

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

In re:
Russell City Energy Center

PSD Permit No. 15487

) PSD Appeal No. 10-04 (Robert Sarvey,
) Petitioner)

) [Related to PSD Appeals No. 10-01, 10-02,
) 10-03, 10-05, 10-06, 10-07, 10-08, 10-09, &
) 10-10.]

RESPONSE TO PETITION FOR REVIEW

Brian C. Bunger, Esq.
District Counsel
Alexander G. Crockett, Esq.
Assistant Counsel
Bay Area Air Quality Management District
939 Ellis Street,
San Francisco, CA 9409

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INTRODUCTION AND SUMMARY OF ARUGUMENT

Pursuant to the Clerk's March 25, 2010, letter, Respondent the Bay Area Air Quality Management District ("District") submits this Response to Petition for Review 10-02 filed by Petitioner Robert Sarvey ("Petitioner" or "Mr. Sarvey") in this proceeding.

In this Petition, Mr. Sarvey seeks review of the PSD Permit the District issued for the Russell City Energy Center on five grounds. He claims (i) that the District did not impose sufficiently stringent BACT limits on NO₂ emissions from turbine startups; (ii) that the District did not properly evaluate collateral environmental impacts associated with "ammonia slip" when using a Selective Catalytic Reduction ("SCR") system to control NO₂ emissions; (iii) that the District did not properly consider alternatives to using a wet cooling system at the facility that could potentially reduce particulate matter emissions; (iv) that the EAB should consider the impacts to permitting of the recently-promulgated 1-hour National Ambient Air Quality Standard ("NAAQS") for NO₂, which had not been adopted when the permit was issued; and (v) that the permit conditions the District has imposed may not be practically enforceable.

In addition to a threshold procedural concern that the Petition was not timely filed, the District submits that the Petition must be dismissed on the merits because none of these arguments provides any grounds for granting review. The District therefore respectfully requests that the Board deny the Petition in its entirety.

First, with respect to the NO₂ limits for startups, the District properly based its BACT limits on test data from other facilities using similar equipment. The test data showed a high degree of variability among startups, and so the District established the BACT limit with a reasonable margin of safety to ensure that it will be consistently achievable over the life of the facility. Mr. Sarvey has not provided any reason to conclude that the District committed clear error in doing so.

Second, with respect to ammonia slip emissions from the SCR system, the District carefully evaluated all available information regarding the potential for ammonia slip to cause secondary particulate matter ("PM") formation, and concluded that the SCR system here would

not have any significant impact on secondary PM. Again, Mr. Sarvey has not provided any reason to conclude that the District committed clear error in doing so.

Third, with respect to requiring a dry cooling system, the District did consider whether it could require dry cooling as BACT, but declined to do so for two reasons. First, it is far from clear that the PSD BACT provision would allow the District to require a facility designed with a wet cooling system to be redesigned to use dry cooling instead. But in any event, the District found that even if dry cooling could be required as BACT, the District would not require it for this facility because of the ancillary benefits that wet cooling here compared to dry cooling.

Fourth, with respect to the new 1-hour NO₂ standard, that standard had not yet been published when the District issued this permit, and so the District was not required to – and indeed could not have – conducted an analysis with respect to that standard as part of the permitting process. Accordingly, there are no grounds for granting review of the District’s permitting decision based on a retroactive application of this new standard, especially where the facility has already been subject to stringent regulatory requirements for NO₂. These requirements included the PSD BACT requirement for NO₂ for the annual standard, and Non-Attainment New Source Review requirements for NO_x (as NO₂) as an ozone precursor, which required the facility to provide to offset its NO₂ emissions at a 1:15 ratio.

Fifth, Petitioner has not provided any reason to conclude that any of the permit conditions would not be fully enforceable under the Clean Air Act, and his Petition should be dismissed on this ground as well.

FACTUAL AND PROCEDURAL BACKGROUND

This Petition for Review seeks to appeal a Prevention of Significant Deterioration (“PSD”) Permit issued by the District for the Russell City Energy Center. This PSD Permit was issued in response to a Remand Order issued by the Environmental Appeals Board in PSD Appeal No. 08-01, which remanded an earlier version of the permit to the District to provide additional public notice and comment opportunities. (*See* Remand Order, *In re Russell City*

Energy Center, 14 E.A.D. ___, PSD Appeal No. 08-01 (EAB July 29, 2008) (hereinafter, “Remand Order”).)

In response to the Remand Order, the District re-issued a draft PSD permit and conducted a great deal of public outreach notifying the public of the draft PSD permit and inviting public comment. The District initially published its draft PSD permit, along with a Statement of Basis explaining the District’s basis for the draft permit, on December 8, 2008. The District accepted written comments on the draft permit until February 6, 2009. The District also held a public hearing during this time period to receive verbal comment, on January 21, 2009. The District then reviewed and considered the public comments it received, and based on the public comments (and other new information) it revised and re-issued the draft permit for a further round of public review and comment. The District issued the revised draft, along with an Additional Statement of Basis, on August 3, 2009, and accepted written comments until September 16, 2009. The District also held a second public hearing, on September 2, 2009. The District then issued the Final PSD Permit that is the subject of this Petition for Review on February 3, 2010, along with comprehensive responses to all public comments it received. The District is providing copies of the relevant record documents that it published in this process as Exhibits to the Declaration of Alexander G. Crockett, Esq., (“Crockett Decl.”), accompanying this Response. The Exhibits include the Final PSD Permit (Exh. 1), the Notice the District issued with the Final PSD Permit (Exh. 2), the Responses to Public Comments that the District published to accompany the Final PSD Permit (Exh. 3), and the Additional Statement of Basis (Exh. 4) and Statement of Basis (Exh. 5) that the District provided for the two public notice periods (which contained the draft permit conditions the District was proposing).

The District conducted a great deal of investigation and analysis in these documents. Rather than presenting a full recitation of facts relevant to each specific issue Petitioner has raised in this initial factual discussion, the District outlines the relevant factual basis on which it made its PSD permitting decision in the appropriate sections of the argument below.

STANDARD OF REVIEW

Petitions for Review of PSD permits are under 40 C.F.R. Section 124.19(a). Pursuant to Section 124.19(a), the Board may grant review only if the permitting authority's decision to issue the permit was based on a clearly erroneous finding of fact or conclusion of law, or if it involves an important matter of policy or exercise of discretion that warrants review. *See In re Zion Energy, LLC*, 9 E.A.D. 701, 705 (EAB 2001); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126-27 (EAB 1999). The Board's power of review should be only sparingly exercised, and most permit conditions should be finally determined at the permit issuer's level, absent exceptional circumstances. *See In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 114 (EAB 1997).

The burden of demonstrating that review is warranted rests with the petitioner challenging the permit decision. *Kawaihae Cogeneration*, 7 E.A.D. at 114; *In re EcoElectrica L.P.*, 7 E.A.D. 56, 61 (EAB 1997). In order to establish that review of a permit is warranted, section 124.19(a) requires a petitioner both to state the objections to the permit that are being raised and explain why the agency's previous response to those objections – that is, the agency's basis for the decision – is clearly erroneous or otherwise warrants review. *See Kawaihae Cogeneration*, 7 E.A.D. at 114; *see also In re P.R. Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995); *In re Genesee Power Station L.P.*, 4 E.A.D. 832, 866-67 (EAB 1993). Petitioners must explain how the agency's PSD analysis constituted clear error or an abuse of discretion, and it is not enough simply to repeat objections made during the comment period.

ARGUMENT

Petition for Review 10-04 should be dismissed in its entirety because it does not provide any grounds on which the Environmental Appeals Board could grant review. The District addresses each specific claim raised in the Petition in turn, and explains in detail why the Board should reject it.

I. The Petition Was Not Timely Filed and Should Be Dismissed (Unless Its Untimeliness Was Solely the Result of Problems With EPA's CDX Electronic Filing System)

At the outset, the District observes that the Petition was not timely filed by the March 22, 2010, deadline for filing appeals of this permit. *See* Notice of final permit issuance, Final PSD Permit at 2, Responses to Comments at i (establishing March 22, 2010, filing deadline). Petition No. 10-04 was not filed until March 23, 2010, and is therefore untimely. As the Board has consistently held, absent special circumstances, late filing will result in dismissal of the petition. *See, e.g., Gateway Generating Station*, PSD Appeal No. 09-02, slip op. at 10 (citing *Puna Geothermal Venture*, 9 E.A.D. 243, 273; *In re Envotech, L.P.*, 6 E.A.D. 260, 266 (EAB 1996); *In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 328 (EAB 1999)). The Board should therefore dismiss this Petition as untimely, unless there were circumstances beyond Petitioner's control that prevented him from filing on time.

