

DEPARTMENT OF INDUSTRIAL RELATIONS
OCCUPATIONAL SAFETY
AND HEALTH APPEALS BOARD

2520 VENTURE OAKS WAY, SUITE 300
SACRAMENTO, CA 95833
(916) 274-5751
FAX (916) 274-5785



October 29, 2013

Jon Benjamin, Attorney at Law
FARELLA, BRAUN & MARTEL LLP
235 Montgomery Street
San Francisco, CA 94104

EXPEDITE

Re: FIRST SOLAR ELECTRIC INC.
13-R4D7-3280/3282

DOCKETED: 10/29/13

Dear Mr. Benjamin:

Enclosed are the docketed copies of each Appeal form that you filed with the Board. The above listed docket numbers should appear on all future correspondence. A copy of any correspondence with the Appeals Board must be served on the Division of Occupational Safety and Health DOSH and any other party to the proceeding.

You are obligated to notify any affected employees or their representative that an appeal is pending and that they have a right to participate in the proceeding. You are required to post a copy of the docketed Appeal form and a Participation Notice (similar to the sample enclosed) at or near the site of the violation or in a conspicuous place where it will be readily observable by employees. In addition to posting, a copy of the Appeal form and the Participation Notice must be served on the following: 1) any authorized employee representative; and 2) any employee (or their representative) who was seriously injured or killed in an accident related to this appeal. Proof, such as a brief letter, that the forms were posted must be sent to the DOSH District Manager whose address appears on the citation.

Please direct any request for information dealing with the filing of your appeal to the above address and/or telephone number. All other communications prior to the hearing will be handled by the assigned Administrative Law Judge (ALJ) Clara L. Hill-Williams (626) 332-1145.

Any written motion, such as a request for subpoena, consolidation of cases, or request for party or intervenor status must be made by written motion to the ALJ named above at 2520 Venture Oaks Way, Suite 300, Sacramento, CA 95833.

Sincerely,


Office Technician

cc: Accounting
DOSH District Manager-Bakersfield
DOSH Legal Unit-Oakland
DOSH Legal Unit-Los Angeles
IMIS# 313388555

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

2520 Venture Oaks Way, Suite 300
Sacramento, CA 95833
(916) 274-5751
FAX (916) 274-5785

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OCT 01 2013

OSH Appeals Board

APPEAL FORM

313388555

Inspection Number on Citation

2013-R4D7 -3280

First Solar Electric, Inc.

Employer Name on Citation

1. You only have 15 working days from receipt of a citation to appeal.

Employer Legal Name or DBA (Optional)

2. A copy of this form must be attached to each citation or notification appealed. Failure to file a completed form may result in dismissal of the appeal.

10400 Helios Way & 13505 Hwy 58

Address

Santa Margarita, CA 93453

FIRST READ IMPORTANT INFORMATION ON THE REVERSE SIDE THEN COMPLETE ONE APPEAL FORM FOR EACH CITATION

1. This is an Appeal from:

CITATION NO(s): 1 Item No(s): 1

NOTIFICATION OF FAILURE TO ABATE ALLEGED VIOLATION
CITATION NO(s): Item No(s):

SPECIAL ORDER/SPECIAL ACTION NO:
Item No(s):

2. Specific ground(s) for this appeal are: (Check all that apply)

The safety order was not violated.

The classification (i.e. serious, willful, repeat) is incorrect.

The abatement requirements are unreasonable.

Required changes Time allowed to complete changes

The proposed penalty is unreasonable.

3. Explain any other reasons for appeal or issues to be raised on appeal. Affirmative defenses must be specifically stated. Some important affirmative defenses are listed on the OSHAB website at: <http://www.dir.ca.gov/OSHAB/oshab.html>
See attached pages.

4.

(Signature of Employer or Employer's Representative)
{If there is any change in representation after you file your appeal, you must notify the Appeals Board in writing}

Jon L. Benjamin

(Type or print name)

Attorney, Farella, Braun + Martel LLP, on behalf of First Solar Electric (California), Inc.

(Title)

235 Montgomery Street

(Address) {Address where all communications from the Appeals Board will be sent}

San Francisco

CA

94104

(City)

(State)

(Zip Code)

(415) 954-4971

jbenjamin@fbm.com

9/30/13

(Telephone)

(E-Mail Address)

(Date)

{All correspondence from the Appeals Board will be sent to the representative above at the address above. If there is any change in address, telephone number, and/or e-mail address after you file your appeal, you must notify the Appeals Board of the change(s). All such notifications must be in writing}

