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

In the matter of Russell City Energy Center	)	PSD Appeal No. 08-01

RESPONSE TO PETITIONER'S OPPOSITION TO REQUEST FOR SUMMARY DISMISSAL

Pursuant to the Board's February 14, 2008 Order, Respondent Bay Area Air Quality Management District ("District") submits this Response to Petitioner's Opposition to the District's Request For Summary Dismissal. [1]

I. SUMMARY

Petitioner does not contest that he failed to participate in this permitting action at the draft stage, or that he failed to timely appeal within 30 days after he received notice of the issuance of the final permit. Instead, he argues that he should be excused from his failure to satisfy these requirements based on allegations that the District improperly noticed the draft permit. But the record is clear that he cannot blame any purported defects in the notice for his failures.

First, with respect to Petitioner's failure to comment or otherwise participate at the draft permit stage, the record shows that the District did substantially comply with all applicable notice requirements, and that there was a huge amount of public outreach regarding this Project, as discussed in detail in Section II below. Moreover, to the extent that the District did not technically comply in every last detail with some particular aspect of 40 C.F.R. Section 124.10's notice requirements, Petitioner cannot claim to have been prejudiced by any such defect. Even if the District had complied to the letter with every last requirement, Petitioner cannot reasonably argue that he would have raised his air quality concerns at the draft permit stage, or that he

[1] The Order Requiring Response specifically asked for briefing on three points. Those are addressed in Sections II.A., II.B., and II.C. below.

would be in any different position today regarding his lack of standing. And as the Environmental Appeals Board has held, where a Petitioner "has failed to demonstrate how the [permitting agency's] alleged technical violations of § 124.10 affected these proceedings, or that [Petitioner] was in any way prejudiced by these alleged violations . . . , such violations, even if they occurred, were harmless, and do not invalidate the permit issuance." *In re J&L Specialty Products Corp.*, 5 E.A.D. 31, 79 (EAB 1994).

Second, with respect to Petitioner's failure to file his appeal within 30 days after receiving notice of the issuance of the permit and of his rights to appeal, the alleged notice defects can have no effect whatsoever, as he failed to file within 30 days of receiving *actual* notice. Thus even if the Board finds that the way the draft permit was noticed has somehow prejudiced Petitioner with respect to his standing to appeal, there is no way he claim that any defect in the notice should excuse his failure to file a timely appeal within 30 days of notice.

II. PETITIONER CANNOT BLAME HIS FAILURE TO COMMENT ON INSUFFICIENT NOTICE

Petitioner blames his failure to raise his concerns during the comment period on alleged defects on the public notice that was given for the draft PSD permit. *See* Opposition To Request For Summary Dismissal ("Opposition") at p. 1. But the record shows that the District complied substantially with all applicable notice requirements. Moreover, anywhere that the District did not technically comply in every detail with a particular requirement, such minor defects cannot have prejudiced Petitioner such as to excuse his failure to participate. Petitioner's failure to participate was not because there was a lack of public notice about the Project, it was because Petitioner was not paying attention to what was going on with the project until the very end of the permitting process, and he would not have been in a position to participate during the comment period even if notice was given in exact accordance with every minute detail of 40 C.F.R. Section 124.10.

A. Petitioner Was Not Entitled To Notice By Mail Under 40 C.F.R. Section 124.10(c)

Petitioner cannot claim to have been prejudiced by not receiving actual mail notice of the PDOC/Draft PSD Permit, because did not have a right to such notice under Section 124.10(c)(1). He is not a public agency and so he does not fall among the parties that have a right to mail notice under Section 124(c)(1)(i) through (ix), and he was not on any mailing list that met the requirements of Section 124.10(c)(1)(ix).[2] Several such mailing lists were created by the Energy Commission in its role as the lead agency for the Project's environmental review, and they do not include Petitioner. *See* Declaration of Richard C. Ratliff submitted herewith ("Ratliff Decl."), ¶ 2-3 and Exhs. A-C.

