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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

MOUNT SHASTA BIOREGIONAL ECOLOGY CENTER
et al.,

Plaintiffs and Appellants,

v.

SISKIYOU COUNTY AIR POLLUTION CONTROL
DISTRICT et al.,

Defendants and Respondents;

ROSEBURG FOREST PRODUCTS CO. et al.,

Real Parties in Interest and
Respondents.

C065668

(Super. Ct. No.
SCCVPT090933)

In February 2009, defendant Siskiyou County Air Pollution Control District (District) issued an Authority to Construct (ATC) permit to real party in interest Roseburg Forest Products Co. (Roseburg). The ATC permit authorizes Roseburg to expand its existing veneer manufacturing facility outside Weed,

California, to enable the cogeneration of electricity for resale. Plaintiffs Mount Shasta Bioregional Ecology Center (MSBEC) and Weed Concerned Citizens (WCC) filed an administrative appeal of the District's decision claiming, among other things, the District failed to require Roseburg to incorporate the best available control technology (BACT) for reducing air pollution from the expanded facility. The District's Appeal Hearing Board (Hearing Board) conducted an evidentiary hearing but ultimately rejected the appeal and affirmed the permit authorization.

Plaintiffs initiated this mandamus action in the superior court seeking to overturn the decision of the Hearing Board. In addition to their BACT claim, plaintiffs raised various procedural challenges to the Hearing Board's proceedings. The trial court rejected plaintiffs' arguments and denied the petition.

Plaintiffs appeal. They contend, as they did in the trial court, they were denied due process in the proceedings before the Hearing Board because one member of the Hearing Board had a conflict of interest, the Hearing Board failed to provide them a copy of its hearing rules in a timely fashion, and only one of three Hearing Board members reviewed the findings of fact and conclusions of law before signing them. They further contend the Hearing Board erred in rejecting their claim that the District failed to require Roseburg to use the BACT. We conclude plaintiffs failed to establish any error in the administrative proceedings and affirm.

FACTS AND PROCEEDINGS

The facts are taken from the testimony presented at the administrative hearing and all documentary evidence properly included in the administrative record or otherwise conceded by the parties.

In 1982, Roseburg purchased an existing wood veneer manufacturing facility outside the City of Weed in Siskiyou County. Operations at the facility involve stripping the bark from logs, using the bark for fuel to run the equipment on the premises, and converting the remaining wood into sheets of veneer to be shipped elsewhere for fabrication into plywood.

In August 2006, Roseburg submitted an application to the District to expand the facility in order to take advantage of an abundance of wood fuel in the area for generating electricity for resale. The proposed project consists of modifying the existing boiler on the premises in order to produce super-heated steam, which steam would then be used to run a turbine for the production of electricity. Because this process would increase gas emissions from the facility, Roseburg was required to obtain a permit from the District.

Of the various gases produced by the expanded facility, the only one that would increase above the applicable threshold of significance for Siskiyou County (County) was nitrogen oxide (NO_x). This increase triggered a county requirement that Roseburg utilize the BACT to reduce NO_x emissions.

Roseburg chose selective noncatalytic reduction (SNCR) technology as the BACT for the project to reduce emissions by 35 percent. Chad Darby, an air quality consultant hired by Roseburg for the project, described SNCR as follows: SNCR "is where you inject either urea or ammonia directly into the firebox. With the fireboxes at the temperature that this boiler is, which I believe is between 1600 and 2,000 degrees farenheit, the urea will be converted into ammonia at that temperature. The ammonia reacts with [NO_x]. [¶] So at the back end, the [NO_x] emissions are reduced and diatomic nitrogen and oxygen, which are prevalent in the atmosphere, is what you get out of the process."

Roseburg also considered using selective catalytic reduction (SCR) technology, which utilizes a catalyst to allow ammonia to react with and neutralize NO_x at lower temperatures. However, this was ruled out for various reasons, including the likelihood that the catalyst would become plugged because of the nature of the fuel being used in the boiler.

Another technology considered by Roseburg was regenerative selective catalytic reduction (RSCR), which involves adding a selective catalytic reduction unit to the back end of the exhaust system. However, this would require additional construction and the burning of additional fuel to bring the temperature of the emissions back up to a level required for reaction with the catalyst. This too was rejected because of the potential for plugging up the catalyst.

On February 24, 2009, the District approved the project with the SNCR technology and issued the ATC permit. Plaintiffs filed an administrative appeal of the District's decision. The hearing on plaintiffs' appeal was initially scheduled for April 13, but was postponed until May 6 on stipulation of the parties. Although Hearing Board rules require that all written evidence be submitted at least 10 days before the hearing, plaintiffs were given until May 1 to submit evidence based on their claim they had not received a copy of the Appeal Hearing Procedures of the Hearing Board until April 24.

