

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)	
_____)	

REQUEST TO TAKE ADMINISTRATIVE NOTICE OF OFFICIAL
FACTS AND TO SUPPLEMENT THE ADMINISTRATIVE RECORD
BY CHABOT-LAS POSITAS COMMUNITY COLLEGE DISTRICT CONCERNING
CAITHNESS PUBLIC RECORDS

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Dated: July 19, 2010

**REQUEST TO TAKE ADMINISTRATIVE NOTICE OF OFFICIAL FACTS
AND TO SUPPLEMENT THE ADMINISTRATIVE RECORD**

Introduction

In its March 22, 2010 petition for review, the Chabot-Las Positas Community College District (“College District”) requested that the Board take official notice of the non-record government documents cited in its Petition, relying on *In re Matter of City of Denison*, 4 E.A.D. 414, 419 n. 8 (EAB 1992) (taking official notice of administrative order not part of proceeding before Board) and *In re Hawaiian Commercial & Sugar Co.*, 4 E.A.D. 95, 102 n.13 (EAB 1992) (taking official notice of EPA guidance document. College District Pet. at 4. As this Board explained in *In re Arcibo & Aguadilla Reg. Wastewater Treatment Plants*, 12 EAD 97, 145, n. 86 (EAB 2005), taking official notice of relevant non-record information contained in a official proceeding relating to the application before the Board is appropriate.

Here, the College District seeks to supplement the administrative record before the Board to include the October 6, 2009 email request by BAAQMD Engineer Weyman Lee referred to in BAAQMD’s response and BAAQMD and RCEC’s sur-replies, but not included in the administrative record, and a portion of the public record of Caithness Long Island’s application reflecting the emission reductions referred to in the College District’s September 16, 2009 comments which is also attached to its March 22, 2010 petition as Exhibit 4. (Apparently, two of the four pages were received by BAAQMD: *see* BAAQMD Engineer Weyman Lee’s declaration executed on June 10, 2010 in support of BAAQMD’s Sur-Reply.)

The October 6, 2009 email by Engineer Lee was prepared prior to the close of record and is a communication upon which both BAAQMD and RCEC rely on and refer to in their

responsive documents, including sur-replies, to the College District's Petition. According to BAAQMD and RCEC, this communication sought the documentation concerning the Caithness Long Island Power Plant which counsel for the College District refers to and cites in the College District's September 16, 2009 letter to BAAQMD concerning the number of emission tons of CO reduced by using an auxiliary boiler.

Presently, however, this communication by BAAQMD to counsel for the College District on October 6, 2009, prior to the close of the record, is not included in the administrative record. *See* Certified Index of Administrative Record executed on April 22, 2010 by Engineer Lee. At 69, Section 12.59.18-19: Public Notice And Comment Process (includes communications from BAAQMD, but fails to include 10-6-09 communication). As discussed in the College District's reply executed on May 28, 2010, the fact that BAAQMD contends that it did not receive the portion of the public record for Caithness referred to in its September 16, 2009 correspondence, although first identified in the College District's February 9, 2010 response to comments to the draft December 2009 Amended Statement of Basis, and attached to the College District's March 22, 2010 petition, was only brought to the College District's attention in a footnote to BAAQMD's response to the College District's petition.

Because "consistent with general administrative law principles, ... the complete or official administrative record for an agency decision includes all documents, materials, and information that the **agency relied on directly or indirectly in making its decision,**" the College District seeks administrative notice of these official records and to supplement the administrative record with the documents which BAAQMD's arguments rely on to justify their rejection of requiring RCEC to install an auxiliary boiler to reduce start up CO emissions. *In re Dominion Energy*

Brayton Point, LLC (formerly USGen New England, Inc. Brayton Point Station), 12 E.A.D. 490 (2006), emphasis added.

A. Request To Supplement The Administrative Record With The October 6, 2009 E-Mail Of Weyman Lee Inquiring Into Cost Benefit Analysis But Failing To State That The Siemens Record Received For “With Auxiliary Boiler” Was Only For “Fuel Oil.”

In support of BAAQMD’s argument attempting to justify its rejection of requiring RCEC to install an auxiliary boiler, which is achieved in practice BACT substantially reducing CO emissions, BAAQMD’s sur-reply states that “The District also specifically asked [the College District] for further explanation of the basis for its cost-effectiveness analysis calculations, but [the College District] failed to provide any additional information.” *See* District Response to Petition 10-02 at 34-35.” Sur-Reply at 7, n. 3.

BAAQMD’s Response referred to in the Sur-Reply argues that “[w]hen the District inquired further a few weeks later as to the basis of this cost-effectiveness calculation, Petitioner simply quoted passages its September 16, 2009, comment letter and noted that due to a mathematical error the actual the actual cost-effectiveness that petitioner was asserting was \$11,451 pert ton.” Response at 34. Relied on in support is “letter from J. Hargleroad, counsel for Petitioners to W. Lee, BAAQMD, (Oct. 9, 2009), Crockett Decl. Exh 10, at 1-2.)