These lists clearly satisfy the requirements of Section 124.10(c)(1)(ix) in that they were created as part of the comprehensive public outreach that was undertaken for the Project. The CEC reviewed these outreach efforts in detail when a number of parties requested reconsideration of the CEC's licensing decision, claiming among other things that the level of public notice had been insufficient.[3] In denying the request, the CEC explained:

> For the RCEC amendment, the Commission provided the same type of thorough public notice that it does for certification proceedings, even though such notice is not required for amendment proceedings. Less than two weeks after the amendment petition was filed, the Commission sent a Request for Agency Participation in the Review of the RCEC Project and a Notice of Informational Hearing and Site Visit to all agencies that had participated in the RCEC AFC proceeding, and any other agencies identified as having a potential interest. This included the City of Hayward and no less than seven departments within the government of Alameda County. (When the amendment petition was filed, the project site was partly within the City of Hayward and partly within an unincorporated part of Alameda County. During the amendment proceeding, the

[2] Petitioner argues that the Hayward Area Planning Association ("HAPA"), a group he claims to be a member of, was entitled to direct mail notice under 40 C.F.R. Section 124.10(c)(1)(vii), which requires mailing to certain interested agencies, including regional land use planning agencies. Petitioner claims that HAPA is such an agency. *See* Opposition at p. 3. But HAPA is a private "citizen group" organization, not a government agency subject to 124.10(c)(1)(vii). *See* Declaration of Sherman Lewis, HAPA president, in Opposition Exh. 25.

[3] Petitioner was not among the parties that challenged the Energy Commission's notice process, although the HAPA was. *See* CEC Reconsideration Order at p. 1.

County and City agreed on and implemented the City's annexation of the previously-unincorporated land.)

The Commission also provided written notice of the amendment petition to all property owners within 1,000 feet of the project site or 500 feet of the proposed natural gas pipeline, or the proposed electric transmission line associated with the project. To ensure that all of the people potentially most affected by the Project would be informed, before the first informational hearing and site visit the Public Advisor conducted outreach to sensitive receptors in the area such as local schools, daycare centers, elder care facilities, and nonprofit organizations (youth sports associations, outdoor interest groups, children's organizations and the like).

In addition, the Commission established a public website for the RCEC amendment proceeding, upon which were posted all notices and orders issued in the proceeding and all of the major documents filed by participants. The website included a detailed written guide to public participation in the siting process, including specific instructions on how and when to file a Petition to Intervene. Information about the project was also posted on websites of the City of Hayward and of Assemblywoman Mary Hayashi, whose district includes the project site.

Public notice activities continued throughout the entire proceeding. Thus every person or entity on any one (or more) of the Commission's three mailing lists for the projects received paper notice of all events, whether or not the person or entity was a formal party in the proceeding. The "interested agency" list included roughly 30 local, regional, state, and federal agencies, including two Alameda County departments . . . . The "general list" included more than 80 citizens, several interested businesses, and agencies that were not on the "interested agency" list – including seven Alameda County departments. Finally, the "property owner" list included 129 names of entities or persons owning property adjacent to or near the RCEC project. And in addition to the paper mailing lists, the Commission used an e-mail list to provide, to 260 public citizens and agency employees, all documents filed in the case.

As the proceeding progressed, the Commission staff held publicly noticed workshops in the community on such issues as air quality, public health, hazardous materials use, land use, and aviation safety. Subsequently, the Commission held publicly noticed evidentiary hearings on a wide range of issues, and a hearing to take comment on the proposed decision, at Hayward City Hall.

In addition to the Commission's extensive public notification and outreach, the RCEC amendment proceeding received frequent media coverage in local outlets such as the *Oakland Tribune*, the *TriValley Herald*, the *San Jose Mercury-News*, the *Contra Costa Times*, and KPFA Radio. Informal meetings and discussions were held throughout the project area, for example at Chabot College.

Describing the results of all this activity, Michal Monasmith of the Public Advisor's office reported to the Commission that "there's been the highest degree of public involvement that I've experienced in my four years with the Commission, with these two cases."