At the time plaintiffs filed their administrative appeal, the Hearing Board had only two of five authorized members, including Hearing Board Chairman James Gubetta. A third member was appointed in April. Because Gubetta lived within 300 feet of Roseburg's facility, yet his participation was necessary to constitute a quorum for the Hearing Board, he sought the advice of the California Fair Political Practices Commission (FPPC). The FPPC ultimately advised Gubetta he could participate in the appeal under the circumstances.

The Hearing Board thereafter conducted an evidentiary hearing on plaintiffs' appeal, with Gubetta participating, and affirmed the decision of the District to issue the ATC permit.

Plaintiffs initiated the instant proceedings in the superior court against both the District and the Siskiyou County Board of Supervisors (Board). Their petition alleges five claims: (1) violation of the District's own rules regarding the BACT; (2) failure to give proper notice of a resumption of the

appeal hearing; (3) violation of the Government Code in permitting Chairman Gubetta to participate in the process; (4) violation of procedural due process regarding the introduction of evidence; and (5) abuse of discretion in refusing to permit late submittal of evidence.

The trial court rejected each claim and denied the petition.

DISCUSSION

I

Standard of Review

In administrative mandamus proceedings, the applicable standard of review depends on the nature of the claims raised. As a general matter, the courts inquire into whether the agency "has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." (Code Civ. Proc., § 1094.5, subd. (b).) Abuse of discretion occurs where the agency "has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (*Ibid.*)

Plaintiffs raise three primary issues on appeal. They argue the proceedings before the Hearing Board were defective both (1) because a participating board member had a conflict of interest, and (2) because plaintiffs were denied due process in the way the proceedings were conducted. They further argue (3)

the Hearing Board failed to require Roseburg to use the BACT on the project.

The procedural issues involve mixed questions of law and fact subject to the independent judgment of the trial court. This court reviews the determinations of the trial court on any preliminary factual questions to determine if they are supported by substantial evidence and exercises independent judgment on the ultimate questions of law. (*Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 87.) On the substantive issue of whether the Hearing Board required Roseburg to use the BACT, our task is the same as that of the trial court. We review the decision of the Hearing Board to determine if it is based on substantial evidence. (*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1583.) We must uphold the Hearing Board's decision "unless the review of the entire record shows it is so lacking in evidentiary support as to render it unreasonable. (*Ibid.*) However, "[w]hile the [Hearing Board's] findings on questions of fact will be sustained if supported by substantial evidence on the record considered as a whole, yet, if the [Hearing Board] committed any errors of law, the trial and appellate courts perform 'essentially the same function' and are not bound by the [Hearing Board's] legal conclusions." (*Johnson Controls, Inc. v. Fair Employment & Housing Com.* (1990) 218 Cal.App.3d 517, 532.)

II

Conflict of Interest

The District issued the ATC permit on February 24, 2009. Plaintiffs filed their administrative appeal on March 16. At the time, the Hearing Board had only two of five authorized members, including Chairman Gubetta. A third member was appointed in April.

Because Gubetta lived within 300 feet of the Project site, he sent a letter to the FPPC requesting advice as to whether he could participate in the decision on plaintiffs' appeal. Government Code section 87100 prohibits a public official from participating in any governmental decision "in which he knows or has reason to know he has a financial interest." (Gov. Code, § 87100.) However, Government Code section 87101 provides an exception where the official's participation "is legally required for the action or decision to be made." (Gov. Code, § 87101.) Gubetta requested advice on whether this exception applies where his participation is necessary to constitute a quorum.

The FPPC responded on April 23, 2009, concluding: "Absent additional facts, we do not find that multiple vacancies resulting from a political failure of the appointing authority to fill the vacancies are sufficient to warrant the use of the legally required participation exception."

On April 29, Siskiyou County Counsel, Tom Guarino, called the FPPC and provided additional facts pertinent to the conflict

issue. On April 30, the FPPC sent a second letter to Gubetta reversing its earlier decision. That letter concluded: "Based upon the facts provided, you may participate in the decision regarding the permit under the legally required participation exception so long as your participation is necessary to establish a quorum."

Gubetta thereafter participated in the decision of the Hearing Board to deny plaintiffs' appeal.

Plaintiffs contend the Hearing Board violated Government Code section 87100 in permitting Gubetta to participate in the decision on their appeal despite a clear conflict. They assert the FPPC determined Gubetta had a conflict of interest and told the District it could appoint two other applicants and thereby meet the quorum requirement. They further assert Guarino provided the FPPC additional information "in order to encourage the FPPC to rescind its previous advice," and the FPPC's later reversal was "based upon a misrepresentation of the facts by Mr. Guarino." According to plaintiffs, the District, "aware of the conflict, aware of the FPPC's opinion, aware that there were applicants for the vacancies, and had on its agenda to appoint members of the Hearing Board, elected not to make an appointment." Plaintiffs argue the only possible reason for the District's failure to appoint new members was political, and a political reason is not sufficient to invoke the legally required participation exception of Government Code section 87101.

