

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

In re Russell City Energy Center)	PSD Appeal No. 10-02
)	
Russell City Energy Company, LLC)	
PSD Permit Application No. 15487)	
_____)	

MOTION BY CHABOT-LAS POSITAS COMMUNITY COLLEGE
DISTRICT FOR PERMISSION TO FILE REPLY BRIEF TO RESPONSES BY
BAAQMD AND RCEC

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Dated: May 14, 2010

On May 6, 2010, the Environmental Appeals Board, in an order by the Honorable Edward E. Reich, issued a briefing schedule for any petitioner wishing to file a reply brief to “submit a motion to that effect stating with particularity the arguments to which Petitioner seeks to respond and the reasons Petitioner believes it is necessary to file a reply to those arguments.”

Petitioner Chabot Las-Positas Community College District (the “College District”) now moves the Board to authorize the filing of a reply brief addressing the following arguments by the applicant Russell City Energy Center (RCEC) and the Bay Area Air Quality Management District (BAAQMD) to which the College District wishes to respond, including why it is necessary to reply:

1. RCEC argues that the College District did not “preserve” certain arguments raised in its petition for review, such as BAAQMD’s clear err of not disclosing, plotting out and circulating for public review the modeling results for 24-hour PM_{2.5} at the achievable emissions rate of 9 lbs/hour, which results in a higher concentration level of 6.33 ug/m³, a level which BAAQMD admits would cause or contribute to the violation of the NAAQS under the Clean Air Act, because it “was not previously raised in any public comment.” (RCEC at 15-18; *also see*, BAAQMD at 11-12 & RCEC arguments re Mankato Facility concerning cost analysis for use of an auxiliary boiler. RCEC at 40.)¹ The College District seeks to reply since addressing the College District’s entitlement to raise these important substantive arguments may likewise assist the Board in determining the merits of those substantive issues.

¹ “RCEC at ___” refers to the RCEC’s Response to Petition for Review Filed by Chabot-Las Positas Community College District.

2. The underlying foundational argument against review presented by both RCEC and BAAQMD is whether the District is required to analyze the 24hour PM_{2.5} NAAQS at all. (BAAQMD at 10-16.) This is an important question because the College District asserts that such a legal construction as urged by RCEC and BAAQMD violates the Clean Air Act and is not supported. The undisputed fact that the modeling for 24hour PM_{2.5} at 9 lbs/hour establishes a concentration level of 6.33 ug/m³ which violates the NAAQS highlights the importance of this legal issue.

Further, both BAAQMD's and RCEC's arguments that "non-attainment NSR requirements apply," are carefully qualified that the annual estimated of PM emissions, approximately 86.8 tons, falls "below the threshold at which substantive requirements become applicable." (BAAQMD at 11-12.) In essence, according to BAAQMD and RCEC, a polluter which violates the NAAQS in a region in which the pollutant is in non-attainment without a State Plan may cause and contribute to the concentrations of the pollutant for which the region is nonattainment as long as the annual tonnage, such as 99.99 tons, falls just below Appendix S's 100 tons/yr threshold.²

The College District asserts that such an argument is not legally supportable and such a statutory construction as urged by BAAQMD and RCEC violates the Clean Air

² See Response to Comments, p. 78, fn 158:

Here, the facility is exempt from Appendix S because it will emit less than 100 tons per year of PM_{2.5}. (See 40 C.F.R. Appendix S, ¶ II.A.4(i)(a) (establishing 100 tpy threshold for regulation of Major Stationary Sources); *see also* Additional Statement of Basis at p. 55.) **There are therefore no additional Clean Air Act regulatory requirements applicable beyond the PSD regulations, and no additional federal permit required beyond the PSD Permit.**

(Emphasis and italics added.)

Act. (This issue also is related to the argument raised by RCEC, discussed below, concerning the College District's environmental justice argument.)

3. Both RCEC and BAAQMD also contend that it is appropriate for an Air District to base its source impact analysis under 40 C.F.R. section 52.21(k) by utilizing an emissions rate which BAAQMD admits may not be achievable, while ignoring and not publishing to the public³ the results of the achievable emission rate which reveals that RCEC would cause or contribute to the violation of the NAAQS for 24 hour PM_{2.5}, a pollutant for which the Bay Area is not in attainment. (RCEC at 18-24; BAAQMD at 16-24.) Their underlying theory is that because 7.5 lb/hr would be permitted it is “federally enforceable” and therefore the “worst case” emission rate. The College District submits that this argument is not supported by statutory and/or decisional law.