Order Denying Petitions For Intervention and Denying Petitions For Reconsideration, Etc., *In re Amendment to Application for Certification of the Russell City Energy Center Project*, Proceeding No. 01-AFC-7C (Cal. Energy Comm'n. Nov. 7, 2007), *aff'd sub. nom, County of Alameda v. State Energy Resources Conservation & Development Comm'n*, (Cal. Sup. Ct. No. S158875), 2008 Cal. LEXIS 227 (Cal. Sup. Ct. Jan. 3, 2008), Exh. 1 to the Request for Official Notice being submitted concurrently herewith (hereinafter, "CEC Reconsideration Order"), at pp. 3-4. Since Petitioner was not on any of the public notice mailing lists of interested parties for the project, he cannot be someone who was entitled to direct mail notice under 40 C.F.R. Section 124.10(c).[4]

B. Notice Was Mailed To All Interested Parties Entitled To It Under 40 C.F.R. Section 124.10(c)

The preponderance of the evidence in the record – indeed, the only evidence in the record – is that the PDOC/Draft PSD Permit was mailed to the CEC's service list for the project, and thus to all interested parties entitled to receive it under Section 124.10. The fact that the evidence of the mailing is circumstantial – *i.e.*, the testimony of the CEC's Public Advisor for the project, J. Mike Monasmith, that he is informed and believes that it was mailed based on the CEC Docket Section's normal practice (*see* Monasmith Decl., ¶ 3-4[5]) – does not alter this conclusion.[6] It is well settled that "[a] mailing may be proved circumstantially" through evidence of an organization's customary mailing practices. *See, e.g., United States v. Bowman*,

[4] Petitioner challenges the District's reliance on public notice efforts undertaken by the CEC to satisfy the notice requirements in Section 124.10. *See* Opposition at p. 4. But Petitioner cannot seriously contend to have been prejudiced by such reliance. Had the District itself gone and duplicated the extensive public outreach efforts, and itself generated the lists that resulted from those efforts, Petitioner's name would still not have been on the lists and he would not have been entitled to notice. The final result would have been the same whether the CEC had generated the lists or whether the District had done it itself.

[5] Petitioner ignores the Monasmith Declaration and claims that the only evidence of mailing is the Lee Declaration. *See* Opposition at p. 4.

[6] The District sought further, direct evidence from the CEC that the notice was in fact mailed. The CEC was not able to offer anything beyond the testimony about its standard practices that has already been submitted.

783 F.2d 1192, 1197 (5th Cir. 1986) ("The circumstantial evidence concerning the bank's customary practices was more than adequate to support the jury's determination that the mailing in fact took place.") (citation omitted). This is especially true where the standard of proof is only a "preponderance of the evidence" standard, and there is no contrary evidence to suggest that the CEC's normal practice was not followed in this particular case. Certainly, Petitioner has not put anything into the record on which he can satisfy the burden of proof that rests upon him to establish that there is jurisdiction for his appeal based on his arguments about lack of mailing.

The record also indicates that the mailing went to all those entitled to it under Section 124.10(c)(1). Given the extensive public outreach, the service list included all agencies, entities and other interested persons who had not waived their right to notice by not responding to the Energy Commission's invitation to participate in the proceeding. *See* 40 C.F.R. § 124.10(c)(1) ("any person otherwise entitled to receive notice under this paragraph [regarding notice by mail] may waive his or her rights to receive notice for any classes and categories of permits").[7] Thus, every entity and individual who could have been entitled to notice under Section 124.10 who expressed an interest in the Project by responding to the CEC's outreach and participating in the permitting process did in fact get notice, based on what the record shows.