Before turning to the merits of plaintiffs' arguments, a few words about their mischaracterization of the record are in order. The FPPC never determined Gubetta had a conflict of interest, as plaintiffs assert. The FPPC assumed a conflict existed and considered the issue whether, notwithstanding the conflict, Gubetta could participate in the decision on plaintiffs' appeal. Nor did the FPPC at any time tell the District it could appoint two other applicants in order to obtain a quorum. On the other hand, it is not disputed for purposes of this proceeding that Gubetta had a conflict and the appointment of two new members to the Hearing Board would have obviated the need for Gubetta to participate.

Although County Counsel Guarino did provide the FPPC additional information following the agency's first opinion letter, there is nothing in the record to suggest he did so in order to encourage the agency to change its decision. That additional information was a direct response to the FPPC's initial letter, in which the agency explained application of the legally required participation exception depends on a number of factors. The agency cited *In re Tobias* (1999) 13 FPPC Ops. 5, page 4, where it had identified the following factors: "whether there was an alternative method of decisionmaking consistent with the purpose and functions of the particular agency, whether the agency could have changed the quorum requirements, or appointed alternative or interim members who could vote, whether the decision had to be made within a specified time period, and the importance of the agency moving forward." The FPPC further

noted: "the only information you have provided in your request for advice is that three of [the] five positions on the [Hearing] Board are vacant, and that it is unlikely that two of the vacancies will be filled in the foreseeable future." The letter concluded: "Accordingly, we do not find the multiple vacancies resulting from a political failure of the appointing authority to fill the vacancies are sufficient to warrant the use of the legally required participation exception absent additional information pertaining to the factors identified in the *In re Tobias* opinion." Clearly, the FPPC invited the District to provide additional information.

Nor is there anything in the record to support plaintiffs' accusation that Guarino misrepresented the facts to the FPPC. Although we do not know exactly what Guarino said to the agency in his phone conversation, much of it can be gleaned from the FPPC's follow-up letter. In it, the agency asserted: "Discussing the Hearing Board's enabling statute, Mr. Guarino stated that the controlling provisions of the Health and Safety Code require the Siskiyou County Board of Supervisors (the 'Board of Supervisors') to appoint the members of the Hearing Board and specifies that no member of the Board of Supervisors may serve on the Hearing Board. Furthermore, the Hearing Board must make all permit decisions. Other than its power to appoint Hearing Board members, the Board of Supervisors does not oversee and cannot override a Hearing Board decision. The Hearing Board's decisions are subject only to judicial review, and

neither the Board of Supervisors nor the Hearing Board has the authority to alter quorum requirements."

The FPPC continued: "Mr. Guarino stated that the provisions of the Health and Safety [Code] require the Hearing Board to set a hearing to consider a permit application within 30 days of receiving an application. While the Hearing Board can continue a decision past 30 days, the decision regarding the permit in question has already been continued once and further continuation may cause economic harm to the applicant, which has already been forced to lay off employees pending the Hearing Board's decision."

Finally, the FPPC letter states: "Mr. Guarino stated that the vacancies on the Hearing Board have been difficult to fill. The county has spent six months advertising the position and has yet to receive a single application. In six months of recruiting, the county has been successful in filling only one vacancy."

Plaintiffs do not contest the accuracy of any of the foregoing statements by Guarino. They do contend, however, that there is more to the story of the District's ability to fill the two vacancies than is reflected in the FPPC letter. They assert the District received four written applications to the Hearing Board and one verbal inquiry between May 1 and May 4, 2009. They further assert the District failed to take any action on those applications despite having on its agenda at a May 5 hearing the appointment of new members to the Hearing Board.

Thus, they argue, the District obviously failed to appoint any of the applicants for political reasons.

Of course, inasmuch as the indicated applications were not submitted to the District until after Guarino's contact with the FPPC, they obviously could not have been part of his conversation with that agency. As for the May 5 agenda, plaintiffs appear to imply the District was set to act on the various applications but chose not to do so for political reasons. However, that inference is not supported by the record.

One agenda item for the District's May 5 hearing read: "Discussion, direction and possible action re appointments to the Air Pollution Control District Hearing Board." The other agenda item read: "Appointment of two members to the Air Pollution Control District Hearing Board, for terms ending January 19, 2012 (engineer) and January 1, 2012 (medical) (**Continued from April 7, 2009**)." These agenda items say nothing about the purported recent applications. As a matter of fact, the second agenda item suggests it had nothing to do with those applications, inasmuch as it was a continuation of an agenda item from April 7, before the applications were received. There is nothing here to suggest the agenda items were anything more than a continuation of the District's ongoing efforts over six months to fill the vacant positions on the Hearing Board.

