

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

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In re:	)	
Russell City Energy Center	)	PSD Appeal Nos. 10-01 thorough 10-10
	)	
PSD Permit No. 15487	)	
	)	

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**OPPOSITION TO  
MOTION FOR LEAVE TO JOIN PETITION FOR REVIEW 10-02**

On April 16, 2010, the Chabot-Las Positas Faculty Association (“Faculty Association”) moved the Environmental Appeals Board for leave to “join in and support” Petition for Review No. PSD 10-02 filed by the Chabot-Los Positas Community College District in this proceeding.

Respondent the Bay Area Air Quality Management District (“District”) opposes the Faculty Association’s Motion as an impermissible attempt at circumventing the requirement to file appeals in this matter by March 22, 2010. The Motion acknowledges that the Faculty Association missed this deadline, *see* Motion at 2, but claims that the Faculty Association was not aware of the deadline. The Motion blames this lack of awareness on the fact that it had to change counsel because its prior counsel had a conflict of interest. *See id.* But there is no reason why a change in counsel should have made the Faculty Association unaware of the appeal deadline in this matter. The Faculty Association asserts that it has been interested in and has participated extensively in this proceeding. *See id.* at 1-2. As such a participant, it was on notice of the March 22, 2010, filing deadline that the District clearly published in the Final PSD Permit, the Responses to Public Comments Document it published, and in the notice of final permit action it provided to all participants in this proceeding. *See* Final PSD Permit, Exh. 1 to Declaration of Alexander G. Crockett In Support of Responses Requesting Summary Dismissal of Petitions 10-01, 10-05, 10-06 & 10-07 (April 8, 2010) (hereinafter, “Crockett Decl.”), at p. 2;

Notice of Final Permit Issuance, Crockett Decl. Exh. 2; Responses to Public Comments, Crockett Decl. Exh. 3, at p. i. There is no reason why the Faculty Association would need a lawyer to understand that this date, which was clearly explained in the permitting documents, was the deadline by which it would need to file a Petition for Review if it was interested in participating in the appeal proceedings here.

Moreover, even if the Faculty Association did require a lawyer to understand this filing deadline, there is no reason why its prior lawyer and subsequent lawyer could not and should not have made arrangements to track important litigation deadlines as they passed responsibility for representing the Faculty Association from one to the other. A failure of counsel to pay attention to filing deadlines will not justify a late Petition for Review, *see In re B&L Plating, Inc.*, 11 E.A.D. 183 (EAB 2003), and it should not be allowed to justify a late “joinder” in a Petition for Review that seeks to achieve the same result.

For these reasons, the Board should not allow the Faculty Association to make up for its “unaware[ness] of the deadline” by intervening in an existing petition where it would not be able to file a petition of its own. The filing deadlines for permit appeals need to be strictly construed in order to ensure procedural fairness and uniform application of Board’s appeal provisions. “Uniform application of the requirement is necessary because of the various parties and permit that are subject to this provision and because important consequences flow from petitioning for review.” *Town of Hampton, New Hampshire*, 10 E.A.D. at 132 (quoting *In re Bethlehem Steel Corp.*, 3 E.A.D. 611, 613 n.9 (Adm’r 1991)). The Board should not allow the Faculty Association to enjoy a more lenient standard by coming into this proceeding through the back door of “joinder” where the front door of filing its own petition has been closed for some time. In doing so, the Board will ensure that it “preserve[s] its limited resources for parties who are diligent enough to follow its procedural rules.” *B&L Plating*, 11 E.A.D. at 191 (citing *In re Gary Dev. Co.*, 6 E.A.D. 526, 533-34 (EAB 1996)).

In addition, even without this important timeliness concern, the District notes that the appeal provisions in 40 C.F.R. Section 124.19 do no appear to provide for “joinder” of or

intervention by additional parties after a petition for review has been filed, and the Faculty Association had not cited any either. Nor do the Board's Practice Manual or the Clerk's March 25, 2010, scheduling letter appear to provide for any "joinder" of or intervention by additional parties. The Faculty Association has therefore not shown any procedural basis on which its Motion can be granted.

The District also observes that the Faculty Association's participation will not add anything to the Board's consideration of this appeal. The Faculty Association does not seek to add any new issues at this stage or to provide any new arguments regarding any of the issues in the petitions that have been timely filed. The Faculty Association therefore does not provide any good reason why the Board should allow it to intervene at this late stage. The sole effect of granting the Motion now will to add one more party to the growing number of parties seeking to participate in this proceeding.

The District also objects to the Motion's request that the Board take administrative notice of two documents that are unrelated to the record in this PSD Permit proceeding. The Motion does not claim that they are part of the record on which the permit was issued, nor does it attempt to provide any foundation whatsoever as to how they could be related to any PSD requirements on which this permit will be reviewed. Moreover, in requesting the Board to take notice of these documents, the Faculty Association is attempting to add new evidence to this proceeding that was not cited in any of the timely Petitions for Review, and thus cannot be considered by the Board in adjudicating any of these Petitions. For all of these reasons, the request for administrative notice should be denied as well.

Finally, the District wishes to clarify that it has not represented to counsel for the Faculty Association that it supports joinder in this matter. Counsel for the District has confirmed with counsel for the Faculty Association that the statement on page 3 of the Motion that "[t]he Faculty Association has been in contact with counsel for the District, and has been advised that the District supports the Association's joinder in this matter" refers to Petitioner the Chabot-Las Positas Community College District, not to Respondent the Bay Area Air Quality Management

District. As counsel for the Faculty Association explained in an email to counsel for the District on April 19, 2010, “[w]e do not contend, do not believe, and did not say, that the Bay Area Air Quality Management District supports our joinder.”

**CONCLUSION**

For the foregoing reasons, the Faculty Association’s Motion for Leave To Join in the Petition for Review in PSD Appeal No. 10-02 should be DENIED.

Dated: April 20, 2010

Respectfully Submitted

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

\_\_\_\_\_/s/\_\_\_\_\_  
By: Alexander G. Crockett Esq.  
Assistant Counsel

**PROOF OF SERVICE**

I, Mildred Cabato, declare as follows:

I am over the age of 18, not a party to this action, and employed in the City and County of San Francisco, California, at 939 Ellis Street, San Francisco, CA 94109.

On the date set forth below, I served this document, **“Opposition To Motion For Leave To Join Petition For Review 10-02”**, by placing a copy of it in a sealed envelope, with First Class postage thereon fully paid, and depositing said envelope in the United States Mail at San Francisco, California, addressed to the person set forth below:

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