Moreover, even if the Environmental Appeals Board finds that the notice was not in fact properly provided to some entity that was entitled to it, Petitioner still has not shown that he was prejudiced by it in some way sufficient to grant him standing to appeal. Even if the District itself had mailed out the notice, and even if it had mailed it to every single person on the CEC's extensive public notice lists (or its own notice lists, if the District had duplicated the CEC's efforts and made its own), Petitioner still would not have participated in a way that would afford

[7] Petitioner has also challenged the District's reliance on the CEC's docket section for doing the actual, physical mailing of the notice. (Opposition at p. 4.) But again, he cannot reasonably argue that he could have been prejudiced in any way by who actually did the mailings. The relevant question is what notice was sent and to whom. The identity of the sender is immaterial. Even if the District had addressed the envelopes and licked the stamps itself, the outcome would have been the same.

him standing, as is evident from his lack of participation in the CEC's proceeding. Petitioner clearly had an interest in the CEC proceeding at least as substantial as he is claiming here, as many of the same air quality issues he now seeks to raise (*e.g.*, Best Available Control Technology) were a part of the CEC's overall environmental review for the project. Indeed, Petitioner's interest in the CEC's environmental review process was even more substantial than his interest in the District's PSD Permit process, as he is raising concerns about issues that go beyond just air quality, such as biological resources impacts, stormwater management and other water quality issues, endangered species concerns, and floodplain impacts. (*See* Petition for Review at pp. 21-23; Opposition at pp. 16-17 & 20.) And yet, he failed to participate in the CEC proceeding to pursue these concerns (*see* Monasmith Decl., ¶ 6; Ratliff Decl., ¶ 4), even after the CEC provided far more extensive public notice and public outreach than could even arguably have been required here, including direct mail notice to multiple mailing lists and multiple several public hearings (*see* CEC Reconsideration Order, at pp. 3-4, quoted *supra*). As the CEC described Petitioner's participation, he "was simply a 'no show' " when his interests were at stake, even after very extensive public outreach. *See* Amicus Brief of the California Energy Commission In Support of Motion to Dismiss For Lack of Jurisdiction, *In the matter of the Appeal of Rob Simpson etc.*, BAAQMD Hearing Board Docket No. 3456 (filed Feb. 28, 2008), Exhibit B to Request For Official Notice submitted concurrently herewith, at p. 2. Since Petitioner was not someone who responded when the CEC mailed notice of its broad CEQA-equivalent environmental review to a huge list of interested parties, he cannot reasonably argue that he would have responded on the relatively more narrow air-quality-specific matters at issue in the PSD Permit, even if the District had itself mailed notice to every entity on the list of parties set forth in Section 124.10.[8] Even if the District had done so, Petitioner would have

[8] Petitioner claims to have participated in the CEC proceedings "through our HAPA attorney Jewell Hargleroad." (Opposition at pp. 3, 13.) But when Ms. Hargleroad participated (after the Commission's final licensing decision, which was well after the close of the comment period on the draft PSD permit), she did not purport to represent Petitioner. *See* Ratliff Decl., ¶ 4. Thus comments by Ms. Hargleroad (or others representing HAPA) would not have been able to confer

found himself in the exact same position he is in today, with no standing to appeal because he failed to comment at the draft stage.

Simply put, Petitioner's lack of participation in the CEC proceeding belies his contention that the manner in which notice was provided "prevented my participation in the permitting process", Opposition at p. 2, heading I, or that the alleged errors he complains of were "prejudicial and harmful error", *id.* at p. 1. To the contrary, it appears from Petitioner's own action (or inaction, to be precise) that he would not have participated in the permitting of the Project in a way that would give him standing here, no matter what level of notice was given. Without a showing of prejudice, a defect in the mailing of notice to another person cannot create standing where the Petitioner himself failed to comment. *See In re J&L Specialty Products Corp.*, 5 E.A.D. 31, 79 (EAB 1994) ("[W]e fail to see how a [petitioner] would have standing to complain about someone else allegedly not being mailed notice of the draft permit," absent some sort of prejudice to the petitioner himself from the lack of mailing.). As the Board explained in that case, "Because [petitioner] has failed to demonstrate how the Region's alleged technical violations of § 124.10 affected these proceedings, or that it was in any way prejudiced by these alleged violations, we conclude that such violations, even if they occurred, were harmless, and do not invalidate the permit issuance." The Board should reach the same conclusion here. To the extent that there were alleged technical violations of Section 124.10 because the notice was

