

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

In re: Sierra Pacific Industries
PSD Appeal No. 12-03
PSD Permit No. SAC 12-01

Respondent: EPA Region 9

**RESPONSE TO ORDER TO SHOW CAUSE
WHY STANDING SHOULD BE GRANTED
TO CITIZENS FOR CLEAN AIR**

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Friends of the Earth, Netherlands & Alfred Akpan et al V Royal Dutch Shell Petroleum
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Kiobel V Royal Dutch Shell Petroleum
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Administrative Procedure Act (APA), Pub.L. 79-404, 60 Stat. 237

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Environmental Justice Guidelines

Executive Orders:

Executive Order # 12898

Executive Order # 13563

INTRODUCTION

Ed W. Coleman, Co-coordinator of Citizens For Clean Air (“CCA”), appeals a decision by Omer Shalev, the EPA Region 9 (“Region”) authorized Presiding Administrative Officer.

Appellant does not seek standing under the PSD permitting process. Appellant is willing to concede that Region's permit outcome will be to the highest standard and will include the most stringent Best Available Control Technology (“BACT”) possible.

Appellant seeks standing under the Administrative Procedures Act (“APA”) and Environmental Justice Guidelines.

On October 1, 2012, Omer Shalev issued a final decision which denied all public hearings regarding a Sierra Pacific Industries cogeneration plant planned for Shasta County. The Presiding Officer violated Environmental Justice Guidelines by establishing a threshold for public involvement and then refusing to disclose that threshold to the public.

For the reasons stated below, the Presiding Officer erred when he concluded that the citizens of Shasta County should be penalized for erroneously misunderstanding the threshold required to obtain a public hearing. It is arbitrary and capricious to create a standard that the public can not meet.

ISSUES PRESENTED FOR REVIEW

Appellant alleges error in the following :

A. Appellant alleges Presiding Officer Omer Shalev erred in stating that the Region “had discretion to hold a Public Hearing if we determine there is a significant amount of public interest,” but at the same time not providing any significant details on what the threshold for the public to obtain a public hearing might be.

B. Appellant alleges Presiding Officer Omer Shalev erred in his determination that no significant amount of public interest existed.

C. Appellant alleges that since Shasta County is an Environmental Justice community, the standard for review under Environmental Justice Guidelines in such communities is exceptionally low. Region 9 is the lead as well as advisory agency for Executive orders # 12898 and #13563. It is reasonable to expect the highest standards from the Region.

FACTUAL AND PROCEDURAL BACKGROUND

On October 1, 2012, Omer Shalev issued a final decision which denied all public hearings regarding a Sierra Pacific Industries cogeneration plant planned for Shasta County.

In this October 1, 2012 email, Omer Shalev stated to CCA, "... EPA does not currently plan to hold a public hearing for this proposed action. As stated in the public notice for this proposed action, 'pursuant to 40 CFR 124.12, EPA has discretion to hold a Public Hearing if we determine there is a significant amount of public interest in the proposed permit. Requests for a Public Hearing must state the nature of the issues proposed to be raised in the hearing.' To date, EPA has not received a significant amount of public interest in this project or additional requests for a public hearing. Moreover, your request for a public hearing has not stated 'the nature of the issues proposed to be raised in the hearing.' If you still desire for EPA to hold a public hearing, you must state the issues that you intend to propose at the hearing, and we must receive indications that there is a significant amount of public interest."

Under the APA, Appellants had 30 days from the final decision issued by the Presiding Officer in which to appeal that decision. Since our injury occurs under APA and Environmental Justice Guidelines, we risked losing standing if we failed to exhaust our administrative remedies by not filing before the October 30, 2012 deadline.

ARGUMENT

The Presiding Officer erred in his decisions:

A. Presiding Officer Omer Shalev erred in stating that a threshold of “significant public interest” existed that would allow the Region to hold a public hearing, while simultaneously failing to provide significant details to the public on how to obtain a hearing.

The APA requires that in order to set aside agency action not subject to formal trial-like procedures, the court must conclude that the regulation is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.”

The Presiding Officer violated Environmental Justice Guidelines by establishing a threshold for public involvement and then refusing to disclose that threshold to the public. It is arbitrary and capricious to conclude that the citizens of Shasta County should be penalized for not meeting the threshold required by the Region to obtain a public hearing. If the Region sincerely desired public participation, they would have given an accurate and detailed explanation of the threshold requirements. Anything less is an abuse of discretion.

According to the Attorney General's Manual on the Administrative Procedure Act (1947), drafted after the 1946 enactment of the APA, the basic purposes of the APA are (1) to require agencies to keep the public informed of their organization, procedures and rules; (2) to provide for public participation in the rule making process; (3) to establish uniform standards for the conduct of formal rule making and adjudication; (4) to define the scope of judicial review.