IMPORTANT INFORMATION

- A. Use this form to appeal a Citation, Notification of Failure to Abate Alleged Violation, or Special Order/Special Action.
- B. You must complete *a separate appeal form for each citation or notification* you wish to appeal and *attach a copy of the complete citation or notification that you are appealing.*
- C. If the citation or notification being appealed includes more than one item **do not use separate appeals forms for each item.** Instead, specify the items you are appealing in the space provided in No. 1 on the front of this form. (for example, "Citation No. 1, Item Nos. 2, 5, and 8)
- D. **Be sure to sign your appeal form and provide all the information requested in No. 4 above.**
- E. Your appeal form shall be deemed not completed unless you attach a copy of each citation or notification that you are appealing, and failure to file a completed appeal form may result in dismissal of the appeal.
- F. If you or your representative change address, telephone number, and/or e-mail address, it is your responsibility to notify the Appeals Board in writing of the change(s). Otherwise the Appeals Board will continue to use the address it has on file and you risk not receiving notices or other communications from the Appeals Board. Appeals Board regulations make it the employer's obligation to notify the Appeals Board of any changes to the employer's and/or representative's contact information.
- G. Mail each completed Appeal form and citation or notification to the Occupational Safety and Health Appeals Board, 2520 Venture Oaks Way, Suite 300, Sacramento, CA 95833.
- H. Late appeals will not be accepted unless good cause is shown.

Cal/OSHA Citation Number 1, Item 1
Inspection Number: 313388555

This appeal of Citation No. 1 by First Solar Electric (California), Inc. ("FSE") is timely filed.¹ A certified mail copy of the citation was received by FSE's agent, its law firm, Farella Braun + Martel LLP, on September 10, 2013. A copy of the citation is attached as Exhibit 1 and incorporated herein by reference. A copy of the certified mail envelope showing the September 10, 2013 delivery date is attached as Exhibit 2 and incorporated herein by reference. As provided in Labor Code Section 6600, FSE has 15 working days from the date of receipt of the certified mail copy of the citations to file this appeal, which is October 1, 2013. Because of prior and ongoing mail delivery problems at the Topaz Solar Farm Project ("Project") site, the certified mail copy of the citation sent to the facility site did not arrive until September 16, 2013. However, because Farella, as FSE's agent, received a certified mail copy on September 10, 2013, FSE accepts the September 10 date to determine the deadline for filing this appeal. Thus, as noted above, this appeal is timely made.

At the outset, it should be noted that people can contract Valley Fever in any setting wherever spores are mobilized. Because of the multiple modes and opportunities for exposure, there is no way to connect a specific occurrence of Valley Fever with a specific exposure scenario. In addition, because Valley Fever spores are so ubiquitous, microscopic and easily mobilized by any dust disturbing activity, it is impossible to prevent all exposures to Valley Fever spores.

In that light, the County of San Luis Obispo ("County") imposed conditions of approval to control dust and minimize exposure to Valley Fever at the Project as a result of the analysis of air quality and human health impacts during environmental review of the Project under the California Environmental Quality Act. The Valley Fever Dust Management Plan ("VFDMP") was specifically developed pursuant to County Condition of Approval No. 38. The VFDMP was approved by the County Epidemiologist in the County Public Health Department ("SLOPHD") on July 11, 2011. Moreover, the County issued a letter to the State Department of Public Health on September 17, 2013 stating that FSE is in compliance with the VFDMP. A copy of the County's September 17 letter is attached as Exhibit 3 and incorporated herein by reference. In addition, neither Aspen Environmental, which is the County's independent, third-party environmental monitor, nor the San Luis Obispo County Air Pollution Control District, nor the SLOPHD have ever formally cited or informally indicated to FSE orally or otherwise that FSE was not in compliance with the requirements of the VFDMP as approved by the SLOPHD. Finally, it is important to note that dust control measures at the Project site have evolved consistent with proactive continuous improvement measures as construction has progressed and additional measures have been added to augment the existing effective controls against fugitive dust generation. (See attachment to Exhibit 3, Letter from Tim Higdon (FSE) to Steve McMasters (County Planning and Building Department), dated June 28, 2013.)

In addition to the grounds for appeal noted on the Appeal Form, FSE raises the following affirmative defenses with respect to this citation, and as discussed below, reserves the right to assert additional affirmative defenses.

¹ The Citation incorrectly identified the recipient as First Solar Electric, Inc.

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Cal/OSHA Citation Number 1, Item 1
Inspection Number: 313388555

First, no FSE employees were exposed to airborne dust conditions in violation of the VFDMP.

Second, FSE implemented effective engineering controls at the site with respect to its employees, namely the engineering controls set forth in the approved VFDMP. FSE expects to show that effective watering was provided to stabilize airborne dusts, sufficient water was available, water was applied to off-road areas, and watering was sufficient to minimize airborne dust. Further, FSE expects to show that spoil piles were tarped or otherwise stabilized, and that other effective soil stabilization measures were implemented. In addition, FSE took appropriate steps to provide the VFDMP to its contractors, including CLP Resources Inc. ("CLP"), and directed its contractors to implement the VFDMP with respect to their employees, as called for by the VFDMP.