The District has been made aware that Petitioner claims that he attempted to file his Petition with EPA's CDX electronic filing portal on March 22, 2010, but that problems with the CDX system allegedly prevented him from completing his filing. The District has no independent basis on which to evaluate such claims, but it understands that the EAB is investigating whether any such problems occurred with the CDX system.¹ *See* Order Denying

¹ Notably, the District has received no such indication of an attempt at timely filing in the case of Petition No. 10-05, to which the District previously responded requesting summary dismissal on timeliness grounds. Here, Petitioner sent a copy of his Petition directly to the Clerk before the electronic filing deadline, in a "PDF" format suitable for CDX filing, and he also emailed the CDX help desk with an explanation that had been trying to file his document with CDX but was having problems uploading it to that system. By contrast, the Petition in Appeal No. 10-05 was simply emailed to the Clerk after the filing deadline as a word-processing document – not as a

Request For Summary Dismissal of CARE Petition And Requesting Response On The Merits, PSD Appeal No. 10-05 (EAB April 14, 2010), slip op. at 2. Should the Board determine that the late filing was “solely attributable to a CDX malfunction that may result in the inability to complete an electronic transaction” in accordance with the Board’s policy set forth in its electronic filing instructions (*see* http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/Electronic+Submission?OpenDocument), the District would have no objection to the Board’s consideration of this Petition for Review. Should the Board determine that the late filing was not solely attributable to a CDX malfunction, the Board should dismiss the Petition as untimely. Threshold procedural requirements such as timely filing of petitions for review are strictly construed. *See, e.g., Gateway Generating Station*, PSD Appeal No. 09-02, Slip Op. at 10; *Town of Marshfield, Mass.*, NPDES Appeal No. 07-03, Slip. Op. at 8; and cases cited therein. Strict compliance with the timeliness requirement is necessary in order to ensure procedural fairness and uniform application of Board’s appeal provisions. “Uniform application of the requirement is necessary because of the various parties and permit that are subject to this provision and because important consequences flow from petitioning for review.” *Town of Hampton, New Hampshire*, 10 E.A.D. at 132 (quoting *In re Bethlehem Steel Corp.*, 3 E.A.D. 611, 613 n.9 (Adm’r 1991)). If Petitioner’s late filing was the result of any reason other than a CDX malfunction, the Petition should be dismissed in accordance with these precedents. *See also In re B&L Plating, Inc.*, 11 E.A.D. 183, 191 (EAB 2003) (dismissing late-filed appeal because the EAB “will preserve its

“PDF” file of the type that would have been used if the Petitioners in No. 10-05 had been trying to use CDX – and with no indication whatsoever that Petitioners had been trying to upload a PDF to CDX to accomplish the filing. Petitioner here also followed up with a proper CDX filing the next day, whereas the Petitioners in Petition 10-05 apparently never did so (according to the Board’s docket website in this case); and they only submitted a Petition suitable for filing under the Board’s rules by hard copy received and filed on March 30, 2010. Given the complete lack of evidence of any potential exculpatory circumstances regarding Petition 10-05 that could be found to excuse its untimeliness, the District submitted a response requesting summary dismissal of Petition 10-05, but it preserved its untimeliness arguments with respect to Petition 10-04 to include along with its response on the merits.

limited resources for parties who are diligent enough to follow its procedural rules.”) (citing *In re Gary Dev. Co.*, 6 E.A.D. 526, 533-34 (EAB 1996)).

II. The District Did Not Commit Clear Error In Establishing BACT Limits for Startup Emissions

Turning to the substance of the Petition for Review, Petitioner’s first argument challenges the District’s BACT analysis for startups. The argument is targeted primarily at the District’s cold startup limits for NO₂, which the District established based on a review of data from other similar facilities. But a review of the record shows that the District carefully considered how stringent a BACT limit it could impose that would be consistently achievable, based on the available evidence of what level emissions performance has been observed at other similar facilities using the same type of equipment. In doing so, the District incorporated a reasonable margin of safety to ensure that the limit would be consistently achievable under all operating scenarios in light of the variability in performance demonstrated by the available data. This approach is exactly how a BACT limit is supposed to be established, and the Petition provides no basis to find that the District could have clearly erred in doing so. To make clear how reasonable this analysis was, the District first summarizes how the District arrived at its BACT limits below, and then addresses the reasons why the Petition’s claims of error are misplaced.

A. The District Properly Based Its BACT Limit On Emissions Performance Achieved By Other Facilities, With A Reasonable Safety Margin To Account For The High Degree Of Variability In Startup Emissions.

As the Petition describes, in establishing the BACT limit the District presumed that the BACT limit should be at least as stringent as the cold startup limit the Metcalf Energy Center, the most recent similar power plant that the District has permitted, which is 480 pounds. *See* Statement of Basis at 44; *see also* Petition 10-04 at 8. The District then evaluated actual emissions data from performance tests at the Metcalf facility and three other similar facilities (the Sutter Energy Center, the Delta Energy Center, and the Los Medanos Energy Center) to determine if an even more stringent limit would be consistently achievable for this type of equipment. With respect to cold startups, the data showed a very high degree of variability, with

the lowest test result at 103 pounds and the highest test result at 499 pounds. *See* Statement of Basis at 45-46. Notably, there were four test results that came in at or above the 480-pound limit (499, 488, 485, and 480). *See id.*

The District explained its assessment of the available data in the Statement of Basis, stating:

The data showed a very large amount of variability, which is caused by a number of reasons. The factors that can make individual startups take longer or shorter and generate more or less emissions include ambient temperatures of the equipment, limitations on the loading sequence prescribed by the gas turbine manufacturer to assure safe loading of the equipment, and limitations on the steam-cycle side of the facility necessary to ensure that the steam turbine and associated piping are safely warmed.

Id. at 44. Based on this review of the data, the District concluded that imposing a maximum not-to-exceed BACT limit for NO₂ emissions during cold startups of less than 480 pounds would not be consistently achievable. The District was aware that some data points showed emissions for specific startups below this 480-pound limit. But the data also showed a high degree of variability, and indicated that during some startups emissions were at a level that was at or near the 480-pound limit (and in a few cases, were even over 480 pounds). The District therefore concluded that a limit below 480 pounds would not be consistently achievable. As the District explained:

The data the Air District has evaluated suggest that it would not be appropriate to reduce the emissions limits for the proposed Russell City Energy Center below the limits adopted for the Metcalf facility [*i.e.*, 480 pounds for cold startups] as a mandatory BACT limit. Although some turbines on some occasions have achieved lower emissions rates, the BACT limit must be achievable at all times throughout the facility's operational life. A reasonable safety margin must be included so that the facility will be able to comply with its limits during every startup, even if emissions for specific startups or as an average for startups as a whole may be less. The data from other similar facilities shows that if the Air District were to impose limits substantially below the Metcalf limits, the proposed facility could face difficulty in complying with them.

Id. at 46. The District therefore proposed the 480-pound cold start NO_x limit in the December 2008 draft permit.

During the initial comment period, the District received comments that it should also examine available data from the Palomar Energy Center in Escondido, CA, which commenters claimed was achieving superior startup performance compared to other, older plants. (The Palomar facility has permit limits for startups that are far higher than the startup limits the District imposed here,² but commenters stated that apart from the permit limits the facility was actually achieving startup emissions performance that was far lower.) In response to these comments, the District obtained and analyzed operating data from the Palomar facility. *See id.* at 60-63. There were only five cold-startups in the available data from Palomar (which is consistent with the fact that cold startups from facilities like this are relatively uncommon events). These five data points were highly consistent with the range of data from the other facilities that the District had evaluated in the Statement of Basis, with an average of 182.8 pounds of NOx emitted and a maximum of either 375 or 437 pounds of NOx emitted, depending on whether one uses the District's calculation or the calculation of the San Diego Air Pollution Control District, the air district with jurisdiction over the Palomar facility. *See Additional Statement of Basis at 60-61.* The District concluded that, on the basis of these five data points at least, there was no definitive indication that Palomar was performing significantly better than the other facilities the District had examined, or that the District's initial assessment based on those other facilities was inaccurate. *See id.* at 61. The District did note that the highest of the five data points – 375 pounds or 437 pounds, depending on which calculation is used – was 9% or 22% (depending on the calculation used) below the 480 pound proposed permit limit. But the District concluded that including a 9%-22% compliance margin in a permit limit based on these five data points would not be inappropriate, for several reasons. As the District explained:

First, the data from Palomar includes only five available data points for cold startups, which does not generate a great deal of statistical confidence that the maximum seen in this data set is representative of the maximum that can be

² *See Additional Statement of Basis at 60 n.111* (noting that the Palomar NOx startup limit is 400 pounds *per hour*, meaning that total startup emissions for a multi-hour startup could be several multiples of 400 pounds).

expected over the life of the facility. Moreover, the wide variability in the data that is available highlights the variability in individual startups, underscoring the need to provide a sufficient compliance margin to allow the facility to be able to comply during all reasonably foreseeable startup scenarios. For both of these reasons, the Air District has concluded that a cold startup limit of 480 pounds of NO₂ is a reasonable BACT limit that is consistent with the startup emissions performance seen at the Palomar facility.