4. BAAQMD and RCEC also contend that BAAQMD did not abuse its discretion in excluding all but one roadway in its acknowledged six mile impact area applying the understated 7.5 lbs/hour emission rate for 24 hour PM_{2.5}. (RCEC at 24-35; BAAQMD at 24-32.) RCEC argues that somehow including these significant roadways would be “double counting” its contribution. (RCEC at 34.) BAAQMD, on the other hand, “does not dispute the general notion that roadways such as I-880 and Hesperian Blvd. could

³ BAAQMD also argues that by merely making the air modeling results available on a disk it has sufficiently “published” the results, although those source impact analysis results for the 9 lbs/hour were never disclosed publicly as part of a Statement of Basis and the location of those addition 2,400 sensitive receptors remain unknown and unplotted out on a map. Given the additional 2,400 sensitive receptors remain undisclosed and not mapped out, although present on a disk available to the public, the College District contemplates that it is not necessary to respond to this argument that the public bears the expense and burden to locate a modeling expert with substantial resources to figure out what the disk otherwise not discussed in the Additional Statement of Basis reveals. This is not “publishing” or disclosing anything. However, if the Board wishes the College District to brief this issue, the College District is ready and willing to do so given BAAQMD's argument that the availability of the disk is sufficient publication of this important information.

cause significant PM concentration gradients nearby to those roadways,” but justifies its “exclusion of these sources . . . based on the conclusion that they will not cause a significant concentration gradient at any location where the facility’s impacts will be above the SIL.” The failure to map out and plot these “significant PM concentrations” for this community already at a health risk in relation to this major significant stationary source is an important public issue that needs to be addressed.

5. BAAQMD and RCEC also contend that the College District somehow misled BAAQMD on reviewing the Caithness records and that the College District’s cost comparisons to other projects raised by RCEC based on the BAAQMD’s records provided are “false.” (RCEC at 35-47 [Mankato]) These issues need to be addressed so that the Board knows what documents were before BAAQMD, and why the reasoning upon which BAAQMD utilizes to reject inclusion of an auxiliary boiler as BACT and LAER for NO_x and CO is flawed.⁴

6. RCEC argues that the College District’s argument that BAAQMD’s environmental justice analysis is incomplete and inadequate should be dismissed. (*See generally*, at 47-52.) Specifically, RCEC argues that even if its impact on an environmental justice community “result[ed] in a concentration greater than the identified SIL,” this provides no grounds to deny it a PSD permit. (RCEC at 50.) Given the Bay Area’s non-attainment status for 8-hour ozone and PM_{2.5}, applying the facts at issue, this certainly should be a solid basis to require full modeling disclosure, including the significant roadways of Interstate 880 and Hesperian Blvd. as well as the impacts which

⁴ The College District also wishes to provide to the Board the cost effective analysis prepared by Calpine, RCEC’s proponent, and provided to BAAQMD which is the source for confusion by apparently combining different facilities and listing on the page “320MMBtu/hr.”

will result by applying the achievable emission rate of 9lbs/hour for PM2.5, a rate guaranteed by the vendors.

Further, RCEC argues that the College District's supplemental appendix to the July 2009 Workshop Report, which provides a better map than Exhibit 2, prepared by BAAQMD's Community Air Risk Evaluation program, "CARE," identifying this community's health at risk already from pollution should be rejected. On the other hand, while relying on that same supplemental exhibit, RCEC argues that the project and its "significant impacts . . . lie *outside* of the identified priority community." (RCEC at 51, emphasis added.) The College District wishes to briefly address just "how close" to the line drawn by CARE RCEC would be located.

Generally, the College District seeks to assist the Board in identifying the undisputed facts and presenting why based on those undisputed facts the PSD permit approval must be reversed and remanded back.

The College District anticipates addressing these issues within 30 pages or less.

Dated: May 14, 2010

Respectfully Submitted,

S/_____
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CERTIFICATE OF SERVICE

I hereby certify that Motion By Chabot-Las Positas Community College District For Permission To File Reply Brief To Responses By BAAQMD And RCEC was sent to the following persons in the matter indicated:

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