Third, this is not a dual employer situation. FSE does not exercise supervision and control over CLP employees working in the field. Under its contract and course of conduct with FSE, CLP provides superintendents, forepersons and field-level employees to the Project site. FSE pays different rates for each of these employee levels. FSE directs CLP superintendents on general work requirements, who in turn direct forepersons that exercise supervision and control over the CLP field-level employees. More specifically, FSE has directed CLP superintendents that they are responsible for implementing the VFDMP, who are in turn responsible for directing CLP forepersons and field staff on implementation of the VFDMP, including the effective implementation of engineering controls. Similarly, the other contractors hired by FSE at the Project site are responsible for ensuring that their employees are properly implementing the VFDMP. Accordingly, FSE is not a secondary employer or special employer under the Division of Occupational Safety and Health Policy and Procedures Manual No. P&P C-1D, "Dual-Employer Inspections." Therefore, if any violation of Title 8 California Code of Regulations Section 5141(a) occurred, this citation should not be issued against FSE. CLP's role at the Project site is that of a general contractor, not a primary employer under the dual employer doctrine.

Lastly, the citation is vague as to what abatement is being sought.

FSE reserves the right to amend its appeal, including but not limited to providing additional facts and evidence in support of the affirmative defenses raised above. In addition, FSE may raise additional affirmative defenses, including but not limited to asserting that any violation was an independent employee act and/or was an unforeseeable employee act, the citation was not issued within six months after the occurrence of the alleged violation, and is void for vagueness, as it may determine based on additional evidence adduced during discovery. As provided in Title 8 California Code of Regulations Sections 371(c)(1) and 371.2(a), FSE may amend its appeal by right up to 20 days before the hearing before the Cal/OSHA Appeals Board.

State of California

Division of Occupational Safety and Health
Bakersfield District Office (0950647; 4029)
7718 Meany Avenue
Bakersfield, CA 93308-5110

Inspection Number: 313388555

Inspection Dates: 03/05/2013 - 09/04/2013

Issuance Date: 09/04/2013

CSHO ID: Y0393

Optional Inspection Nbr: 030-13



Citation and Notification of Penalty

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Company Name: First Solar Electric Inc.
Inspection Site: 10400 Helios Way & 13505 Hwy 58, Santa Margarita, CA 93453

OSH Appeals Board

Citation 1 Item 1 Type of Violation: **Serious**

5141. Control of Harmful Exposure to Employees

(a) Engineering Controls. Harmful exposures shall be prevented by engineering controls whenever feasible.

VIOLATION:

During and/or prior to the time of inspection, the employer did not implement effective engineering controls to control exposures to airborne dust, in order to limit exposures to coccidioides, the spore that causes Valley Fever (Coccidioidomycosis), a serious and potentially fatal disease. Coccidioides spores are known to be present in the soils of this area. The employer conducted work activities that involved considerable disturbance of the soils. Although the employer's Dust Management Plan included engineering controls, during and/or prior to the time of the inspection the engineering controls that were not effectively implemented included, but were not limited to:

- a. The employer did not effectively provide watering methods to stabilize airborne dusts. Insufficient water was available, and water was often not applied to the off-road areas. Watering methods, quantities, and frequency were not sufficient to minimize airborne dust in all areas where employees were exposed.
- b. The employer did not ensure that all spoils piles were tarped or otherwise stabilized.
- c. The employer did not implement other effective soil stabilization measures such as minimizing the area of exposed bare dirt to the immediate areas being worked, the application of soil stabilizers, and the prompt re-vegetation of completed areas.

First Solar Electric, Inc. was responsible for safety and health conditions at the site by contract and permit provisions, and failed to effectively protect the First Solar employees as well as employees of contractors including, but not limited to, CLP Resources Inc.

Date By Which Violation Must be Abated:

09/14/2013

Proposed Penalty:

\$ 5060.00

See pages 1 through 4 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

2520 Venture Oaks Way, Suite 300
Sacramento, CA 95833
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OSHA Appeals Board

APPEAL FORM

313388555

Inspection Number on Citation

2013-R4D7 -3281

First Solar Electric, Inc.

Employer Name on Citation

1. You only have 15 working days from receipt of a citation to appeal.

Employer Legal Name or DBA (Optional)

10400 Helios Way & 13505 Hwy 58

Address

Santa Margarita, CA 93453

2. A copy of this form must be attached to each citation or notification appealed. Failure to file a completed form may result in dismissal of the appeal.

FIRST READ IMPORTANT INFORMATION ON THE REVERSE SIDE THEN COMPLETE ONE APPEAL FORM FOR EACH CITATION

1. This is an Appeal from:

CITATION NO(s): 2 Item No(s): 1

NOTIFICATION OF FAILURE TO ABATE ALLEGED VIOLATION
CITATION NO(s): Item No(s):

SPECIAL ORDER/SPECIAL ACTION NO: Item No(s):

2. Specific ground(s) for this appeal are: (Check all that apply)

The safety order was not violated.