Id.

During the second comment period, the District received further comment on this issue. The comments criticized the District setting the BACT limit at a level that would accommodate the highest levels of emissions seen in actual startups from similar facilities. The comments claimed that the District should base the BACT limit on the average emissions performance from other facilities, not the highest emissions experienced (or near-highest, as the comments recognized that some of the data points were actually above the 480-pound limit). *See* Responses to Public Comments at 100 (describing comments received). In response, the District disagreed that the BACT limit should be based on average emissions seen in data from other facilities. As the District explained, “[t]he BACT limits will be enforceable, not-to-exceed permit limits that the facility will be required to comply with at all times and under all foreseeable operations conditions, not just during average startups. The limits therefore need to allow for a sufficient compliance margin to accommodate all reasonably foreseeable startups, not just the average case.” *Id.* With respect to the Palomar data specifically, the District also added that its conclusion was “based on early data from the Palomar facility showing emissions could be as much as 375-437 pounds for a cold startup, with a reasonable additional compliance margin to allow for the fact that startups are highly variable in nature and that the 375-437 pound startup emissions seen in the Palomar data may not necessarily be the highest startups the facility will experience over its lifetime.” *Id.*

B. The Data From The Delta, Metcalf, and Palomar Facilities Do Not Show That The District Erred In Setting The Cold-Startup NO₂ BACT Limit At 480 Pounds.

Petitioner now claims that the District committed clear error in establishing the 480-pound limit on cold-startup NO₂ emissions based on this permitting record. The Petition focuses on the data the District reviewed from the three facilities with the lowest startup emissions seen in the data set as a whole – Delta, Metcalf, and Palomar – and claims that the data from these facilities establishes that NO₂ emissions below 480 pounds per cold startup are clearly “achievable” for purposes of a BACT limit. Specifically, the Petition claims that “[t]he District erroneously concluded that data from other similar facilities (Delta and Metcalf) showed that if the Air District were to impose limits substantially below the Metcalf limits, the proposed facility could face difficulty in complying with them.” Petition 10-04 at 9. The Petition criticizes the District’s evaluation of the Delta data by stating that:

BAAQMD should have adopted the Delta Energy Center NO₂ emissions as BACT. The highest emissions of NO₂ for the Delta Energy Center . . . were 281 pounds per startup 40% less than the RCEC permit. . . . Even though the Delta Energy Center data demonstrated that its maximum cold start emissions were 281 pounds which provided a 40% compliance margin, the District still failed to adopt lower NO₂ startup emission limits.

Id. at 9. The Petition similarly criticizes the District’s evaluation with respect to the Metcalf data on the grounds that “[i]nstead of adopting the actual start up and shutdown emissions as BACT, as the regulations require, the District rejected the actual emissions as BACT because they didn’t provide a large enough compliance margin.” *Id.* at 8. Finally, the Petitioner also criticizes the District’s analysis of the Palomar data on these same grounds, asserting that “[t]he Districts [*sic*] review of Cold Start Data revealed that the highest NO₂ emissions during a cold startup at Palomar were 375 pounds according to the District’s own calculations” (ignoring the 437 pound data point using the alternative calculation). The Petition then claims that:

At that point the District should have chosen either the Delta *limit* of 281 pounds the Metcalf limit of 335 pounds or the Palomar *limit* of 375 pounds at BACT for NO₂ startup emissions. Instead, the District completely ignored the results of its BACT analysis and chose the 480 pound cold start limit.

Id. at 11 (emphasis added). The Petition cites the difference between the highest data point at each of these three facilities and the District’s 480 pound BACT limit, and concludes that “[c]learly the Air District has failed to adopt lower permit *limits* for start ups and shut downs that have been demonstrated in practice as PSD BACT for the RCEC.” *Id.* at 12-13.

Petitioner’s argument based on these data points from these other three facilities must fail because it is based on a misunderstanding of specific data points seen in the test results from other facilities as “limits”, rather than as emission results from individual startups to be considered when establishing an enforceable maximum limit. The Environmental Appeals Board has clearly recognized this distinction in two recent cases addressing this issue, *In re Prairie State Generating Co.*, 13 E.A.D. ___, PSD Appeal No. 05-05 (EAB Aug. 24, 2006), *aff’d sub nom.*, *Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007) and *In re Newmont Nevada Energy Investment, L.L.C.*, 12 E.A.D. 429 (EAB 2005). In those cases, the Board agreed that the BACT limit should not be set at a performance level that was achieved in any particular test result, but at a level that can be consistently achieved in all test results over time. As the Board explained, the BACT analysis needs to make a

distinction between, on the one hand, measured ‘emission rates’, which are necessarily data obtained from a particular facility at a specific time, and on the other hand, the ‘emissions limitation’ determined to be BACT and set forth in the permit, which the facility is required to continuously meet throughout the facility’s life.

Prairie State, supra, slip. op. at 70 (citing *Newmont*, slip. op. at 18 [12 E.A.D. at 442].) The District was therefore not required to base its BACT limit here on the maximum emission rate seen in a test result at Delta or Metcalf or Palomar or any other specific facility. Rather, the District had an obligation to set the limit at a rate that will be consistently achievable, based on all the information before it in the record.

That is exactly what the District did here. As explained in the Additional Statement of Basis and Responses to Public Comments, the District evaluated all of the available data and established the BACT limit at 480 pounds of NO₂, which was the level that it concluded would

be the most stringent that would be consistently achievable. The District based this analysis on the available test data from all similar facilities, including the four facilities evaluated in the initial showing cold startup emissions ranging as high as 499 pounds, *see* Statement of Basis at 45-46, as well as the additional five data points from Palomar showing emissions ranging as high as 375-437 pounds, *see* Additional Statement of Basis at 61, Responses to Public Comments at 100. Based on this evaluation, the District concluded that the facility would not be able to maintain cold-startup NO₂ emissions below 480 pounds on a consistent basis, given that the data showed that startups are highly variable in nature; that some facilities with similar equipment had shown cold startups with NO₂ emissions at 480 pounds and even above 480 pounds; and that for facilities that had not shown a test result as high as 480 pounds in the data reviewed, the available data may not represent the highest startups that the facility will ever experience throughout its lifetime. *See* Responses to Public Comments at 100-01. With regard to this last point, it is notable that the data from Delta that Petitioner cites is based on a total of six data points, *see* Statement of Basis at 45, the data from Metcalf is based on nine data points, *see id.*, and the data from Palomar is based on only five data points, *see* Responses to Public Comments at 96.

Petitioner now claims that the District should have based the limit on the highest test results seen in the specific data sets it reviewed from the best-performing facilities, but he offers no basis for presuming that this facility will perform as well as the best-performing of the similar facilities,³ and he offers no basis for presuming that the highest data point seen in the data set the District reviewed will represent the highest emissions that the facility will ever experience over its lifetime. To the contrary, the Petition merely claims that the District erred in establishing a limit that was higher than the highest data point seen at three of the five similar facilities that the District examined. *See* Petition 10-04 at 8-12. In this respect, Petitioner's claim must be

³ Notably, the Petition avoids mention of the data from the Sutter Energy Center and the Los Medanos Energy Center, which both exhibited cold startups with NO₂ over 480 pounds. *See* Statement of Basis at 45-46.

dismissed for failing to state how the District could have erred. *See Prairie State, supra*, slip. op. at 145.

But even if the Board were to proceed to the substance of this argument, it must fail because the District was clearly justified in incorporating a compliance margin to account for the variability in startup emissions. The EAB has consistently upheld the use of such a reasonable compliance margin – also referred to as a “safety factor” – in establishing BACT limits. As the Board explained most recently in *Prairie State*:

[T]he concept of a “safety factor” is intended to allow the permitting authority flexibility in setting the permit limits where there is some degree of uncertainty regarding the maximum degree of emissions reduction that is achievable. For example, we have approved the use of a safety factor to take into account variability and fluctuation in expected performance of the pollution control methods, or test method variability.