During the District's May 5 hearing, Guarino informed the District that, after receipt of the FPPC's second letter authorizing Gubetta to participate, several letters had come in

"[w]ithin the last day or so." Guarino informed the District: "[W]e have not had an opportunity to review the applications to determine one way or another whether these folks meet the qualifications. We have a hearing set to go forward on tomorrow [sic] on a matter that the board members have previously actually met on and moved forward with. We need to follow our normal process. It's not by [sic] recommendation that the [District] try to appoint people from this group today because we don't know, other than the letters, what their qualifications are and background and that's something we have to confirm for you to make sure that they're eligible as candidates. So my recommendation would be that the [District] not take any action on b and c [(the two agenda items)] until we go through the process and we can place all the applications for you in a group and you can make your decision." Based on that recommendation, the District took no action on the two agenda items.

Plaintiffs contend the District was required to appoint new members to the Hearing Board rather than permit Chairman Gubetta to participate. In its second letter, the FPPC indicated Gubetta could participate in the decision on plaintiffs' appeal "so long as [his] participation is necessary to establish a quorum." Presumably, if other members could have been appointed to the Hearing Board before the hearing on plaintiffs' appeal, Gubetta's participation would not have been required to establish a quorum.

Plaintiffs assert one individual submitted an application four days before the May 5 meeting, thereby giving the District

sufficient time to investigate his qualifications. Plaintiffs also assert another applicant was well known in Siskiyou County, thereby requiring no investigation. However, beyond merely asserting this to be so, plaintiffs cite nothing in the record to establish the qualifications of these two individuals, or any others, for the two vacant Hearing Board positions. But even if they were qualified, it is obvious from Guarino's statements at the District's May 5 hearing that their qualifications were not known to him. Furthermore, Guarino suggested to the District that it should not make a decision on the two vacancies until Guarino's office has had an opportunity to assess the qualifications of all four or five applicants and to present those qualifications to the District. Thus, even if the District could have assessed the qualifications of one or two of the applicants on May 5, there is nothing to suggest it could have done so as to all of them. The question is not simply whether the one or two applicants were qualified but whether they were the best qualified of all applicants.

Plaintiffs contend the District could nevertheless have appointed one member on an interim basis to preside over this matter. However, even assuming the District *could* have done so, plaintiffs provide no rationale for why the District *should* have done so under the circumstances, other than to provide a substitute for Chairman Gubetta. But at the time the District chose not to go forward with any new appointments, it had received the second FPFC letter indicating Gubetta was not disqualified.

Furthermore, as the trial court noted, despite six months of almost no success in filling the vacant Hearing Board positions, the District received four applications on the eve of the hearing on plaintiffs' appeal. Under these circumstances, the District can hardly be faulted for proceeding cautiously.

Finally, plaintiffs contend the Hearing Board could have delayed a decision on their appeal to give the District sufficient time to determine whether to appoint one or more of the applicants to the Hearing Board. However, plaintiffs' appeal was filed on March 16, and the Hearing Board was required to consider the appeal within 30 days of such filing. (Health & Saf. Code, § 42302.1; Siskiyou County Air Pollution Control District Rules (hereafter District Rules), rule 2.9 [District Rule 2.9 is not part of the record on appeal. Respondents have requested we take judicial notice of this rule, as well as District Rule 1.2, to be discussed later. We grant respondents' request].) Although the Hearing Board granted a continuance beyond the 30-day limit on stipulation of the parties, there does not appear to be any authority for such continuance. The trial court concluded plaintiffs were not prejudiced by the continuance, and plaintiffs do not challenge that finding on appeal. By the time of the May 6 hearing, it had already been 50 days since the appeal was filed. It had also been two and a half years since Roseburg filed its application. Plaintiffs cite nothing in the record to suggest the Hearing Board abused its discretion in failing to delay the proceedings further to

permit the District an opportunity to evaluate the applications and make appointments.

III

Procedural Due Process

Plaintiffs contend they were denied due process in the way the appeal proceedings were conducted. They argue "[t]he record demonstrates that the District was uncooperative and actively obstructed [their] participation." We find no due process violation.

"The protections of procedural due process apply to administrative proceedings [citation]; the question is simply what process is due in a given circumstance. [Citations.] Due process, however, *always* requires a relatively level playing field, the so-called 'constitutional floor' of a 'fair trial in a fair tribunal,' in other words, a fair hearing before a neutral or unbiased decision-maker. [Citations.]" (*Nightlife Partners, Ltd. v. City of Beverly Hills, supra*, 108 Cal.App.4th at p. 90.)