The classification (i.e. serious, willful, repeat) is incorrect.

The abatement requirements are unreasonable.

Required changes Time allowed to complete changes

The proposed penalty is unreasonable.

3. Explain any other reasons for appeal or issues to be raised on appeal. Affirmative defenses must be specifically stated. Some important affirmative defenses are listed on the OSHAB website at: <http://www.dir.ca.gov/OSHAB/oshab.html>
See attached pages.

Citation Number 2, Item 1
Inspection Number: 313388555

This appeal of Citation No. 2 by First Solar Electric (California), Inc. ("FSE") is timely filed.¹ A certified mail copy of the citation was received by FSE's agent, its law firm, Farella Braun + Martel LLP, on September 10, 2013. A copy of the citation is attached as Exhibit 1 and incorporated herein by reference. A copy of the certified mail envelope showing the September 10, 2013 delivery date is attached as Exhibit 2 and incorporated herein by reference. As provided in Labor Code Section 6600, FSE has 15 working days from the date of receipt of the certified mail copy of the citations to file this appeal, which is October 1, 2013. Because of prior and ongoing mail delivery problems at the Topaz Solar Farm Project ("Project") site, the certified mail copy of the citation sent to the facility site did not arrive until September 16, 2013. However, because Farella, as FSE's agent, received a certified mail copy on September 10, 2013, FSE accepts the September 10 date to determine the deadline for filing this appeal. Thus, as noted above, this appeal is timely made.

At the outset, it should be noted that people can contract Valley Fever in any setting wherever spores are mobilized. Because of the multiple modes and opportunities for exposure, there is no way to connect a specific occurrence of Valley Fever with a specific exposure scenario. In addition, because Valley Fever spores are so ubiquitous, microscopic and easily mobilized by any dust disturbing activity, it is impossible to prevent all exposures to Valley Fever spores.

In that light, the County of San Luis Obispo ("County") imposed conditions of approval to control dust and minimize exposure to Valley Fever at the Project as a result of the analysis of air quality and human health impacts during environmental review of the Project under the California Environmental Quality Act. The Valley Fever Dust Management Plan ("VFDMP") was specifically developed pursuant to County Condition of Approval No. 38. The VFDMP was approved by the County Epidemiologist in the County Public Health Department ("SLOPHD") on July 11, 2011. Moreover, the County issued a letter to the State Department of Public Health on September 17, 2013 stating that FSE is in compliance with the VFDMP. A copy of the County's September 17 letter is attached as Exhibit 3 and incorporated herein by reference. In addition, neither Aspen Environmental, which is the County's independent, third-party environmental monitor, nor the San Luis Obispo County Air Pollution Control District, nor the SLOPHD have ever formally cited or informally indicated to FSE orally or otherwise that FSE was not in compliance with the requirements of the VFDMP as approved by the SLOPHD. Finally, it is important to note that dust control measures at the Project site have evolved consistent with proactive continuous improvement measures as construction has progressed and additional measures have been added to augment the existing effective controls against fugitive dust generation. (See attachment to Exhibit 3, Letter from Tim Higdon (FSE) to Steve McMasters (County Planning and Building Department), dated June 28, 2013.)

In addition to the grounds for appeal noted on the Appeal Form, FSE raises the following affirmative defenses with respect to this citation, and as discussed below, reserves the right to assert additional affirmative defenses.

¹ The Citation incorrectly identified the recipient as First Solar Electric, Inc.

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OSH Appeals Board

Citation Number 2, Item 1
Inspection Number: 313388555

First, no employees of FSE were exposed to airborne dust conditions on March 5, 2013 in violation of the VFDMP.

Second, as noted in the discussion under Citation No. 1, which is incorporated herein by reference, FSE expects to show that it implemented effective engineering controls at the site with respect to its employees on March 5, 2013. Therefore, administrative controls were not required to be implemented under Title 8 California Code of Regulations Section 5141(b).

Third, if administrative controls were required on March 5, 2013 because engineering controls were not effective at controlling potential exposure to Valley Fever, FSE implemented effective administrative controls at the site with respect to its employees, namely the administrative controls set forth in the approved VFDMP and the Environmental Health and Safety Plan ("EHASP") prepared for the Project. FSE expects to show that it issued a stop work order to the entire site in accordance with its policy to stop work when wind speeds exceed 25 miles per hour or opacity exceeds 20 percent. FSE took appropriate steps to provide the VFDMP and EHASP to CLP Resources Inc. ("CLP"), and directed CLP to implement the VFDMP and EHASP with respect to their employees, as called for by the VFDMP.