This case presents an excellent opportunity for the Board to define the scope of judicial review, as well as require the Region to keep the public informed of their organization, procedures and rules.

Unlike arbitrary and capricious review, substantial evidence review gives the courts leeway to consider whether an agency's factual and policy determinations were warranted in light of all the information before the agency at the time of decision.

Article III of the Constitution reserves judicial powers for the courts. Accordingly, courts tend to be strict under the substantial evidence standard when agencies acts like courts because being strict gives courts final say, preventing agencies from using too much judicial power in violation of separation of powers.

Pursuant to 5 USCS § 702, a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action, may seek redress of grievances. While the standing requirements imposed by Article III require a plaintiff to suffer a sufficient injury in fact, § 10 of the Administrative Procedure Act, requires that the plaintiff also demonstrate that he or she has prudential standing. For a plaintiff to have prudential standing under the APA, the interest sought to be protected by the complainant must be arguably within the zone of interests to be protected or regulated.

The citizens of Shasta County have suffered an “injury in fact,” since we have been denied a public hearing under Environmental Justice Guidelines. We are within the “zone of interests” as demonstrated by the fact that Environmental Justice calls for “early and sustained” involvement of the community. Our repeated requests for a single hearing were denied.

B. Presiding Officer Omer Shalev erred in his determination that no significant amount of public interest existed.

Shasta County has already been identified as an Environmental Justice community. See *In Re KNAUF FIBER GLASS, GMBH PSD Appeal Nos. 983 through 9820*, “ORDER DENYING REVIEW IN PART AND REMANDING IN PART,” decided February 4, 1999.

The following guidelines under Executive Order # 12898 have been violated by the Region:

- 1)Region did not "go above and beyond usual protocol to identify, involve and help potentially affected communities."
- 2) Region did not "provide opportunities for community input in the NEPA process, including identifying potential effects and mitigation measures in consultation with affected communities and improving accessibility of public meetings, official documents and notices to affected communities.

3) Region did not follow the procedures found on page 5 of Executive Order # 12898 which reads: "Community involvement is particularly important in cases involving potential environmental justice issues. Early and sustained communications with the affected community throughout the NEPA process is an essential component of environmental justice."

4) Region did not follow the procedures found on page 17 of Executive Order # 12898 which reads: "Local resources should be sought for local and up-to-date knowledge of a given area and its inhabitants as well as a lead to other sources of information...Outreach to community groups may be the most reliable data collection method in other cases..."

Environmental Justice calls for early and sustained involvement of the community. Our repeated requests for a single hearing have been denied.

C. Presiding Officer Omer Shalev erred when he failed to recognize Region is the lead as well as advisory agency for Executive Orders # 12898 and #13563.

Standards under Environmental Justice Guidelines are exceptionally low. Region is the lead as well as advisory agency for Executive orders # 12898 and #13563. It is reasonable to hold the Region to the highest standards.

On February 11, 1994, President Bill Clinton issued Executive Order # 12898, which encourages to "the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States..."

On January 18, 2011, President Obama issued Executive Order # 13563, which emphasizes the importance of protecting "public health, safety and our environment while promoting economic growth, innovation, competitiveness, and job creation." Executive Order # 13563 points to the need for predictability and for certainty, and for use of the least burdensome tools for achieving regulatory ends. It indicates that agencies "must take into account benefits and costs, both quantitative and qualitative." It reaffirms the principles, structures, and definitions in Executive Order # 12866, which has long governed regulatory review. It also authorizes agencies to consider, and discuss qualitatively, "values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts."

Executive Order # 13563 elaborates five new principles to guide regulatory decision making. First, agencies are directed to promote public participation, in part through making relevant documents available on the [regulations.gov](https://www.regulations.gov) to promote transparency and comment. It also directs agencies to engage the public, including affected stakeholders, before rule making is initiated.

Second, agencies are directed to attempt to reduce “redundant, inconsistent, or overlapping requirements,” in part by working with one another to simplify and harmonize rules. Third, agencies are directed to identify and consider flexible approaches to regulatory problems, including warnings and disclosure requirements. Such approaches may “reduce burdens and maintain flexibility and freedom of choice for the public.” Fourth, agencies are directed to promote scientific integrity. Fifth, and finally, agencies are directed to produce plans to engage in retrospective analysis of existing significant regulations to determine whether they should be modified, streamlined, expanded, or repealed.

Therefore, we should be granted standing under the above Executive Orders, which are in place to guide regulatory decision making. Region should be working to promote public participation, not deny it based upon arbitrary and capricious standards.

CONCLUSION

Please grant Appellant standing. This is an important issue which could result in significant policy change. Environmental Justice Guidelines require meaningful involvement by the very communities the Region seeks to serve.

Respectfully submitted,

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November 18, 2012