BAAQMD’s response continues that “With no apparent basis for Petitioner’s emissions numbers presented in the summary table in its comment letter – **and no further information forthcoming in response to the Districts follow-up inquiry for *documentation* on the basis of Petitioner’s cost effectiveness estimates** – the District has no other choice but to conclude that Petitioner’s estimates lacked a sound technical basis on which to make a BACT cost-effectiveness determination.” BAAQMD Response at 36, emphasis and italics added.

Although the College District's October 9, 2009 letter in response to BAAQMD's October 6, 2009 inquiry is included in the administrative record, not included in the administrative record is Mr. Lee's October 6, 2009 e-mail inquiry generating this response. This e-mail inquiry is highly relevant because it inquires into the cost effectiveness analysis, but never seeks documentation or discloses that the Siemens public records submitted as part of the Caithness Long Island project submitted by the College District and received by BAAQMD related to an auxiliary boiler for only "fuel oil," but not emissions related to an auxiliary boiler for natural gas, which match the emission levels identified in the College District's September 16, 2009 comments. Instead, Mr. Lee's inquiry simply states:

We are in the process of reviewing and responding to comments regarding the Additional SOB. Please provide the following: ¶1. The cost effectiveness calculations for \$11,515 per ton of CO emissions.

Given BAAQMD's attempted reliance in support of its argument that such an important BACT equipment must be thrown out the window because it "also specifically asked [the College District] for further explanation," Sur-Reply at 7, n. 3, this communication from the senior engineer to the College District establishes that with "fuel oil" emission levels alone in hand, BAAQMD did not "specifically ask" at all for any documentation, but laid silent on this point, not disclosing until its Response before this Board in a footnote that it had only received the "fuel oil" emission levels for the Siemens auxiliary boiler. Response at 35, n. 20.¹

Given BAAQMD's stated reliance on its email request by Mr. Lee made prior to the issuance of the permit, this communication to counsel for the College District should be part of

¹ As discussed below, the Caithness Energy Center in Long Island was first raised by the College District in its February 6, 2009 Comments to BAAQMD's draft amended PSD permit.

the “official administrative record . . . that the agency relied on directly or indirectly in making its decision.” *In Re Dominion Energy Brayton Point, LLC(Formerly Usgen New England, Inc.) Brayton Point Station* (NPDES 03-12 Remand Order) 12 E.A.D. 490, 519 (2006).

2. Request To Supplement The Administrative Record With A Portion Of The Permit Application Of The Caithness Long Island Project Which Is A Matter Of Public Record And Includes All Four Pages, Including The Emission Levels Cited In The College District’s September 16, 2009 Letter “Auxiliary Boiler – Natural Gas.”

The College District further asks to supplement the administrative record with a portion of the permit application of the Caithness Long Island Project. The pages at issue already were attached to the College District’s March 22, 2009 petition as exhibits and were intended to be mailed to BAAQMD on September 16, 2009, only two of the four pages enclosed by mail were apparently received. These portions of the Caithness Application Permit, which are presently omitted from the Administrative Record, are a matter of public record.

Although two of the four pages of the Caithness application are presently included in the administrative record, declaration of Engineer Lee executed on June 10, 2010 submitted in support of BAAQMD’s sur-reply, the College District seeks to supplement the administrative record with the remaining two pages concerning the Siemens auxiliary boiler for the Westinghouse 501 FD turbine, which are the pages concerning the auxiliary boiler for natural gas that the College District refers to in its September 16, 2009 Comments.² As established in the accompanying declaration of Jewell Hargleroad, the public records of Caithness were referred to by the College District in its February 6, 2009 Comments, a subsequent March 31,

² The attachment of the public records further includes the cover letter, index of the application for the permit for Caithness, and all of appendix C entitled “Vendor Data.”

2009 letter to Mr. Lee, and discussed in and relied on in support of BAAQMD's August 2009 Response to Comments.

Dated: July 19, 2010

Respectfully Submitted,

S/

Jewell J. Hargleroad,
Attorney for Petitioner Chabot Las-Positas
Community College District

SUPPORTING DECLARATION OF JEWELL J. HARGLEROAD

I, Jewell J. Hargleroad, hereby declare:

I am admitted to practice law before all California and federal courts and am the principal of the Law Office of Jewell Hargleroad, counsel for the petitioner Chabot-Las Positas Community College District ("College District") in this proceeding. I have personal knowledge of the facts set forth below and would and could testify truthfully and competently to the following.