Prairie State, slip. op. at 73. On this point, *Prairie State* is the culmination of a long line of cases supporting the use of a safety factor where there is significant variability in emission performance levels, as there is here. *See Prairie State*, slip. op. at 76 (“Variability in the observed performance of a control technology has long been recognized as an appropriate circumstance for the permitting authority to use a safety factor in setting the Permit’s BACT limit.”); *In re Knauf Fiber Glass GmbH (“Knauf II”)*, 9 E.A.D. 1, 15 (EAB 2000) (25% “variability” factor appropriate in light of potential variations in fiberglass manufacturing process); *Masonite*, 5 E.A.D. at 560 (“the control efficiency achievable through the use of technology may fluctuate, so that it would not always achieve its optimal control efficiency”).

C. The Data Do Not Show That The District Erred In Setting The Hot-Startup NO₂ BACT Limit At 95 Pounds

In addition to the challenge to the 480-pound NO₂ limit for cold startups, the Petition also criticizes the District’s 95-pound NO₂ limit for hot startups. The Petition acknowledges that the District lowered the limit from 125 pounds as initially proposed to the final 95-pound limit in response to comments, *see* Petition 10-04 at 10-11, but it asserts that even 95 pounds is so high that it constitutes clear error. To support this claim, the Petition argues that the highest data

point in the hot-startup data from the Palomar facility showed a hot startup with 75 pounds of NO₂, and the highest data point in the data from the Delta facility showed a hot startup with 82.2 pounds of NO₂. The Petition claims that “[t]he 75 pound emission limit for the Palomar Project represents a 20% compliance margin over the 95 pound limit, but the District still failed to adopt a lower limit.” *Id.* at 11. But again, the Petition provides no sound reason to question the District’s conclusion that the limit should be set at 95 pounds to ensure that it will be consistently achievable.

As with the cold-startup limit, the 95-pound hot startup limit was based on an analysis of data from other similar facilities, including the Palomar data. As the District explained in the Additional Statement of Basis, the District compared hot startup data from Delta and Palomar, which showed that those facilities had average emissions in the range of 25-30 pounds of NO₂ per hot startup, with the highest test results at 82.2 and 75 pounds, respectively (excluding a 145-pound event at Palomar that was apparently an “outlier” of questionable reliability). *See* Additional Statement of Basis at 62. The District concluded that, based on this data, a lower limit than the 125 pounds it initially proposed would be achievable. The District therefore proposed a lowered limit of 95 pounds of NO₂ per hot startup, which the District concluded would be consistently achievable for this type of equipment. *See id.* The District did not propose a limit below 95 pounds based on this data, and it explained that it was doing so to provide “an appropriate margin of compliance to take into account the fact that startups are by their nature highly variable and the highest startup emissions seen in the data collected to date may not necessarily reflect the highest emissions that would reasonably be expected under all circumstances over the life of the facility.” *Id.* The District then received comments during the second comment period claiming, as the Petition does here, that the District should base the hot startup NO₂ limit the average emissions rates seen in the 25-30 pound range, and not at a level designed to accommodate the maximum emissions that could foreseeably be experienced during a hot startup events. The District responded that:

The BACT limits will be enforceable, not-to-exceed permit limits that the facility will be required to comply with at all times and under all foreseeable operating conditions, not just during average startups. The limits therefore need to allow for a sufficient compliance margin to accommodate all reasonably foreseeable startups, not just the average case.

Responses to Public Comments at 100. In particular, the District noted that the preliminary data from Palomar showed emissions of up to 75 pounds (discounting the 145-pound apparent outlier), and that it was reasonable to establish an additional safety margin given that the highest data point seen in the preliminary data may not necessarily be the highest startup that the facility will ever experience during its entire lifetime. *See id.* On this basis, the District determined that the 95-pound hot startup NO₂ limit satisfied the BACT limit. *See id.* at 100-01.

The Petition does not provide any reason why the District could have erred in this analysis, and simply repeats the comments that the limit should have been set lower because there is evidence from other facilities that they have been able to achieve lower startup emission in particular test results. These arguments must therefore be dismissed for the threshold reason that they have not explained how the District's responses were flawed. *See Prairie State*, Slip. Op. at 145 (collecting cases)

Furthermore, even if the Board were to reach the merits on this issue, it is clear that the District was entirely reasonable in using an appropriate safety margin to set the not-to-exceed BACT permit limit at 95 pounds, based on the data before it. As that data showed, hot startup NO₂ emissions are highly variable, with averages from similar equipment at around the 30-pound mark but on some occasions rising as high as 75 pounds at Palomar (excluding the 145-pound apparent outlier) to 82.2 pounds at Delta, both of which are more than 2.5 times higher than the average. The District was fully justified on this record in establishing the permit limit at 95 pounds to account for this high degree of variability, and also in recognition that the data it had before it may not necessarily have reflected the highest emissions that could reasonably be foreseen over the entire life of the facility, as the District explained in the Responses to Comments (*see pp.* 100-01). As the Board made clear in *Prairie State*, this is exactly the situation where the use of a “safety factor” is appropriate “to allow the permitting authority

flexibility in setting the permit limits where there is some degree of uncertainty regarding the maximum degree of emissions reduction that is achievable” and to “to take into account variability and fluctuation in expected performance of the pollution control methods” *Prairie State*, slip. op. at 73. The Petition provides no reason why the Board should reach a different result here.

D. None of Petitioner’s Other Arguments Regarding the District’s Startup BACT Analysis Has Any Merit, Either

In addition to challenging the cold- and hot-startup NO₂ limits, the Petition also alludes to Petitioner’s dissatisfaction with the District’s approach to setting BACT for startups in a few other areas as well. But as with the challenges to the BACT limits, none of these points provides any reason to grant review here.

Petitioner asserts that the District conducted its analysis “in a backward fashion” by starting with the limits for the Metcalf facility, the most recent facility the District has permitted, and then evaluating whether more stringent limits would be achievable. Petition 10-04 at 8. But the Petition offers nothing of substance on which to criticize the District’s approach. A BACT review should necessarily take into account what limits have been established in other recent permits for similar facilities, which provide presumptive evidence that such a limit will be achievable for the facility under review. A BACT review should also take into account actual emissions data from other similar facilities (where available), which can establish that even more stringent limits may be achievable. This is exactly how the District proceeded here, and there is no reason to conclude that it was in any way “a backward fashion.”

In a similar vein, the Petition also complains in passing about the District’s selection of the BACT control technology. The Petition does not present any specific challenge to the District’s determination beyond expressing general disapproval with the District’s decision not to require additional control technologies, but the District nevertheless responds to demonstrate that no grounds for granting review with respect to this determination. As explained in detail in the District’s documentation provided to support this permit, the District considered and eliminated

three additional control technologies that could potentially reduce startup emissions, (i) once-through steam boiler technology, also known as “Fast-Start” technology, (ii) use of an auxiliary boiler; and (iii) low-load “turn-down” technology. *See* Petition 10-04 at 6 (citing Statement of Basis at 39). The District addressed these technologies as follows:

- With respect to “Fast-Start” technology, the District evaluated a newly-developed product from Siemens called “Flex-Plant 10”, which is a once-through steam boiler system that uses a single-pressure steam boiler. The District evaluated this technology, but concluded that the single-pressure steam boiler system was less efficient than the triple-pressure steam boiler system that the Russell City facility will use. The District therefore rejected this technology based on the energy efficiency penalty and the associated additional emissions that would result from using less-efficient equipment. *See* Statement of Basis at 40, Additional Statement of Basis at 68-71, Responses to Public Comments at 105-110.
- With respect to an auxiliary boiler, the District evaluated this technology and found that the costs associated with using such a system would not justify the amount of emissions reductions that would be achieved from implementing it. The District therefore rejected use of an auxiliary boiler on cost-effectiveness grounds. *See* Additional Statement of Basis at 69-70; Responses to Public Comments at 114-116.
- With respect to low-load “turn-down” technology, the District evaluated a new product from GE called “Op-Flex”, which has thus far been used to address startup emissions at only one facility, the Palomar facility discussed above. The District found it questionable whether the technology is currently an “available technology” for purposes of the BACT analysis, but also concluded that even if the technology is “available” it has not demonstrated that it can achieve a startup emissions performance any better than what the Russell City will be held to under the District’s permit. *See* Additional Statement of Basis at 71-72, Responses to Public Comments at 116-17.