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standing on Petitioner where he did not comment himself, as the Board has made clear on a number of occasions. *See, e.g., In re American Soda, LLP*, 9 E.A.D. 280, 288 (EAB 2000) (No standing where "[Petitioner] neither participated in the public hearings held on the permit, nor filed written comments . . .", and a related entity who did comment "never stated it was commenting on behalf of [Petitioner]."); *In re Sierra Pacific Industries*, 11 E.A.D. 1, 6-7 (EAB 2003) (Petitioner may not rely on comments made by neighbor unless he explicitly incorporated them by reference as his own). Indeed, the fact that Ms. Hargleroad represents HAPA (who did not appeal) and not Petitioner (who did) is clear on the face of the Petition itself, in which Petitioner "ask[s] for time to secure legal counsel . . . ." If he was appealing on behalf of HAPA here, or if Ms. Hargleroad had represented him in an appearance before the CEC, he would already have had legal counsel. Simply sitting next to Ms. Hargleroad at a hearing, as Petitioner claims to have done (*see* Opposition at p. 13) is not sufficient to establish standing. *See In re Envotech, L.P.*, 6 E.A.D. 260, 267 n. 11 (Petitioner cannot gain standing by "[s]imply attending a public hearing, but not participating in the proceedings . . . .").

not mailed by the District or because it was not mailed to some entity entitled to it, such violations cannot invalidate the permit issuance because Petitioner has no reasonable argument that it prevented him from participating.

C. The Information Given Adequately Noticed The Proposed Permitting Action In Substantial Compliance With 40 C.F.R. Section 124.10(d)

Petitioner also tries to blame his failure to comment on purported deficiencies in the content of the notice. But Petitioner contends that he had never even saw the notice when it was issued, so by definition the content of the notice that was provided cannot have prejudiced him. Petitioner may debate whether his unawareness of the draft permit and his right to comment was based on a failure to publicize the project widely enough or due to his own failure to pay attention to what was going with this Project. But he cannot seriously claim that his unawareness was due to the contents of a notice he never saw.

This glaring hole in Petitioner's argument aside, the contents of the notice would not excuse Petitioner's lack of participation even if he had seen it, because it did substantially explain all of the information about the project and the draft PSD permit as required under 40 C.F.R. Section 124.10(d). If Petitioner had truly placed himself in a position to have seen it – which seems unlikely given his lack of timely participation on any level, as described above – he would have had all of the necessary information about the PSD Permit and how to comment on it.

First, Petitioner contends that the notice of the PDOC/Draft PSD permit did not identify Calpine Corporation, the initial project owner, but only identified the project as "Russell City Energy Center", a reference to the name of the project itself and of the Calpine subsidiary that is now the project owner.[9] *See* Opposition at pp. 5-6. But none of the air quality concerns that Petitioner seeks to raise turns on the identity of the project owner. Petitioner may feel that

[9] Ownership transferred from Calpine Corporation to Russell City Energy Company, LLC, in 2007. *See* Opposition Exh. 4 p. 1 (Order approving transfer posted August 7, 2007); *see also* Opposition Exh. 5 p. 3 fn. 1 (referencing same).

Calpine is unworthy of being granted a certificate by the Energy Commission – either directly or through a subsidiary – because of the company's bankruptcy or past bad acts.[10] But such an argument would be unrelated to the PSD issue on which Petitioner now seeks to appeal – *i.e.*, what is the Best Available Control Technology for the facility – or even to the non-PSD air quality issues he has raised, such as the provision of Emission Reduction Credits for the project. There is no way that alleged mis-information about the owner of the project could have prejudiced Petitioner from commenting on the air quality issues in such a way as to establish standing here.

Second, Petitioner contends that the "final notice" was "patently deceptive" in that it did not specify the facility's specific street address. But the notice clearly provides the location of the proposed facility – "Depot Road and Cabot Blvd., Hayward, California" – and the failure to specify the specific address number on Depot Road can hardly be an excuse for claiming to have been uncertain where exactly the facility was located. Opposition, Exh. 1 p. 3. And in any event, there is no way that a purported defect in the *final* notice can even arguably create an excuse for Petitioner not having commented on the *draft* permit. There can be no serious argument that the draft notice was "patently deceptive" in this regard.