1. Based on my review of the certified index of administrative records, presently missing from the administrative record is the October 6, 2009 email from senior Engineer Weyman Lee to me concerning BAAQMD's review of the September 16, 2009 Comments, which refers to the permit application for the Caithness Energy Center located in Long Island, New York. BAAQMD's April 22, 2019 Index of administrative records, docket number 61 part 2, page 69: [http://yosemite.epa.gov/oa/eab_web_docket.nsf/Filings%20By%20Appeal%20Number/68A7D30564062132852577110070A1FA/\\$File/Certified%20Index%20of%20Administrative%20Record%20-%20Part%202%20of%202...61.01.pdf](http://yosemite.epa.gov/oa/eab_web_docket.nsf/Filings%20By%20Appeal%20Number/68A7D30564062132852577110070A1FA/$File/Certified%20Index%20of%20Administrative%20Record%20-%20Part%202%20of%202...61.01.pdf) Attached as Exhibit 1 is a true and correct copy of Mr. Lee's October 6, 2009 email to me inquiring into the cost effectiveness calculations of the

auxiliary boiler in response to the College District's September 16, 2009 discussion on Caithness, which specifically identified and referred to "Siemen's data provided in their application."

2. The Caithness project was first raised by the College District in its February 6, 2009 response to BAAQMD's issuance of the amended PSD permit in December 2008 as one of two "projects which should be examined: The Lake Side Power Plant in Utah - a 2x1 combined cycle project utilizes FP 30 technology and has been in operation since December 2007; and The Caithness Energy Long Island Power 1x1 combined cycle plant currently under construction also is permitted to use FP 30 technology."

3. Later on in February or March 2009, it came to my attention that certain representations by RCEC were being made to BAAQMD without the College District having an opportunity to address them. On March 31, 2009, I wrote Mr. Lee concerning this, enclosing, among other documents, copies of the air permit for Caithness. On page 5 of my letter, which is included as part of this administrative record, index p. 50, no. 12.56.3, quoted is a portion of the description in the air permit of the Caithness project:

This facility consists of one Siemens-Westinghouse 501F combustion turbine, which shall fire natural gas as its primary fuel with distillate oil as a back-up fuel. **The gas turbine shall operate as a combined cycle unit with a nominal power output of 346 MW.** The heat recovery steam generator (HRSG) contains supplemental firing from a natural gas only duct burner. The turbine employs dry low NO_x, steam injection, and a selective catalytic reduction unit (SCR) for control of oxides of nitrogen and catalytic oxidation unit (CO catalyst) for the control of carbon monoxide. *The facility also consists of an auxiliary boiler which fires primarily natural gas with distillate oil back-up. The auxiliary boiler employs a low NO_x burner and flue gas recirculation (FGR) to control emissions of NO_x.* Finally the facility has a natural gas fired fuel gas heater, a diesel fire pump, a steam turbine generator, and a 20,000-gallon aqueous ammonia storage tank..

(Emphasis and italics added.) Also stated on page 5 of the College District’s March 31, 2009 letter, “[a]s reflected by the attached and enclosed documents, both permits for both plants include emission limits for the auxiliary boiler.”

In BAAQMD’s August 2009 Additional Statement of Basis, it states at page 64, in justifying reducing CO emissions:

For Caithness, the permit does have emission limits for startups, and it is therefore possible to compare those limits with the proposed Russell City permit limits. [n 116] **The Caithness permit establishes two tiers of startup limits, one for when the auxiliary boiler is being used and one for when the auxiliary boiler is not being used. The Air District evaluated the limits for startups without the auxiliary boiler first, which is the scenario corresponding to the applicant’s proposed design for Russell City.** . . . The story is slightly different for CO startup emissions, however, as the Caithness permits limits for hot and cold startups are below the CO startup limits the Air District initially proposed for Russell City. Specifically, the Caithness hot startup limit for CO (without auxiliary boiler) is 891 pounds, which is significantly lower than the 2514 pound CO hot startup limit initially proposed for Russell City. Further, the Caithness cold startup limit for CO (without auxiliary boiler) is 2813 pounds, which is significantly lower than the 5028 pound CO cold startup limit initially proposed for Russell City. **Upon further consideration, the Air District believes that revisiting the proposed Russell City limits for hot and cold startups would be appropriate in light of this new information from Caithness.** The Air District is therefore lowering its proposal for the hot startup limit to 891 pounds of CO, based on the limit imposed in the Caithness permit for similar equipment. The Air District is also lowering its proposal for the cold startup limit to 2514 pounds of CO, based on the Caithness permit . . .

Emphasis added. Note 116 cites in support *Prevention of Significant Deterioration of Air Quality (PSD)*, *Caithness Long Island Energy Center*, April 7, 2006 (with transmittal letter from W. Mugdan, Director, U.S. EPA Region 2, Division of Environmental Planning and Protection, to R. Ain); available at: www.caithnesslongisland.com/Final%20PSD%20Permt_4.7.06.pdf. *Compare*, College District’s September 16, 2009 letter, at 3, referring to vendor information pages.