Fourth, this is not a dual employer situation. FSE does not exercise supervision and control over CLP employees working in the field. Under its contract and course of conduct with FSE, CLP provides superintendents, forepersons and field-level employees to the Project site. FSE, pays different rates for each of these employee levels. FSE directs CLP superintendents on general work requirements, who in turn direct forepersons that exercise supervision and control over the CLP field-level employees. More specifically, FSE has directed CLP superintendents that they are responsible for implementing the VFDMP, who are in turn responsible for directing forepersons and field staff on implementation of the VFDMP, including the effective implementation of administrative controls. FSE is not a secondary employer or special employer under the Division of Occupational Safety and Health Policy and Procedures Manual No. P&P C-1D, "Dual-Employer Inspections." Therefore, if any violation of Title 8 California Code of Regulations Section 5141(b) occurred, this citation should not be issued against FSE. CLP's role at the Project site is that of a general contractor, not a primary employer under the dual employer doctrine.

Fifth, the citation was not issued within six months from the date of the alleged violation, as required by Labor Code 6317. The alleged violation at issue in Citation No. 2 occurred on March 5, 2013. According to Cal/OSHA Appeals Board precedent, "[a] citation is issued the day it is signed, dated, and mailed by the division." *Pouk & Steinle*, Cal/OSHA Decision After Reconsideration, 2010 WL 2706199 at *9 (June 10, 2010). To calculate the last date by which this citation should have been issued, the first day is excluded and the last day is included, unless the last day is not a working day, which would then extend the time to the next working day. Title 8 California Code of Regulations Section 348(a). Accordingly, to determine when the six-month deadline for issuing Citation No. 2 expired, counting begins the day after the alleged violation, which is March 6, 2013, and goes six months forward, including that last day of that six month period, which is September 5, 2013 and which was a working day. According to the postmark on Exhibit 2, Citation 2 was mailed on September 6, 2013. Therefore, according to the

Citation Number 2, Item 1
Inspection Number: 313388555

Cal/OSHA Appeals Board precedent cited above, Citation No. 2 was issued a day late and therefore cannot be enforced against FSE.

Lastly, the citation is vague as to what abatement is being sought.

FSE reserves the right to amend its appeal, including but not limited to providing additional facts and evidence in support of the affirmative defenses raised above. In addition, FSE may raise additional affirmative defenses, including but not limited to asserting that any violation was an independent employee act and/or was an unforeseeable employee act, and is void for vagueness, as it may determine based on additional evidence adduced during discovery. As provided in Title 8 California Code of Regulations Sections 371(c)(1) and 371.2(a), FSE may amend its appeal by right up to 20 days before the hearing before the Cal/OSHA Appeals Board.

4.

(Signature of Employer or Employer's Representative)

{If there is any change in representation after you file your appeal, you must notify the Appeals Board in writing}

Jon L. Benjamin

(Type or print name)

Attorney, Farella, Braun + Martel LLP, on behalf of First Solar Electric (California), Inc.

(Title)

235 Montgomery Street

(Address) {Address where all communications from the Appeals Board will be sent}

San Francisco

CA

94104

(City)

(State)

(Zip Code)

(415) 954-4971

jbenjamin@fbm.com

9/30/13

(Telephone)

(E-Mail Address)

(Date)

{All correspondence from the Appeals Board will be sent to the representative above at the address above. If there is any change in address, telephone number, and/or e-mail address after you file your appeal, you must notify the Appeals Board of the change(s). All such notifications must be in writing}

IMPORTANT INFORMATION

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State of California

Division of Occupational Safety and Health
Bakersfield District Office (0950647; 4029)
7718 Meany Avenue
Bakersfield, CA 93308-5110

Inspection Number: 313388555
Inspection Dates: 03/05/2013 - 09/04/2013
Issuance Date: 09/04/2013
CSHO ID: Y0393
Optional Inspection Nbr: 030-13



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OSHA Appeals Board

Citation and Notification of Penalty

Company Name: First Solar Electric Inc.
Inspection Site: 10400 Helios Way & 13505 Hwy 58, Santa Margarita, CA 93453

Citation 2 Item 1 Type of Violation: **Serious**

5141. Control of Harmful Exposure to Employees.

(b) Administrative Controls. Whenever engineering controls are not feasible or do not achieve full compliance, administrative controls shall be implemented if practicable.

VIOLATION:

During and/or prior to the time of inspection, the employer did not implement effective administrative controls as included in the Dust Management Plan, in order to minimize exposure to Coccidioides, the spore that causes Valley Fever, a serious and potentially fatal disease. Coccidioides spores are known to be present in the soils of the area.

On March 05, 2013 employees were exposed to high wind and high dust conditions. First Solar Electric, Inc. was responsible for safety and health conditions at the site by contract and permit provisions and failed to protect CLP Resources Inc. employees by stopping work in high wind conditions whereby visible emissions were observed above 20 percent opacity and at other times when engineering controls were not effective.