Third, Petitioner contends that his failure to comment should be excused because the notice of the PDOC/Draft PSD Permit (i) simply referenced District Regulation 2-2-405, which explains the District's procedures for requesting a public hearing on a draft permit, instead of providing a "brief description" of the procedures for requesting a hearing; (ii) provided only the name and address of Weyman Lee, the District contact for the project, instead of giving his name, address, and telephone number; and (iii) did not explain that there was no information available on the "degree of PSD increment consumed" because the Project's emissions were

[10] Petitioner's reference to past violations are from testing done at other facilities in 2001, six years before the PSD permit was issued. Petitioner has shown no evidence of any current non-compliance with air quality requirements, let alone non-compliance that would rise to the level of presenting questions about whether this Project will be able to comply with its air quality requirements.

below the threshold that would have triggered a PSD analysis. *See* Opposition at 6-7.[11] None of these purported minor technical defects in the notice could have prejudiced Petitioner, who is clearly sophisticated enough to have filled in any minor pieces of information that were not explicitly stated in the notice. He clearly would have been made aware of his right to request a public hearing based on the reference to District Regulation 2-2-405, even without an explicit "brief statement" specifically describing them. He clearly would have been aware how to contact Mr. Lee for more information even without explicit notice of Mr. Lee's phone number, and in fact he indicates that he was able to contact Mr. Lee once he (belatedly) became involved in the project, whom he spoke to "for hours" regarding the permit in November of 2007. *See* Opposition, p. 13. And he could clearly have discovered that there had been no calculation of the degree of PSD increment consumed because the project did not even trigger the applicable thresholds for conducting a PSD analysis just by reading the PDOC/Draft PSD Permit. *See* Summary of Air Quality Impact Analysis for the Russell City Energy Center, Opposition Exh. 25, pp. 59-66.[12] Where the District was not required to conduct an analysis of degree of PSD increment consumption, there can have been no requirement to have published such information in the notice.

It seems incomprehensible that Petitioner could have been prejudiced in his obtaining this information simply because it was not explicitly recited in the actual text of the notice. Moreover, even if Petitioner really did believe that his public rights to information about the permit process had been prejudiced, he had a duty to inform the District at the draft stage so it could have re-issued the notice correcting any defects that Petitioner could identify. There is no

[11] Petitioner also claims that the notice did not identify the draft PSD Permit. *See* Opposition at p. 7. But the notice clearly states that "the District has issued . . . a proposed PSD permit . . . ." Opposition, Exh. 1, "Notice Inviting Written Public Comment".

[12] Exhibit 25 to Petitioner's Opposition contains a number of documents, one of which is the Summary of Air Quality Impact Analysis for the Russell City Energy Center, which was Appendix E to the Final Determination of Compliance. That document starts at approximately the 20th page of Opposition Exhibit 25. For ease and convenience of reference, a copy of this portion of Opposition Exhibit 25 is attached hereto.

way that he can claim that these purported defects were not clearly evident at the draft permit stage, had he been paying attention to what was going on in the permitting process to begin with.

Fourth, Petitioner contends that publication of the notice of the PDOC/Draft PSD permit in the *Oakland Tribune* was defective because it is not a newspaper of general circulation in all parts of the District's jurisdiction, not just in Alameda County where the facility is located. Petitioner can point to no requirement for publication in a newspaper of general circulation "within *the entirety of* the District" or "within *all areas of* the District" or other words to that effect. The District made a reasonable choice to publish in the *Oakland Tribune* as a major newspaper for Alameda County, the county in which the facility is located, and certainly cannot be found to have abused its discretion in doing so.[13]

Finally, to the extent that any of this information that was provided in the notice did not comply in some detail with the exact requirements of Section 124.10, there is no way that Petitioner can reasonably argue that such technical non-compliance prevented him from participating at the draft stage. In such a case, minor defects in the notice should be ignored as harmless. *See In re J&L Specialty Products Corp.*, 5 E.A.D. 31, 79 (EAB 1994) ("Because [Petitioner] has failed to demonstrate how the Region's alleged technical violations of § 124.10 affected these proceedings, or that it was in any way prejudiced by these alleged violations, we conclude that such violations, even if they occurred, were harmless, and do not invalidate the permit issuance.").