The Petition has provided no specific argument as to how the District could have erred in making these BACT determinations, and there is none as can be seen from a review of the District’s detailed evaluation of these additional technologies. Moreover, to the extent that the Petition’s criticisms can be seen as claims that the District erred in making these determinations, they would fail for simply restating objections that were made in comments without demonstrating how the District’s response could be clearly erroneous or otherwise subject to review. *See*

Prairie State, *supra*, slip. op. at 145 (collecting cases).⁴ The Petition provides no grounds for granting review of the District’s BACT technology selection.

Petitioner also criticizes the District’s discussion of the limited nature of the cold startup data from the Palomar facility, which consists of just five data points. Petitioner claims that the District should have sought additional data, and asserts that the District could have obtained additional data from the California Energy Commission or could have contacted Petitioner himself for help in getting more data. *See* Petition 10-04 at 11-12. But Petitioner did not provide any such additional data with his comments, and did not even claim that additional data may be available from other sources. Furthermore, the record indicates that District did in fact attempt to find additional data, but there was none available either from the San Diego Air Pollution Control District, the local air district with jurisdiction over the facility, or from the Palomar facility itself. *See* Responses to Public Comments at 94 n.190. For all of these reasons, the Petition has provided no grounds for review based on the amount of data the District reviewed (which also included five other facilities besides Palomar).

Finally, the Petition also includes a footnote that appears to be copied from a draft of Petition 10-03 filed on behalf of Citizens Against Pollution, which claims that there is no precedent in EAB caselaw for providing a compliance margin of more than few percentage

⁴ One new point that Petitioner raises that was not submitted in comments is that there is a proposed facility that Petitioner alleges placed an order for a “Flex-Plant 30” system on August 10, 2009. The “Flex-Plant 30” system is a triple-pressure once-through steam boiler system that Siemens has been developing, which the District considered but rejected because it had not yet become available. *See* Responses to Public Comments at 105-07. This information was clearly available during the second comment period, which closed on September 16, 2009, but Petitioner failed to raise it in his comments at that time. Petitioner is therefore barred from raising it now as he has not preserved the matter for review on appeal. *See* 40 C.F.R. §§ 124.13 (petitioners “must raise all reasonably ascertainable issues and reasonably available arguments supporting their position by the close of the public comments period”), 124.19 (petitioners must demonstrate “that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations”); *see also In re Diamond Wanapa I, LP*, PSD Appeal No. 05-06, slip op. at 5-6 (EAB, Feb. 9, 2006) (issue-preservation requirement “is not an arbitrary hurdle placed in the path of potential petitioners. Rather, the requirement serves an important function related to the efficiency and integrity of the overall administrative permitting scheme.”) (citations omitted).

points. *See* Petition 10-04 at 12 n.13; *cf* Petition 10-03 at 26-27. But as the District discusses in its response to Petition 10-03, that assertion is simply not true. The EAB has consistently approved of BACT limits with safety margins of larger than a few percentage points where, as here, they are adequately justified based on sound technical reasons such as a high degree of variability in equipment emissions performance over time. *See, e.g., Newmont*, 12 E.A.D. at 59-64 (upholding a BACT limit that was established based on a control efficiency of 66.5%, even though there was evidence that under the best circumstances the technology could achieve a control efficiency of 80-90% (a safety margin of 17-26%)); *In re Kendall New Century Development*, 11 E.A.D. 40, 53 (approving a BACT limit of 25 ppm CO where there was evidence in the record that another facility was achieving 20 ppm CO (a safety margin of 25%)); *Knauf II*, 9 E.A.D. at 15 (upholding 25% safety factor based on the degree of variability in the underlying manufacturing process).

For all of these reasons, the Petition has offered no ground on the Board could grant review of the District's BACT limits for startup emissions.

III. The District Did Not Clearly Err In Declining To Reject Selective Catalytic Reduction Because Of Ammonia Slip Concerns

The Petition also claims that the District clearly erred in not rejecting Selective Catalytic Reduction ("SCR") as an acceptable BACT control technology for NO₂ emissions. The Petition claims that the District erred in not rejecting SCR based on its "ammonia slip" emissions, which the Petition asserts was not sufficiently evaluated. Specifically, the Petition asserts that ammonia slip could react with nitric acid in the atmosphere to form ammonium nitrate, which can constitute secondary particulate matter, and that the District did not adequately consider this potential impact.⁵ The Petition claims that the EAB should remand the permit for the District to undertake further analysis on this issue. *See* Petition 10-04 at 13-15.

⁵ Note that the Petition does not provide a full explanation of how this impact could occur. A more detailed explanation of the chemistry than can potentially drive this reaction under the right conditions can be found in the District's analysis on this issue in the permitting documents.

A review of the District's comprehensive and detailed consideration of this issue in the record shows that the District's analysis was more than adequate and that its determination not to reject SCR based on ammonia slip concerns was fully justified. The District initially based its determination on a conclusion that the San Francisco Bay Area air basin is "nitric-acid limited", meaning that there is insufficient nitric acid in the atmosphere to react with any ammonia that may be emitted to form ammonium nitrate. With insufficient nitric acid available in the atmosphere for the reaction to occur, emissions of additional ammonia will not have any impact because the reaction that forms secondary particulate matter will not occur. The District concluded that the Bay Area air basin was nitric-acid limited based on a 1997 study by the District finding no available nitric acid in two different locations in the Bay Area and therefore concluding (preliminarily at least) that the air basin was nitric-acid limited. *See* Statement of Basis at 26-27.

In the Additional Statement of Basis the District then provided additional analysis on this issue, explaining that there was no indication that the conditions in Hayward are any different than the conditions at the two locations evaluated in the District's 1997 study and soliciting comment on whether there was any evidence that Hayward may in fact be different. *See* Additional Statement of Basis at 55-57. The District also explained the uncertain nature of the current state of scientific understanding regarding the connection between ammonia emissions and secondary particulate matter formation, and noted that it would be speculative at this point to conclude that ammonia slip emissions could have a significant secondary particulate matter impact. *See id.* at 56. The District also noted the countervailing benefits of ammonia in the atmosphere in reducing acids in clouds, precipitation and particles, and noted EPA's hesitation to conclude that ammonia should be regulated as a precursor to secondary particulate matter under the current state of scientific knowledge on this issue. *See id.* at 56-57; *see also id.* at 45 (addressing these issues specifically in connection with the NO₂ BACT analysis and the consideration of SCR as a NO₂ control technology).

The District then undertook even more investigation and analysis for the Responses to Public Comments it provided with the final permit. In response to comments criticizing the 1997 study on which the District initially relied, the District reviewed a much more recent study that is currently being undertaken by District staff, for which staff have completed a draft report. This study has utilized a computer model designed to predict PM_{2.5} levels throughout the San Francisco Bay Area based on certain assumptions and data inputs about emissions of PM_{2.5} and its precursors, about regional atmospheric chemistry, and about prevailing meteorological conditions. *See Responses to Public Comments at 59 & 79-83 (citing BAAQMD, Draft Report, Fine Particulate Matter Data Analysis and Modeling in the Bay Area (Draft, Oct. 1, 2009)).* This study confirmed the District's earlier understanding that ammonia slip from the facility will not cause significant additional secondary particulate impacts based on the relative scarcity of available nitric acid in the area. As the District explained in the Responses to Public Comments:

The Air District's report on its computer modeling exercise has not been finalized, but the draft report concludes that regional ammonium nitrate buildup is limited by nitric acid, not by ammonia. The draft report does find that the amount of available nitric acid is not uniform but varies in different locations around the Bay Area, and consequently the potential for ammonia emissions to impact PM_{2.5} formation varies around the Bay Area. Specifically, according to the draft report, the model predicts that a reduction of 20% in total ammonia emissions throughout the Bay Area would result in changes in ambient PM_{2.5} levels of between 0% and 4%, depending on the availability of nitric acid, leaving open the potential that ammonia restrictions could form a useful part of a regional strategy to reduce PM_{2.5}. The draft report therefore restates the general conclusion from the 1997 "first look" memorandum that the Bay Area is nitric-acid limited, although it finds that reductions in the region's ammonia inventory could potentially achieve reductions in PM_{2.5} concentrations in areas that may have sufficient available nitric acid. (The draft report cautions that its assumptions regarding the availability of nitric acid may be misleading, however, because of the preliminary nature of the ammonia emissions inventory used for modeling – a concern cited by EPA in excluding ammonia from PSD permitting.) Notably, the model predicts that Hayward area, like the Livermore and San Jose areas, has among the lowest levels of available nitric acid in the entire region, in the vicinity of 0.25 ppb or less. This last finding suggests that the study from the 1997 "first look" memorandum regarding the Livermore and San Jose areas would be useful in assessing the situation in the Hayward area.