Date By Which Violation Must be Abated:
Proposed Penalty:

09/14/2013
\$ 5060.00

See pages 1 through 4 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

2520 Venture Oaks Way, Suite 300
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FAX (916) 274-5785

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OSH Appeals Board

APPEAL FORM

313388555

Inspection Number on Citation

2013-R4D7 - 3282

First Solar Electric, Inc.

Employer Name on Citation

1. You only have 15 working days from receipt of a citation to appeal.

Employer Legal Name or DBA (Optional)

10400 Helios Way & 13505 Hwy 58

Address

Santa Margarita, CA 93453

2. A copy of this form must be attached to each citation or notification appealed. Failure to file a completed form may result in dismissal of the appeal.

FIRST READ IMPORTANT INFORMATION ON THE REVERSE SIDE THEN COMPLETE ONE APPEAL FORM FOR EACH CITATION

1. This is an Appeal from:

CITATION NO(s): 3 Item No(s): 1

NOTIFICATION OF FAILURE TO ABATE ALLEGED VIOLATION
CITATION NO(s): Item No(s):

SPECIAL ORDER/SPECIAL ACTION NO: Item No(s):

2. Specific ground(s) for this appeal are: (Check all that apply)

The safety order was not violated.

The classification (i.e. serious, willful, repeat) is incorrect.

The abatement requirements are unreasonable.

Required changes Time allowed to complete changes

The proposed penalty is unreasonable.

3. Explain any other reasons for appeal or issues to be raised on appeal. Affirmative defenses must be specifically stated. Some important affirmative defenses are listed on the OSHAB website at: <http://www.dir.ca.gov/OSHAB/oshab.html>
See attached pages.

Citation Number 3, Item 1
Inspection Number: 313388555

This appeal of Citation No. 3 by First Solar Electric (California), Inc. (“FSE”) is timely filed.¹ A certified mail copy of the citation was received by FSE’s agent, its law firm, Farella Braun + Martel LLP, on September 10, 2013. A copy of the citation is attached as Exhibit 1 and incorporated herein by reference. A copy of the certified mail envelope showing the September 10, 2013 delivery date is attached as Exhibit 2 and incorporated herein by reference. As provided in Labor Code Section 6600, FSE has 15 working days from the date of receipt of the certified mail copy of the citations to file this appeal, which is October 1, 2013. Because of prior and ongoing mail delivery problems at the Topaz Solar Farm Project (“Project”) site, the certified mail copy of the citation sent to the facility site did not arrive until September 16, 2013. However, because Farella, as FSE’s agent, received a certified mail copy on September 10, 2013, FSE accepts the September 10 date to determine the deadline for filing this appeal. Thus, as noted above, this appeal is timely made.

At the outset, it should be noted that people can contract Valley Fever in any setting wherever spores are mobilized. Because of the multiple modes and opportunities for exposure, there is no way to connect a specific occurrence of Valley Fever with a specific exposure scenario. In addition, because Valley Fever spores are so ubiquitous, microscopic and easily mobilized by any dust disturbing activity, it is impossible to prevent all exposures to Valley Fever spores.

In that light, the County of San Luis Obispo (“County”) imposed conditions of approval to control dust and minimize exposure to Valley Fever at the Project as a result of the analysis of air quality and human health impacts during environmental review of the Project under the California Environmental Quality Act. The Valley Fever Dust Management Plan (“VFDMP”) was specifically developed pursuant to County Condition of Approval No. 38. The VFDMP was approved by the County Epidemiologist in the County Public Health Department (“SLOPHD”) on July 11, 2011. Moreover, the County issued a letter to the State Department of Public Health on September 17, 2013 stating that FSE is in compliance with the VFDMP. A copy of the County’s September 17 letter is attached as Exhibit 3 and incorporated herein by reference. In addition, neither Aspen Environmental, which is the County’s independent, third-party environmental monitor, nor the San Luis Obispo County Air Pollution Control District, nor the SLOPHD have ever formally cited or informally indicated to FSE orally or otherwise that FSE was not in compliance with the requirements of the VFDMP as approved by the SLOPHD. Finally, it is important to note that dust control measures at the Project site have evolved consistent with proactive continuous improvement measures as construction has progressed and additional measures have been added to augment the existing effective controls against fugitive dust generation. (See attachment to Exhibit 3, Letter from Tim Higdon (FSE) to Steve McMasters (County Planning and Building Department), dated June 28, 2013.)

In addition to the grounds for appeal noted on the Appeal Form, FSE raises the following affirmative defenses with respect to this citation, and as discussed below, reserves the right to assert additional affirmative defenses.

¹ The Citation incorrectly identified the recipient as First Solar Electric, Inc.

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OSH Appeals Board

Citation Number 3, Item 1
Inspection Number: 313388555

First, none of FSE's employees were exposed to airborne dust conditions in violation of the approved VFDMP.