[13] Petitioner also argues that the notice should have been published in the *Daily Review*, which he claims is a newspaper of general circulation for the City of Hayward. He thus argues that publication in the *Oakland Tribune* was somehow too broad and too narrow at the same time, as he claims that its circulation does not cover the entire Bay Area, but also that it is not restricted only to the City of Hayward. The choice of the *Oakland Tribune* was eminently reasonable to notify those in the vicinity of the facility, especially where a portion of the site was initially in unincorporated Alameda outside the City of Hayward, which was only annexed by the City mid-way through the approval process. *See* CEC Reconsideration Order at p. 3. The District was reasonable in assuming that people in Alameda County as a whole would be interested in the PDOC and Draft PSD Permit, and that the larger *Oakland Tribune* would be a better vehicle for notice than the *Daily Review*. The *Tribune* certainly thought the Project was of interest to its readership, as it gave it "frequent . . . coverage." *Id.* at p. 4.

II. PETITIONER CANNOT BLAME HIS FAILURE TO APPEAL WITHIN 30 DAYS ON A LACK OF NOTICE, AS HE FAILED TO FILE WITHIN 30 DAYS EVEN AFTER HE INDISPUTABLY HAD ACTUAL NOTICE

Even if the Environmental Appeals Board excuses Petitioner's failure to comment during the comment period based on alleged defects in the notice, any such defects cannot reasonably be argued to excuse his failure to appeal within 30 days, the other major jurisdictional prerequisite for appeals to this Environmental Appeals Board under 40 C.F.R. Part 124. It is undisputed that Petitioner did not appeal within 30 days even after he received *actual notice* of the issuance of the permit and of his rights to appeal to the EAB.

Petitioner cannot seriously dispute that he had notice of issuance of the permit in November of 2007. He has stated in his own submissions that he learned of the permit issuance on November 29 (*see* Opposition at p.13), and has shown that he asked about the appeal process and was given information about appeals by November 30 (*see* Original Petition For Review, Docket Entry No. 2, at pp.17-18 (attaching email transmitting EAB appeal guidelines). Even if the Board holds that the 30-day appeal clock should start running upon mailing of notice, this appeal would still have had to be filed the end of December, 2007. It was not.

Petitioner is therefore forced to rely solely on the publication of notice of the issuance of the permit in the newspaper as the start of his 30-day appeal time. But as the District explained in its Request For Summary Dismissal, Section 124.19(a) is very clear that the 30 days runs from "service of the notice" of permit issuance, not from any newspaper publication date. Whether the Board counts 30 days from service of notice on the one party who commented, or from service on Petitioner himself, the Appeal was late.

IV. CONCLUSION

For the foregoing reasons, Petitioner should not be excused from the important jurisdiction prerequisites to EAB appeal based on the way the notice of the draft permit was provided. The notice substantially complied with all applicable requirement in Section 124.10. To the extent that there were minor, technical defects in the notice, those could not have prejudiced Petitioner and cannot reasonably be blamed for Petitioner's lack of comments. And

even if any defects in notice could be found to have kept him from commenting at the draft stage, there is no way they can excuse his failure to timely appeal the final permit where he did not file within 30 days of receiving actual notice.

Dated: March 6, 2008

Respectfully Submitted

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BAY AREA AIR QUALITY
MANAGEMENT DISTRICT

_____/s/_ _____
By: Alexander G. Crockett Esq.
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ATTACHMENT

Convenience copy of *Summary of Air Quality Impact Analysis for the Russell City Energy Center*, a document included among those presented by Petitioner in Exhibit 25 to his Opposition To Request For Summary Dismissal.