Responses to Public Comments at 82 (footnotes omitted); *see also id.* at 59 (referencing this analysis specifically in the context of the NO₂ BACT analysis). In addition, beyond simply examining this draft study concerning the region generally, District staff conducted a modeling exercise using the computer model created for the study to predict what the secondary particulate impact would be as a result of ammonia and all other potential secondary particulate matter precursors emitted by this specific facility. That analysis showed that the maximum additional impact on ambient PM_{2.5} concentrations from the facility's emissions of ammonia and all other precursors taken together would be only 0.11 µg/m³, which is not a significant additional impact. *See* Responses to Public Comments at 153-54; *see also id.* at 59 & 82 (referencing this analysis in the context of the NO₂ and PM BACT analyses). Based on all of this analysis, the District concluded that “ammonia slip emissions would not have a significant collateral environmental impact regarding secondary particulate matter formation that would rule out SCR as a control technology for NO₂ compared with EMx technology.” Responses to Public Comments at 59.

The Petition now claims the District's conclusion on this issue “lacks scientific basis”, and that “the District provides no evidence” that the facility's ammonia slip will not cause significant secondary particulate matter impacts. Petition 10-04 at 15.⁶ But this claim is clearly incorrect, as the District provided a great deal of evidence and scientific basis for its conclusion as described in the foregoing paragraphs. Moreover, all that the Petition provides beyond this bald claim that the District failed to provide any analysis on this issue is merely a recitation of the general criticisms that Petitioner provided in his comments objecting to the District's reliance

⁶ The Petition does assert that the District's recent study “has not been provided for the record”. Petition 10-04 at 15 n.22. But the study clearly was part of the record on which the District made its decision, as the District discussed the document in detail and cited it extensively in the Responses to Public Comments. The District also included the document in its collection of record documents it made publicly available for this proceeding and included it on its index of record documents. *See* Certified Record Index, entry no 2.24. The District also made clear that all such documents were available for public review at District headquarters both in the notice it provided upon issuance of the permit, *see* Notice of Final Permit Issuance, and in its Responses to Public Comments (at page i). Petitioner is simply wrong that the District did not actually rely on this document in the record for its permit decision here.

on its 1997 study. Petitioner has not provided any argument or explanation as to how the District's detailed, in-depth response to Petitioner's concerns on this issue could be flawed. In particular, Petitioner completely fails to address the additional evaluation that the District provided based on its current computer modeling study. The Petition must therefore be rejected on its face with respect to this issue for not having explained how the agency's response to comments was clearly erroneous.⁷ See *In re Three Mountain Power, LLC*, 10 E.A.D. 39, 59 (EAB 2001) (collecting cases) (“[I]n order to establish that review of a permit is warranted, 40 C.F.R. § 124.19(a) requires a petitioner to both state the objections to the permit that are being raised for review, and to explain why the permit-issuer's previous response to those objections is clearly erroneous.”)⁸

But beyond this procedural defect, Petitioner's claim must also be rejected on substantive grounds because there is no way that the District could have committed clear error in concluding that the facility's ammonia slip emissions will not cause significant secondary particulate impacts sufficient to prevent SCR from being selected as the BACT control technology. All of the evidence from both the District's 1997 study and from its current study show that the Bay Area generally is nitric-acid limited, and that there is no evidence that there is any significant

⁷ The Petition asserts that “[a]ny additional PM 2.5 concentration is significant”. Petition 10-04 at 15 n.22. This assertion disagrees with the District's conclusion that, even if the District cannot rule out that the facility may cause some small amount of additional secondary particulate because of its ammonia slip emissions, any such additional impact would not be significant. But simply providing a statement contrary to the District's conclusion does not amount to an explanation of how the District could have committed clear error in its response.

⁸ The Petition also claims in the margin that “[t]he District still does not respond to Petitioners request for a level of particulate matter impacts that would be significant.” Petition 10-04 at 15 n.22. But the District did respond on this point. The District noted that commenters “asked what threshold the District would use for considering a secondary particulate impact significant.” Responses to Public Comments at 58. The District responded that “it examines potential collateral environmental impacts such as these on a case-by-case basis and does not have a bright-line rule for when a potential collateral impact would be considered ‘significant’ or not. But certainly, in a case such as this one where the available evidence suggests that ammonia slip will cause only minimal secondary particulate formation – if any at all – the potential for such impacts would not be significant enough to eliminate a particular control technology from the BACT analysis.” *Id.* at 59-60.

amount of available nitric acid in the vicinity of Hayward where the facility will be located that could potentially react with ammonia slip to form secondary particulate matter. *See* Responses to Public Comments at 81-82. The District’s facility-specific modeling exercise looking at the impacts from all secondary particulate matter precursors also confirmed this conclusion, finding that the maximum additional PM impact would be only 0.11 $\mu\text{g}/\text{m}^3$, a minimal additional amount. *Id.* Moreover, as the District’s current study has emphasized, these preliminary conclusions still need to be viewed with caution, because of the preliminary nature of the ammonia emissions inventory that was used for the modeling and the level of uncertainty in its assumptions about the availability of nitric acid. *Id.* These concerns have also been echoed by EPA, and they have led EPA to decide not to regulate ammonia emissions as secondary particulate matter precursors at this point under the PSD program, given the preliminary nature of the scientific understanding of the process. *See id.* at 80-81. For all of these reasons, the Petition provides no substantive grounds for finding that the District clearly erred in allowing the facility to use SCR as BACT for NO_2 . Petitioner states without any support that the facility itself will emit NO_2 which will drive secondary particulate formation, *see* Petition 10-04 at 15, but this assertion – like Petitioner’s assertion that the Hayward area has sufficient available nitric acid – is merely speculation. The Board has made clear on this issue that it will not find clear error in a permitting decision based on speculative arguments such as this. *See Three Mountain Power*, 10 E.A.D. at 58 (collecting cases).⁹

⁹ In *Three Mountain Power* the Board dismissed speculative arguments on this very issue of whether ammonia slip from an SCR system would cause significant secondary particulate formation. The Board explained that it agreed with Region IX’s position that “[t]he Petitioner has not provided sufficient information to prove that its calculations are anything more than speculative concerning a complex process that is extremely difficult to quantify[,] nor has it provided any underlying factual information concerning the chemical composition of the ambient air in the [area where the facility will be located]. Thus, based upon the lack of any supportive information from petitioner and in light of the uncertainties concerning particulate formation discussed above, the petitioner has not met its burden in this instance.” 10 E.A.D. at 58. This language equally well describes Petitioner’s argument in this case.

IV. The District Did Clearly Err In Declining To Require A Dry Cooling System As BACT For Particulate Matter Emissions

The Petition also challenges the District's BACT analysis for PM₁₀ emissions from the cooling tower. *See* Petition 10-04 at 15-16. The Petition claims that the District examined only one control technology for reducing cooling tower particulate emissions – high-efficiency drift eliminators – and did not evaluate additional control technologies, work practices, or alternate water sources that could reduce particulate matter impacts from the cooling tower. *See* Petition 10-04 at 16. The Petition notes that the District lowered the BACT limit on Total Dissolved Solids (“TDS”) in the cooling water from 8,000 ppm as initially proposed to 6,200 ppm in the final permit,¹⁰ but it claims that the District “never provided any analysis of what level and what technology or work practices could provide a lower level of TDS to lower PM-10 emissions from the cooling tower.” *See* Petition 10-04 at 16.

These claims are completely off-base, as the District conducted a very thorough and robust BACT evaluation of control technologies and limits. The District first provided an initial BACT analysis in the Statement of Basis, in which it proposed high-efficiency drift eliminators as the BACT control technology with a proposed efficiency limit of 0.0005%. *See* Statement of Basis at 50-51. The District therefore proposed permit limits of 0.0005% maximum drift rate, with a TDS limit on the cooling water of 8,000 ppm. *See* Statement of Basis at 78, proposed permit condition 44. The District did not receive any comments on this issue during the initial comment period, but it nevertheless found that it would be feasible to lower the TDS limit to 6,200 ppm, and it proposed this lower limit in the Additional Statement of Basis. *See* Additional Statement of Basis at 81; *id.* at 109-10, proposed permit condition 44. The District did not receive any comments on these proposed BACT limits, and specifically no one questioned whether a TDS level below 6,200 ppm would be achievable. The District did receive comments on whether a wet cooling system using recycled water was appropriate for this facility, however.