BAAQMD’s August 2009 Additional Statement of Basis at 65 continues:

The Air District also considered the possibility of requiring an auxiliary boiler, which would presumably be able to achieve the lower emissions limits expressed in the Caithness permit applicable when the auxiliary boiler is used. Upon further consideration of this issue, **the Air District has concluded that while auxiliary boilers are common technology in colder climates to keep equipment warm in cold weather,** the costs associated with requiring such equipment at Russell City would not be justified by the relatively small startup emissions reductions that would be gained. (See discussion in Section VII C.2 below for the complete analysis.) The Caithness permit limits for this operating scenario are therefore not comparable to Russell City and the Air District does not consider them as indicative of what the Russell City facility will be able to achieve.

In summary, the Air District agrees with the comments that it should examine the Palomar, Lake Side, and Caithness facilities as potentially comparable facilities to determine if the startup limits in the Russell City permit are the lowest achievable.

(Emphasis added.)

Attached as Exhibit 2 (via a separate PDF) is a true and correct copy of portions of the January 2005 application for the Caithness Bellport Energy Center 346 MW Combined Cycle Facility PSD and Part 201 Air Permit Application, including the January 26, 2005 cover letter to Region 2 of the U.S. Environmental Protection Agency, the complete table of contents, which includes a list of appendices, and all of Appendix C for Vendor Data. Appendix C includes the Siemens December 14, 2004, four page vendor data prepared for Caithness entitled as follows:

[received]

Page 1:

Caithness - Bellport Energy Center - Total Estimated Startup and Shutdown Emissions W501FD Upgrade in Combined Cycle Operation on Natural Gas - No Aux. Boiler - With Stack Damper - Rev. 03 [received by BAAQMD]

Page 2:

Caithness - Bellport Energy Center - Total Estimated Startup and Shutdown Emissions W501FD Upgrade in Combined Cycle Operation on No. 2 Fuel Oil - No Aux. Boiler - With Stack Damper - Rev. 03

Page 1:

Caithness - Bellport Energy Center - Total Estimated Startup and Shutdown Emissions W501FD Upgrade in Combined Cycle Operation on Natural Gas - With Aux. Boiler - With Stack Damper - Rev. 01

Page 2:

Caithness - Bellport Energy Center - Total Estimated Startup and Shutdown Emissions W501FD Upgrade in Combined Cycle Operation on No. 2 Fuel Oil - With Aux. Boiler - With Stack Damper - Rev. 01

[received by BAAQMD]

Exhibit 2: PDF pages 16-20.

I obtained these records from the New York Air District in 2009 in conjunction with responding to BAAQMD's initial December 2008 amended PSD permit which was the result of the earlier remand by this Board in July 2008.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct. Executed this 19th day of July, 2010, in Hayward, California.

/s/
Jewell J. Hargleroad

EXHIBIT 1

From: Weyman@baaqmd.gov
Subject: RE: RCEC: Chabot-Las Positas' Response to Additional SOB: applica. 15487
Date: October 6, 2009 1:27:32 PM PDT
To: jewellhargleroad@mac.com

Hi Jewell-

We are in the process of reviewing and responding to comments regarding the Additional SOB. Please provide the following:

1. The cost effectiveness calculations for \$11,515 per ton of CO emissions.
2. The AERMOD modeling files for the air quality impacts analysis referred to on pages 4 to 7 in the Chabot-Las Positas comment letter.

Thanks for your help.

Weyman Lee
-----Original Message-----

From: Jewell Hargleroad [mailto:jewellhargleroad@mac.com]
Sent: Wednesday, September 16, 2009 6:37 PM
To: Weyman Lee
Cc: Helen Kang; Deborah Behles; Paul Cort; Shana Lazerow; lbake66@aol.com; Aaron Israel
Subject: RCEC: Chabot-Las Positas' Response to Additional SOB: applica. 15487

Weyman:

Please find attached the comments and objections of Chabot-Las Positas to BAAQMD's Additional SOB. Originals to follow by mail. Your willingness to accept this by email and after 5 p.m. is appreciated.

Jewell J. Hargleroad, Esq.
Ph: 510-331-2975
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jewellhargleroad@mac.com

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CERTIFICATE OF SERVICE

I hereby certify that **REQUEST TO TAKE ADMINISTRATIVE NOTICE OF OFFICIAL FACTS AND TO SUPPLEMENT THE ADMINISTRATIVE RECORD**

was sent to the following persons in the matter indicated:

Via Email:

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I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed this 19th day of July, 2010, at Hayward, California.

_____/s/_____
Jewell J. Hargleroad