Plaintiffs' arguments center on what they perceive to have been a conscious effort by the District to thwart their participation in the appeal process by failing to provide them a copy of the District's appeal hearing rules until the eve of the hearing. They argue the District refused to provide them a copy of the rules despite repeated requests and such rules were not otherwise available to them. As a result, plaintiffs argue,

their ability to present evidence at the appeal hearing "was significantly compromised and impacted."

Much of the evidence on which plaintiffs rely consists of letters written to the District or the County Counsel's office by Dale LaForest in his capacity as the director of an organization called Mt. Shasta Tomorrow. In that correspondence, LaForest recounts his efforts to obtain the appeal rules from the District. However, all of this evidence is hearsay. It is not the actual communications from LaForest requesting information but a hearsay recitation of the steps taken by him and others. And while the letters are in the administrative record, they establish nothing more than that such letters were sent and that such assertions were made. They do not establish the truth of the representations therein.

Similarly, plaintiffs rely on letters written by Karen Rogers and John Sanguinetti on behalf of MSBEC, in which they likewise recount steps taken to obtain the appeal rules. This too is inadmissible hearsay. They also cite comments made by Rogers at the May 6 Appeal Board hearing regarding numerous attempts to obtain the appeal rules. However, this was not testimony submitted under oath but arguments by an advocate. Furthermore, Rogers did not indicate when the purported attempts to obtain the rules occurred.

In the court below, plaintiffs submitted a declaration prepared by Dale LaForest in which he described in some detail the efforts made to obtain the appeal rules and to determine the deadline for submitting evidence. Roseburg objected to

LaForest's declaration on the grounds that LaForest had no personal knowledge regarding the efforts made by plaintiffs to obtain the rules, inasmuch as he was acting on behalf of Mt. Shasta Tomorrow, a non-party.

Plaintiffs contend the trial court erroneously struck the LaForest declaration. However, they cite nothing in the record to show the declaration was ever struck. In its decision on the petition, the trial court concluded the record contains no evidence to support plaintiffs' assertion that they sought unsuccessfully to obtain a copy of the appeal rules between March 13 and April 24. The court further indicated requests made by another entity, i.e., Mt. Shasta Tomorrow, do not suffice for this purpose. Thus, the court did not strike the LaForest declaration, it simply concluded the declaration failed to establish *plaintiffs* had requested the appeal rules.

Plaintiffs continue to rely on appeal on the LaForest declaration. In it, LaForest indicates he is a member of plaintiff WCC and repeatedly attempted without success to inquire about deadlines for submitting evidence. He further asserts that, on March 13, representatives of plaintiffs visited the District office and requested a copy of the appeal rules but were told by District staff they were unaware of any such rules. Finally, LaForest declared no appeal rules were provided by the District between March 13 and April 24, despite repeated requests.

The fact that LaForest is a member of WCC does not mean he was acting on that entity's behalf. On the contrary, all the

correspondence in the record demonstrates he was acting on behalf of Mt. Shasta Tomorrow. Nonetheless, LaForest also asserts in his declaration that on March 13, representatives of plaintiffs visited the District offices and requested the appeal rules. Absent contrary evidence, we take that declaration at face value and assume LaForest was present at the time and observed who else was present and what was requested. On the other hand, LaForest's assertion that there were *repeated requests* between March 13 and April 24 provides no support for an inference that it was *plaintiffs* who made those repeated requests. Nor does LaForest provide a basis for asserting that *plaintiffs* did not receive the appeal rules between March 13 and April 24.

But all this is much ado about very little. Assuming the District failed to provide plaintiffs a copy of the appeal hearing rules until April 24, despite repeated requests, plaintiffs cannot show they were prejudiced thereby. "'There is a generally accepted principle that the appellant must show prejudicial error affecting his interests in order to prevail on appeal . . . and it follows that the appellate court need not and will not review errors which could not have been prejudicial to him.'" (*Guilbert v. Regents of University of California* (1979) 93 Cal.App.3d 233, 241.)

Plaintiffs claim the delay in providing them a copy of the rules "significantly compromised" their ability to present evidence at the May 6 hearing. According to plaintiffs, "[b]ecause the District failed to give adequate notice of a

deadline for submission of evidence in support of [plaintiffs'] administrative appeal of the ATC Permit, the District precluded [plaintiffs] from presenting information concerning the health and environmental impacts associated with the issuance of the ATC permit."

The record does not bear this out. The hearing on plaintiffs' appeal was originally scheduled for April 13, and plaintiffs do not contend they were unaware of this hearing date. Regardless of whether plaintiffs knew they were required by the appeal hearing rules to submit all documentary evidence at least 10 days before the hearing, they certainly knew they were required to have such documentation together and ready to present at the time of the hearing. And while the parties requested a delay of the hearing, that request was not approved until April 13, at which time the hearing was rescheduled to May 6. Thus, if plaintiffs had any evidence to present in support of their appeal, they knew they had to get such evidence together by April 13.