¹⁰ The cooling tower can contribute to particulate matter emissions through solids dissolved in the water used in the cooling system, which can be emitted in the water vapor exhausted through the cooling tower. *See* Responses to Public Comments at 86.

These comments suggested that the District should require a dry cooling system instead, which would eliminate particulate matter impacts from the cooling tower. In response, the District provided a detailed response in which it evaluated whether it could even consider requiring dry cooling as BACT without impermissibly “redefining the source”; and ultimately concluded that even if a BACT analysis could consider dry cooling the District would not require it in this case because of the ancillary environmental benefits from using a wet cooling system with this particular project. *See Responses to Public Comments at 86-89.*

With respect to whether a BACT analysis can even consider whether to require a dry cooling system for a project where the project has been designed to use wet cooling, the District noted that the facility had been specifically designed to make use of recycled water from the City of Hayward’s wastewater treatment plant, which is located adjacent to the facility. The facility was designed with a tertiary treatment plant to treat the City’s wastewater discharge from its own wastewater treatment plant so that it will be clean enough to use for cooling. The District therefore found that the use of a wet cooling system was an integral part of the facility’s design, and that it would have clear environmental benefits and was not a design choice made for purposes of evading air quality permitting requirements. As a result, the District concluded that it could not require the applicant to redesign the source to use a dry cooling system instead under the BACT requirement, as doing so would disrupt one of the basis objectives of the proposed facility – to recycle wastewater from the City’s treatment plant. *See Responses to Public Comments at 87-88.*

After addressing this threshold concern, the District then went on to consider whether – if the District could consider a dry cooling alternative in the BACT analysis – the District should require it in this specific case. Although dry cooling eliminates the particulate matter emissions associated with wet cooling, wet cooling has other ancillary environmental and energy benefits that can offset the particulate matter impacts. For example, the facility’s use of the City of Hayward’s recycled wastewater in its “Zero Liquid Discharge” system will eliminate wastewater discharge into the San Francisco Bay, which will have benefits related to water quality. The

District also noted that wet cooling would be more energy efficient, saving approximately 21 MMBtu/hr of fuel and eliminating 2,500 additional pounds per hour of CO₂ emissions, as well as a proportionate amount of other pollutants that would be emitted by burning that extra fuel. Finally, the District also noted that an air-cooled condenser would be taller and bulkier than a cooling tower, and would therefore have a greater visual impact as well as a greater “downwash” effect; and that it would also have greater noise impacts due to its greater height and surface area, which would result in greater acoustic radiation of noise from the facility to the nearby shoreline. For all of these reasons, the District concluded that BACT would therefore not require dry cooling to be used in preference to wet cooling at this facility because of the ancillary environmental and energy impacts. *See Responses to Public Comments at 88-89.* The District noted that this result ultimately rendered the question of whether the District could even consider the question without impermissibly redefining the source moot. *Id.* at 88.

Petitioner now contends that the District failed to evaluate “technologies, work practices, or other sources of water that would reduce the impacts from the projects [*sic*] cooling tower emissions.” *See* Petition 10-04 at 16. But tellingly, the Petition does not identify any such technologies, work practices or other sources of water other than the dry cooling alternative discussed above. And with respect to dry cooling, there can be no question from the District’s detailed analysis in the Responses to Public Comments that it did in fact consider the dry cooling option. The Petition completely fails even to acknowledge this analysis of dry cooling, let alone try to explain how the District could have committed clear error in its analysis. The Petition must be dismissed for not having explained how the District’s response on this issue was inadequate.¹¹ *See In re South Shore Power, L.L.C.*, PSD Appeal No. 03-02 (EAB June 4, 2003),

¹¹ The Petition appears to claim that the District’s analysis of whether dry cooling would be preferable to wet cooling for this project under a BACT analysis was not “included in its BACT analysis.” Petition 10-04 at 16. But it is not clear what purpose the comparison between wet and dry cooling could have served other than to support the BACT analysis. This point may be intended to claim that the District did not in fact reach the merits of the BACT comparison because it held that the comparison was not required in the first place because of the “redefining the source” doctrine. *See* discussion in Responses to Public Comments at 87-88. But such an

Slip. Op. at 27-28 (collecting cases) (“Because Petitioners simply assert that dry cooling is the preferable option without identifying or explaining why MDEQ’s response is clearly erroneous or otherwise warrants review, Petitioners’ objections do not rise to the level of specificity required to justify Board review.”) (citations omitted).

Moreover, even if this claim were allowed to proceed to the merits, there is no indication that the District could have clearly erred in declining to require dry cooling here. First, the District was clearly justified in refraining from trying to redefine the source in this instance, based on the analysis it provided in the Responses to Public Comments. Second, the District was clearly justified in finding that wet cooling would be preferable to dry cooling as a BACT control technology in this particular instance, given the ancillary benefits in the areas of water quality, energy efficiency, fuel use and related concerns about greenhouse gases and other pollutant emissions, visual impacts, and noise impacts. The District explained both of these reasons in detail in the Responses to Public Comments, and the Petition provides no reason to question the District’s analysis – let alone conclude that it was clearly erroneous. Significantly, the reasons that the District found to justify its choice here are the same as those that the Board has credited in earlier cases in which permitting agencies have allowed power plants to use wet cooling systems with high-efficiency drift eliminators as the District has here: water availability, environmental factors, energy efficiency, and noise concerns, among others. *See South Shore Power, supra*, slip. op. at 27. As in that case, there can be no basis for finding clear error in the District’s BACT determination with respect to dry cooling here, where the District provided an even more robust analysis to support its determination.

argument would misread the District’s two-pronged BACT analysis. The District concluded first that requiring dry cooling for a project that was designed with a wet cooling system would face significant problems under the “redefining the source” doctrine here; and then additionally concluded that even if such a comparison were allowed, the wet cooling system would be the appropriate choice here under the BACT requirement because of the ancillary impacts. Any argument that the District did not in fact reach the substance of the BACT comparison between wet and dry cooling is at most a semantic distinction without any substance.

Beyond the dry cooling issue, nothing else the Petition alludes to can provide any basis to question the District's BACT analysis either. The Petition alludes generally to potential additional "work practices" that could be used to reduce cooling tower particulate emissions. *See* Petition 10-04 at 16. But no such additional work practices were ever mentioned in any of the comments, and nothing specific is provided in the Petition either. The Petition also alludes generally to the potential to use a different source of water to reduce cooling tower emissions. *See id.* But again, no other sources of water were mentioned in any comments and nothing specific is provided in the Petition either.¹² These general assertions therefore do not present any grounds for review here.

Finally, while acknowledging that the District reduced the TDS limit from 8,000 ppm to 6,200 ppm, the Petition charges that "the District never provided any analysis of what level and what technology or work practices could provide a lower level of TDS. But neither Petitioner nor anyone else ever questioned the 6,200 ppm TDS limit during any of the comment periods, *see* Responses to Public Comments at 87, and so Petitioner cannot raise this point now for the first time on appeal.

V. The New NO₂ NAAQS Had Not Been Adopted At The Time This Permit Was Issued.

Petitioner also claims that the Board "should consider the impacts to permitting of the new Federal NO₂ Standard", and that in reviewing his Petition the Board "must be mindful of the

¹² Notably, with respect to the point about alternative sources of water, the District did receive and respond to an unrelated comment claiming that the use of recycled water here could have adverse effects from having to provide additional treatment to make the water clean enough for cooling. The comment implied that if the facility were to use a source of fresh water instead of recycled water, it would not need any further treatment and the energy used to run the tertiary treatment plant would be saved. *See* Responses to Public Comments at 88 n.182. In response, the District noted that there are no sources of fresh water near the facility that are clean enough to use without further treatment in the tertiary treatment plant, meaning that the energy impacts from water treatment would be the same regardless of what water source is used. *See id.* This point also rebuts the Petitioner's speculation here that there may be other water sources with less TDS that could potentially generate less particulate matter emissions from the cooling tower. The District did not explicitly direct this response to the point Petitioner now raises in his Petition because it was not provided in comments. But to the extent that Petitioner had raised it earlier, the District's analysis in footnote 182 would have rebutted this argument as well.

new Federal 1 hour NO₂ standard” Petition 10-04 at 16. In this regard, the Petition is referring to the recently-promulgated 1-hour National Ambient Air Quality Standard (“NAAQS”) for NO₂. *See* Primary National Ambient Air Quality Standards for Nitrogen Dioxide, Final Rule, 75 Fed. Reg. 6475 (Feb. 9, 2010) (to be codified at, *inter alia*, 40 C.F.R. § 50.11). But Petitioner can have no grounds for faulting the District for not taking this new standard into account in issuing the final permit here, as the rule had not even been published at the time the District issued the permit. Indeed, as Petitioner acknowledges, the standard had not become effective even by the date that he filed his appeal. *See* Petition 10-04 at 16.¹³ Given this situation, there is no way that the District should be found to have improperly issued the permit for having failed to apply a regulatory requirement that did not even exist at the time.