Second, as set forth in the VFDMP, the contractors working at the project site, including CLP Resources Inc. ("CLP"), are required to implement a respiratory protection program that meets the requirements of the Cal/OSHA Respiratory Protection Standard in Title 8 California Code of Regulations Section 5144. It is each contractor's responsibility to determine through appropriate analyses, such as job hazard assessments, whether their employees may work in conditions that require utilization of personal protective equipment, such as respirators, to prevent dust inhalation. As to FSE's own employees, FSE expects to show that it evaluated respiratory hazards, established clear policies for the use of respirators, provided adequate respiratory protection, as needed, and evaluated the effectiveness of its respiratory protection program.

Third, this is not a dual employer situation. FSE does not exercise supervision and control over CLP employees working in the field. Under its contract and course of conduct with FSE, CLP provides superintendents, forepersons and field-level employees to the Project site. FSE, pays different rates for each of these employee levels. FSE directs CLP superintendents on general work requirements, who in turn direct forepersons that exercise supervision and control over the CLP field-level employees. More specifically, FSE has directed CLP superintendents that they are responsible for implementing the VFDMP, who are in turn responsible for directing forepersons and field staff on implementation of the VFDMP, including the implementation of a respiratory protection program. Similarly, the other contractors hired by FSE at the Project site are responsible for ensuring that their employees are properly implementing the VFDMP. Accordingly, FSE is not a secondary employer or special employer under the Division of Occupational Safety and Health Policy and Procedures Manual No. P&P C-1D, "Dual-Employer Inspections." Therefore, if any violation of Title 8 California Code of Regulations Section 5144 occurred, this citation should not be issued against FSE. CLP's role at the Project site is that of a general contractor, not a primary employer under the dual employer doctrine.

Lastly, the citation is vague as to what abatement is being sought.

FSE reserves the right to amend its appeal, including but not limited to providing additional facts and evidence in support of the affirmative defenses raised above. In addition, FSE may raise additional affirmative defenses, including but not limited to asserting that any violation was an independent employee act and/or was an unforeseeable employee act, the citation was not issued within six months after the occurrence of the alleged violation, and is void for vagueness, as it may determine based on additional evidence adduced during discovery. As provided in Title 8 California Code of Regulations Sections 371(c)(1) and 371.2(a), FSE may amend its appeal by right up to 20 days before the hearing before the Cal/OSHA Appeals Board.

4.

(Signature of Employer or Employer's Representative)

{If there is any change in representation after you file your appeal, you must notify the Appeals Board in writing}

Jon L. Benjamin

(Type or print name)

Attorney, Farella, Braun + Martel LLP, on behalf of First Solar Electric (California), Inc.

(Title)

235 Montgomery Street

(Address) {Address where all communications from the Appeals Board will be sent}

San Francisco

CA

94104

(City)

(State)

(Zip Code)

(415) 954-4971

jbenjamin@fbm.com

9/30/13

(Telephone)

(E-Mail Address)

(Date)

{All correspondence from the Appeals Board will be sent to the representative above at the address above. If there is any change in address, telephone number, and/or e-mail address after you file your appeal, you must notify the Appeals Board of the change(s). All such notifications must be in writing}

IMPORTANT INFORMATION

- A. Use this form to appeal a Citation, Notification of Failure to Abate Alleged Violation, or Special Order/Special Action.
- B. You must complete *a separate appeal form for each citation or notification* you wish to appeal and *attach a copy of the complete citation or notification that you are appealing.*
- C. If the citation or notification being appealed includes more than one item **do not use separate appeals forms for each item.** Instead, specify the items you are appealing in the space provided in No. 1 on the front of this form. (for example, "Citation No. 1, Item Nos. 2, 5, and 8)
- D. **Be sure to sign your appeal form and provide all the information requested in No. 4 above.**
- E. Your appeal form shall be deemed not completed unless you attach a copy of each citation or notification that you are appealing, and failure to file a completed appeal form may result in dismissal of the appeal.
- F. If you or your representative change address, telephone number, and/or e-mail address, it is your responsibility to notify the Appeals Board in writing of the change(s). Otherwise the Appeals Board will continue to use the address it has on file and you risk not receiving notices or other communications from the Appeals Board. Appeals Board regulations make it the employer's obligation to notify the Appeals Board of any changes to the employer's and/or representative's contact information.
- G. Mail each completed Appeal form and citation or notification to the Occupational Safety and Health Appeals Board, 2520 Venture Oaks Way, Suite 300, Sacramento, CA 95833.
- H. Late appeals will not be accepted unless good cause is shown.