Furthermore, plaintiffs acknowledge they were provided a copy of the appeal hearing rules on April 24, 12 days before the rescheduled hearing. On April 27, Karen Rogers of MSBEC sent a letter to the District complaining about the delay in providing the rules and informing the District that MSBEC would be submitting evidence by May 1. On April 30, counsel for the District notified Rogers that neither the District nor Roseburg objected to their late submission of evidence. At the May 6

hearing, the Hearing Board accepted plaintiffs' May 1 evidentiary submissions.

Plaintiffs make no attempt to identify what additional evidence they would have presented had they been given more time to do so. Nor do they attempt to explain how any such evidence could not have been presented to the Hearing Board by May 1. They assert the Hearing Board rejected additional evidence presented at the hearing because it was untimely. However, in the portion of the record they cite, the Hearing Board considered an objection to the presentation of evidence based on timeliness. Although there was a motion to sustain the objection, the record does not contain any ruling on that motion. At any rate, the nature of the evidence is not revealed.

Plaintiffs contend they "were not provided the same notice of the hearing procedures that were [sic] obviously provided to counsel for the County and [Roseburg]." Plaintiffs cite as support a March 26 memorandum prepared by counsel for Roseburg in which the appeal procedures are laid out, including the 10-day deadline for submitting documentary evidence. Plaintiffs presume from counsel's knowledge of the appeal hearing rules that a copy of those rules must have been provided to Roseburg by the District sometime before March 26. However, there is no reason to presume such knowledge came from any notice provided by the District. And even if it did, this may reveal nothing more than that counsel for Roseburg or Roseburg itself simply knew better who to ask. Plaintiffs' attempt to paint this as

some type of conspiracy between the District and Roseburg is unavailing. Furthermore, as explained above, plaintiffs have failed to show they were harmed thereby.

Plaintiffs contend they were further denied due process because only one of the Hearing Board members read the findings of fact and conclusions of law adopted by the Hearing Board before signing them. Plaintiffs cite the transcript of the hearing where, near the end, the Hearing Board took a short recess to review findings prepared by the District and Roseburg. After the recess, Hearing Board member Andreas stated: "I have had an opportunity during the break to review the proposed findings and order of the Hearing Board as prepared by the respondents. And I would like to bring a motion that we accept those as the actual findings and order of the Hearing Board and that they be adopted today." The motion was seconded by board member Morton and all voted in favor. Plaintiffs contend this portion of the record shows the other two board members did not even read the findings before signing them.

We disagree. The record shows the Hearing Board voted to deny plaintiffs' appeal of the permit approval. Member Andreas then indicated he wished to review the proposed findings before signing them and the Hearing Board took a recess. Thereafter, Andreas moved to approve the findings. The motion was seconded by member Morton, with the addition of an earlier statement of reasons for denying the appeal that he had placed on the record. The moving member approved this addition, and the motion was approved.

We have reviewed the hearing transcript, and it is clear all three board members were actively involved in crafting the findings of fact and conclusions of law. The fact that not all three members stated on the record they had read the document during the recess does not mean they failed to do so. We presume official duty has been regularly performed. (Evid. Code, § 664; *People v. Frye* (1994) 21 Cal.App.4th 1483, 1486; *People v. Young* (1991) 228 Cal.App.3d 171, 186.)

IV

Best Available Control Technology

The ATC Permit requires Roseburg to install SNCR technology for emissions control on the project. Plaintiffs contend SNCR is not the best available control technology for the project, as required by the District's rules. They argue the BACT is instead RSCR technology. They argue such technology, which has been used on several projects in the northeastern part of the country, provides far superior emissions control than SNCR.

District Rule 6.1(D) states: "New stationary sources and modifications excluding cargo carriers, shall be constructed using best available control technology."

District Rule 1.2(B2) defines BACT for any stationary source as "the more stringent of: [¶] 1. The most effective emission control device, emission limit, or technique which has been required or used for the type of equipment comprising such stationary source, unless the applicant demonstrates to the satisfaction of the Control Officer that such limitations are

not achievable; or [¶] 2. Any other emission control device or technique determined to be technologically feasible and cost effective by the Control Officer. Under no circumstances shall BACT be determined to be less stringent than the emission control required by any applicable provision of District, State, or Federal laws or regulations, unless the applicant demonstrates to the satisfaction of the Control Officer that such limitations are not achievable."

District Rule 6.1(I)(1) defines BACT for any source as "the more stringent of: [¶] a. The most effective emissions control technique which has been achieved in practice, for such category or class of sources; or [¶] b. Any other emissions control technique found, after public hearing, by the Control Officer and the Air Resources Board to be technologically feasible and cost effective for such class or category of sources or for a specific source; or [¶] c. For those pollutants for which the national ambient air quality standards are violated in the district, the most effective emission limitation which the Environmental Protection [A]gency certifies is contained in the implementation plan of any state approved under the Clean Air Act for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable."

