting Office Project Managers: "I am informed and believe that copies of both [the permitting documents] were mailed to all parties on the service list for the proceeding, per the normal procedures of the staff of the Energy Commission."⁵ The CEC in its letter to EPA failed to acknowledge its own role in the delay caused in the EAB proceeding.

As for the additional sixteen month period for repermitting proceedings, this delay merely reflects the public commenting and hearing process that should have taken place prior to the issuance of the original permit. The permit was additionally delayed because BAAQMD changed the permit conditions by lowering emissions limits, which necessitated renoticing. This process is at the heart of the public participation provisions Congress included in enacting statutes such as the Clean Air Act. It has proven invaluable in the lower emissions limits it has achieved and in the awareness it has brought to our communities.

We firmly believe that the EAB serves a vital function in a much larger and invaluable process. Through public participation in the commenting and public hearing fora, citizens all over the country have successfully helped to improve the approval process for PSD permits and achieve lower, healthier emissions limits. When this process goes awry, as it rarely does, it is the domain of the EAB to step in and provide guidance.

Notably, on examination of the EAB dockets over the past several years, it appears that there are on average only 5 PSD permit appeals filed with the EAB per year, not all of them from California. *See* EAB Closed Dockets (after January 1, 2006), available at

http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Closed%20Dockets!OpenView&Start=30, and EAB Active Dockets, available at http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Active+Dockets?OpenView

² Available at

[http://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Filings%20By%20Appeal%20Number/4EC369FF484811EB852573D8005DB90C/\\$File/Response...100000.pdf](http://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Filings%20By%20Appeal%20Number/4EC369FF484811EB852573D8005DB90C/$File/Response...100000.pdf).

³ Order Scheduling Video-Conference Hearing (03/20/2008), Russell City Energy Center Docket on EAB website, available at

http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/77355bee1a56a5aa8525711400542d23/d8e4c0304975fdc9852573ca006989ad!OpenDocument.

⁴ Bay Area Air Quality Management District – Response to Petition for Review Requesting Summary Dismissal (01/18/2008).

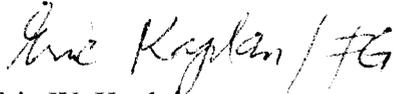
⁵ Declaration of J. Mike Monasmith and Exhibit A (01/18/2008).

(showing four PSD appeals nationwide in 2009, six in 2008, and only three in 2007). Most of these appeals took only a few months.

In its letter, the CEC states that the tailoring rule does not sufficiently abate the potential for “regulatory gridlock” because too many new sources would be subject to regulation under the 25,000 ton threshold proposed. CEC Letter at 3. While the CEC states that “EPA’s estimate of only 400 additional PSD applications nationwide is “almost certainly a grave underestimate,” there is no factual basis offered for this assertion. *Id.* at 3, n. 2. Indeed, a close reading of the proposed rule reveals that EPA actually estimates fewer than 100 additional PSD applications nationwide. 74 Fed. Reg. 55292.

Thank you for your consideration of CAP’s comments.

Sincerely,

Handwritten signature of Eric W. Kaplan in cursive, with a stylized 'EG' monogram at the end.

Eric W. Kaplan
Certified Law Student*

* Eric W. Kaplan is a certified student under the State Bar Rules governing the Practical Training of Law Students, working under the supervision of Professor Helen Kang pursuant to the PTLs rules.