State of California

Division of Occupational Safety and Health
Bakersfield District Office (0950647; 4029)
7718 Meany Avenue
Bakersfield, CA 93308-5110

Inspection Number: 313388555
Inspection Dates: 03/05/2013 - 09/04/2013
Issuance Date: 09/04/2013
CSHO ID: Y0393
Optional Inspection Nbr: 030-13



Citation and Notification of Penalty

RECEIVED

OCT 0 1 2013

Company Name: First Solar Electric Inc.
Inspection Site: 10400 Helios Way & 13505 Hwy 58, Santa Margarita, CA 93453

OSH Appeals Board

Citation 3 Item 1 Type of Violation: Serious

5144. Respiratory Protection.

(c) Respiratory protection program. This subsection requires the employer to develop and implement a written respiratory protection program with required worksite-specific procedures and elements for required respirator use. The program must be administered by a suitably trained program administrator. In addition, certain program elements may be required for voluntary use to prevent potential hazards associated with the use of the respirator. The Small Entity Compliance Guide contains criteria for the selection of a program administrator and a sample program that meets the requirements of this subsection. Copies of the Small Entity Compliance Guide will be available from the Occupational Safety and Health Administration's Office of Publications, Room N 3101, 200 Constitution Avenue, NW, Washington, DC, 20210 (202-219-4667).

(1) In any workplace where respirators are necessary to protect the health of the employee or whenever respirators are required by the employer, the employer shall establish and implement a written respiratory protection program with worksite-specific procedures. The program shall be updated as necessary to reflect those changes in workplace conditions that affect respirator use. The employer shall include in the program the following provisions, as applicable:

- (A) Procedures for selecting respirators for use in the workplace;
- (B) Medical evaluations of employees required to use respirators;
- (C) Fit testing procedures for tight-fitting respirators;
- (D) Procedures for proper use of respirators in routine and reasonably foreseeable emergency situations;
- (E) Procedures and schedules for cleaning, disinfecting, storing, inspecting, repairing, discarding, and otherwise maintaining respirators;

See pages 1 through 4 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

State of California
Division of Occupational Safety and Health
Bakersfield District Office (0950647; 4029)
7718 Meany Avenue
Bakersfield, CA 93308-5110

Inspection Number: 313388555
Inspection Dates: 03/05/2013 - 09/04/2013
Issuance Date: 09/04/2013
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Citation and Notification of Penalty

Company Name: First Solar Electric Inc.
Inspection Site: 10400 Helios Way & 13505 Hwy 58, Santa Margarita, CA 93453

(F) Procedures to ensure adequate air quality, quantity, and flow of breathing air for atmosphere-supplying respirators;

(G) Training of employees in the respiratory hazards to which they are potentially exposed during routine and emergency situations;

(H) Training of employees in the proper use of respirators, including putting on and removing them, any limitations on their use, and their maintenance; and

(I) Procedures for regularly evaluating the effectiveness of the program.

VIOLATION:

During and/or prior to the time of inspection, the employer did not effectively evaluate and implement a written respiratory protection program to protect the employees from exposure to coccidioides spores, which cause Valley Fever (Coccidioidomycosis), a serious and potentially fatal disease. Coccidioides spores are known to be present in the soils of this area. The employer conducted work activities that involved considerable disturbance of the soils. First Solar Electric, Inc. was responsible for safety and health conditions at the site by contract and permit provisions and failed to protect employees of contractors on site, including, but not limited to, employees of CLP Resources Inc. During and/or prior to the time of the inspection, the employer did not develop and implement a respiratory protection program that met the requirements of this standard:

a. The employer did not evaluate respiratory hazards in the workplace to determine operations in which exposure to coccidioides spores required respiratory protection, and did not establish clear policies for the use of respirators. Employees worked in areas where airborne dusts were generated due to work operations or wind, without the use of respiratory protection.

b. Employees used non-approved devices (dust masks) rather than respirators during high-wind events. These devices do not provide adequate respiratory protection.

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State of California

Division of Occupational Safety and Health
Bakersfield District Office (0950647; 4029)
7718 Meany Avenue
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c. The employer did not evaluate the effectiveness of the program, despite receiving reports of diagnosed cases of Valley Fever among employees working at the site.

Date By Which Violation Must be Abated:

09/14/2013

Proposed Penalty:

\$ 5060.00



Compliance Officer/District Manager

See pages 1 through 4 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.



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September 30, 2013

RECEIVED

OCT 01 2013

OSH Appeals Board

Via FedEx

Cal/OSHA Appeals Board
2520 Venture Oaks Way, Suite 300
Sacramento, CA 95833

Re: Notice of Appeal of Citations Issued to First Solar Electric (California), Inc.
Cal/OSHA Inspection No. 313388555

To Whom It May Concern:

Enclosed please find one set of originals and one set of copies of three completed Appeals Forms and related documentation regarding three citations issued to First Solar Electric (California), Inc. pursuant to Cal/OSHA Inspection No. 313388555. The set of three originals is for the use of the Cal/OSHA Appeals Board.

Please stamp the date of receipt and filing on the three copies and return in the enclosed, self-addressed, pre-paid FedEx envelope. *✓ 10/1/13*

If you have any questions, please feel free to contact me at the number above.

Sincerely,



Jon L. Benjamin

JLB
Enclosures

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