Plaintiffs rely inconsistently on both of the foregoing definitions. Defendants and Roseburg (collectively hereafter respondents) contend only the second applies here. They cite District Rule 2.1(G), which states "All new stationary sources

and modifications to existing stationary sources, including power plants and cogeneration and resource recovery projects, with a net emissions increase of air contaminants that would exceed the limits stated in [District] Rule 6.1.B shall be subject to the provisions of Regulation VI." In their reply brief, plaintiffs apparently concede the point, as they no longer rely on District Rule 1.2.

It is undisputed that subset (c) of the BACT definition in District Rule 6.1(I)(1) does not apply in this instance. Thus, BACT for a given category or class of sources is the more stringent of (a) the "most effective" technique that has been "achieved in practice" or (b) any other technique found to be "technologically feasible" and "cost effective." (District Rule 6.1(I)(1).)

Respondents contend that if the District finds a given control technology "either (1) has not been achieved in practice for a particular source category, or (2) is not technologically feasible and cost effective, then that technology is eliminated from consideration as BACT." However, respondents have their conjunctives and disjunctives reversed. Under the second subset, a given technology may be eliminated from consideration if it is *either* not technologically feasible or not cost effective. It need not be both to be eliminated, as respondents suggest. Furthermore, in order to be eliminated from consideration, a given technology must fail to meet both subsets. If the technology is the most effective technology achieved in practice, it qualifies. But even if the technology

is not the most effective one achieved in practice, it may still qualify if it is both technologically feasible and cost effective. Where this analysis results in more than one technology that qualifies, the BACT is the most stringent of those technologies.

Plaintiffs contend the ATC permit's requirement of NO_x emissions reduction by a minimum of 35 percent using SNCR is not the BACT. They argue: "Based upon the record before the District, it is without dispute that RSCR is the best available control technology at reducing [NO_x] and [CO₂] emissions from [Roseburg's] biomass generator." According to plaintiffs, "RSCR is a superior and proven technology designed specifically for wood-fired biomass plants" that "reduces [NO_x] emissions by 75%-- more than double the system approved by [the] District."

It should be noted at the outset that, at the conclusion of the administrative appeal proceedings, the Hearing Board ordered implementation of a more stringent NO_x reduction, from the original 35 percent to 48 percent.

Turning to the merits of plaintiffs' contentions, they cite no evidence presented to the Hearing Board, expert or otherwise, to support their factual assertions regarding BACT. Instead, they rely on an August 13, 2008, letter from the California Air Resources Board (CARB) to Eldon Beck, an assistant air pollution control officer for the District, in which CARB asserted in Specific Comment 1: "[T]here is a new, patented [NO_x] emission control technology developed by Babcock Power Environmental known as RSCR that is currently being applied on biomass boilers

in New Hampshire, Maine, and Vermont." According to CARB, "[t]his technology claims to have the potential to reduce [NO_x] emissions by as much as 70 percent." CARB recommended that the District evaluate using RSCR on the project.

Plaintiffs also rely on a September 11, 2008, letter to Beck from the United States Environmental Protection Agency (EPA). The letter states: "EPA agrees with and would like to reiterate comment #1 in CARB's letter, dated August 13, 2008" EPA further asserts "RSCR should also be considered in the BACT analysis for [NO_x] emissions."

Finally, plaintiffs rely on a November 10, 2008, letter from Petra Pless to the Board. According to the letter, Pless holds a doctorate in environmental science and engineering from U.C.L.A. and has had over 10 years of consulting experience in the environmental field. In the letter, Pless asserts SNCR does not constitute the BACT for the project. According to Pless, several agencies have recommended considerably higher control efficiencies for SNCR systems than the 35 percent proposed here. Pless further states: "[CARB] and the [EPA] recommended evaluation of a new, patented [NO_x] emission control technology, known as RSCR for the Project" and "RSCR technology has been installed on three existing biomass boilers in the U.S."

The foregoing hearsay evidence does not establish either that RSCR is currently being used as indicated or that it achieves the emissions reductions claimed. The letters, standing alone, prove nothing more than that these representations were made to the District or the Board by the

indicated authors. But even assuming the representations are true, they do not establish "without dispute" that RSCR is the BACT, as plaintiffs claim. In its letter, CARB asserts: "Given CARB's observation that the RSCR control technology is currently being applied on biomass boilers operating in the northeast, the District should require this level of emission reduction as BACT *or provide a justification for elimination of this technology from the BACT analysis.*" (Italics added.) EPA likewise asserted: "Given CARB's observation that the RSCR control technology is currently being applied on biomass boilers operating in the northeast, the District should require this level of emission reduction as BACT *or provide a justification for elimination of this technology form the BACT analysis.*" (Italics added.) Pless, for her part, merely parroted the comments of CARB and the EPA regarding RSCR.

Neither CARB nor EPA even assert that RSCR is the BACT. They merely recommended that the District consider RSCR in light of its superior emissions control. In the Hearing Board proceedings, Chad Darby, a senior air quality consultant, testified at some length about the District's consideration of RSCR technology and why it was ultimately rejected. Darby acknowledged the technology had been installed in four facilities in the Northeast. However, he explained those facilities burn different fuel--whole tree chips, wood shavings, sawdust and construction debris--than the wood bark that would be used as fuel in the Roseburg project. He further explained wood bark contains concentrated elements like potassium and

sodium that would act as deactivating poisons for the catalyst in an RSCR system. According to Darby, the RSCR technology is not yet proven for this type of fuel and there is no "reasonable expectation that it will work on a boiler that is burning something that could have as much as ten times as much fly ash containing materials that would be deactivating constituents." Darby also pointed out an RSCR system would involve greater noise due to the use of a large fan and would require aqueous ammonia at levels 19 times the threshold for the California accidental release prevention program.

Plaintiffs presented no contrary evidence. Thus, the District did as directed by CARB and EPA and considered the use of RSCR. However, the District ultimately rejected the technology for reasons which plaintiffs fail to refute.

Plaintiffs argue CARB's letter of March 10, 2009, "essentially refuted the District's rationale and concerns for not using RSCR." Plaintiffs cite the following comments in that letter on the District's BACT analysis: "Regarding operational reliability and effectiveness, the BACT analysis cites catalyst longevity as a potential issue but does not provide any technical reasons or operating data to show degradation problems for periods of time less than the manufacturer's two-year warranty. In addition, the BACT analysis does include operating data such as continuous emissions monitoring system (CEMS) records from the three northeastern United States plants to demonstrate any problems meeting the target 0.075 lb/MMBtu [NO_x] emission standard (approximately 70 percent reduction from

permitted levels) for participation in their regional Renewal Energy Credit program. [¶] BACT analyses only allow the consideration of cost if an emission level is not yet considered achieved in practice, and it is [CARB] staff's opinion that the District has not adequately documented that a lower [NO_x] emission level using RSCR or another comparable technology is not feasible." Relying on the foregoing, plaintiffs assert the District "provides no data to support any concern about long-term effectiveness" of RSCR technology.

With all due respect to CARB, even accepting the hearsay representations in the foregoing letter at face value despite the absence of any evidence regarding the expertise of the author and despite the absence of any opportunity by respondents to cross-examine him, this evidence shows nothing more than a difference of opinion as to whether the District's concerns over using RSCR are well-founded. That letter, in fact, expressly states: "At this time, we are not challenging the District's decision to require [SNCR] as [BACT] for oxides of nitrogen ([NO_x]) instead of other reportedly higher [NO_x] reduction options such as [RSCR]." CARB merely expressed a disagreement over whether the District's analysis "sufficiently substantiated catalyst longevity, limited operating history, and cost as reasons to reject RSCR."

As explained earlier, our task here is to determine if the Hearing Board's findings on BACT are supported by substantial evidence, even though there may be conflicting evidence or opinions on the issue. The burden in this matter was not on the

District to prove it selected the BACT but on plaintiffs to prove the District did not. As explained, the District provided several reasons for rejecting RSCR based on the opinion of its expert. In its March 10, 2009 letter, CARB merely disagreed with some of these reasons. Plaintiffs have not established that the evidence in the record failed to support the conclusion reached by the Hearing Board on the BACT. The most they have shown is that there is a difference of opinion. That is not enough to overturn the Hearing Board's decision.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal. (Cal. Rules of Court, rule 8.278.)

_____ HULL, J.

We concur:

_____ RAYE, P. J.

_____ HOCH, J.

IN THE
Court of Appeal of the State of California
IN AND FOR THE
THIRD APPELLATE DISTRICT

MAILING LIST

Re: Mount Shasta Bioregional Ecology Center et al. v. Siskiyou County Air Pollution Control
District et al.
C065668
Siskiyou County
No. SCCVPT090933

Copies of this document have been sent to the individuals checked below:

/ Donald B. Mooney
Law Offices of Donald B. Mooney
129 C Street, Suite 2
Davis, CA 95616

⊗ William W. Abbott
Abbott & Kindermann
2100 21st Street
Sacramento, CA 95818

/ Thomas Philip Guarino
Siskiyou County Counsel
P O Box 659
Yreka, CA 96097

/ Barbara Anne Brenner
Stoel Rives LLP
500 Capitol Mall, Suite 1600
Sacramento, CA 95814

/ Honorable Karen Dixon
Siskiyou County Superior Court -Main
P. O. Box 1026
311 Fourth Street
Yreka, CA 96097

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