As the Environmental Appeals Board has made clear, in making a decision to issue a permit, the permitting agency is not required to consider new regulatory requirements that do not exist at the time of the permitting decision. To the contrary, the permitting agency is required to apply the existing regulatory requirements at the time the permitting decision is made. The Board has recited this principle most recently in *In re Dominion Energy Brayton Point, L.L.C.*, 12 E.A.D. 490, 531 (EAB 2006), *aff’d sub. nom.*, *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006). In that case, the Board was faced with a new rule under the Clean Water Act known as the “Phase II Rule”, which (as here) had been adopted after the permitting agency issued the final permit but while the permit was still on appeal before the EAB. The Board canvassed its precedents on whether such a subsequently-enacted regulatory requirement should be applicable to the already-issued final permit, and found that they consistently affirmed the principle that the permitting agency’s decision needs to be made based on the regulations as they exist at the time of the decision. The Board quoted its opinion in *In re*

¹³ Incidentally, the Petition mis-states the effective date of the new standard as April 9, 2010. In fact, the new standard’s effective date was April 12, 2010. *See* 75 Fed. Reg. at 6474 (“This final rule is effective on April 12, 2010.”). But the point is the same: the new standard had not even been published yet, let alone become effective, when the District made its final decision to issue the permit.

Phelps Dodge Corp., 10 E.A.D. 460, 478 n.10 (EAB 2002), noting that “the [permitting agency’s] obligation, as the permit issuer, is to apply the CWA statute and implementing regulations *in effect at the time the final permit decision is made.*” *Dominion Energy*, 12 E.A.D. at 616 (emphasis added). It similarly quoted its opinion in *US Pipe & Foundry Co.*, NPDES Appeal No. 75-4 (Adm’r 1975), *aff’d in part, rev’d in part sub nom., Alabama ex rel. Baxley v. EPA*, 557 F.2d 1101, 1108 (5th Cir. 1977), in which it held that “review of the original action taken by the [permitting agency] should be based on the standards and guidelines *in existence at the time the original action was taken*, and thus, to that extent, finality must be accorded to the original action taken.” *Dominion Energy*, 12 E.A.D. at 615 (emphasis added). The Board also noted that on appeal of the *US Pipe & Foundry* decision, the United States Court of Appeals for the Fifth Circuit also agreed that “the appropriate limitations to be applied to the permit were those *in effect at the time of initial permit issuance.*” *Id.*, citing *Baxley*, 557 F.2d at 1110 (emphasis added). Based on these precedents and other sound policy reasons, the Board concluded that “it is not appropriate to remand the Permit to the [permitting agency] for it to reconsider the Permit in light of the . . . Phase II Rule.” *Id.* at (very end of discussion just after fn. 204).

The Board in *Dominion Energy* did not find an absolute bar to remand in this situation in every potential situation, but it should reach the same conclusion here as it did there because the same important policy reasons that compelled rejection of the petitioner’s argument in that case are also present here. First of all, as in *Dominion Energy*, there is no indication in the new NO₂ 1-hour NAAQS final rule to suggest that it should be applied retroactively to apply to PSD permits that have already been issued. EPA discussed the implications of the new rule for PSD permitting at page 6525 of the preamble to the final rule, and all of the language it used there is forward-looking and suggests that the new standard will be applied only to PSD permit analyses going forward into the future after the regulation is adopted. The preamble consistently uses the future tense in considering the effect on PSD permitting, for example explaining that “[t]he full extent of how a new short-term NO₂ NAAQS will affect the NSR process will need to be

carefully evaluated.” 75 Fed. Reg. at 6525. Furthermore, EPA also specifically explains that “[f]irst, major new and modified sources *applying for NSR/PSD permits* will initially be required to demonstrate that their proposed increases of NO_x will not cause or contribute to a violation of either the annual or 1-hour NO₂ NAAQS and the annual PSD increment.” *Id.* (emphasis added). This language expressly contemplates that the new requirements applicable for the new 1-hour standard will be applicable for facilities *in the application process*, not facilities for which a permit has already been issued. Finally, EPA also notes that many of the tools that will be necessary to apply the PSD requirements – such as PSD increments, Significant Impact Levels (“SILs”), and Significant Monitoring Concentrations (“SMCs”) – may not even exist yet. As EPA explains in the Preamble,

[W]e would need to evaluate the need for a new 1-hour NO₂ increment in association with the goals and purposes of the statutory PSD program requirements. . . . We also believe that there may be a need to revise the screening tools currently used under the NSR/PSD program for completing NO₂ analyses. . . . EPA intends to evaluate the need for possible changes or additions to each of these important screening tools for NO_x/NO₂ due to the addition of the 1-hour NO₂ NAAQS. If changes or additions are deemed necessary, EPA will propose any such changes for public notice and comment in a separate action.

Id. These passages show that EPA recognizes that permitting agencies may face difficulties in conducting PSD analyses for the new 1-hour standard even for new permit applications after the standard becomes effective. It is hard to believe that EPA intended for final permits that have already been issued to have to be reopened for such an analysis when it is not even clear that all the necessary tools exist to do so for new applications going forward. For all of these reasons, there is nothing in the new 1-hour NO₂ standard to suggest that it should be applied to final permits that have already been issued, which is the same situation the Board found persuasive in reaching its decision in *Dominion Energy*. *See Dominion Energy*, 12 E.A.D. at 617.

Furthermore, as in *Dominion Energy*, this permit proceeding has been ongoing for a long time. The District has been working on its permitting analyses since at least the beginning of 2007. The District is now well into its fourth year in working on this permit, and it has expended

significant resources in doing so as evidence by the extensive analyses provided in the Statement of Basis, Additional Statement of Basis, and Responses to Public Comments. The other parties that have participated have also undoubtedly expended considerable efforts as well. In particular, the District has already had to contend with a shifting regulatory landscape that has contributed to the work in processing this permit. When the District issued its Statement of Basis, EPA had a “surrogate policy” for evaluating PM_{2.5} impacts. Under this policy, EPA required that the District evaluate PM₁₀ impacts as a surrogate method for considering PM_{2.5} impacts, which the District did. *See* Statement of Basis at 17-18. After the District completed this analysis in the Statement of Basis, EPA then changed its surrogate policy and required a PSD full analysis of PM_{2.5} impacts for projects located in attainment/unclassifiable areas for PM_{2.5}. *See* Additional Statement of Basis at 52. The District accordingly undertook a PM_{2.5}-specific analysis in the Additional Statement of Basis, but it was again faced with a shifting and uncertain regulatory landscape because EPA had signed a document that would re-designate the Bay Area as non-attainment for the 24-hour PM_{2.5} standard – which would have the effect of making 24-hour PM_{2.5} issues subject to 40 C.F.R. Part 51, Appendix S, and not subject to PSD permitting under 40 C.F.R. Section 52.21 – but EPA had not published the signed document in the Federal Register in order to make it legally effective. *See id.* at 52-53. This left the District uncertain as to what regulatory standards would apply for the 24-hour PM_{2.5} standard, necessitating the District to evaluate both alternatives and present them in the Additional Statement of Basis. EPA finally did publish the re-designation in the Federal Register and thus made it legally effective rendering the 24-hour PM_{2.5} analysis unnecessary for PSD purposes, *see* Responses to Public Comments at 76-79 & 141-42, but not before the District had expended considerable additional time and resources to complete the that analysis. If the EAB were to remand this permit again to require the District to start from scratch and evaluate another newly promulgated regulatory requirement for this permit, one wonders when the process will ever end. Such an outcome would bring about the very result the Board was worried about in *Dominion Energy*, in which it observed that “if [permitting agencies] were required to reconsider every . . . permit on appeal to

the Board each time a new rule was issued, such a requirement could wreak havoc on the Agency's permitting program." *Dominion Energy*, 12 E.A.D. at 618 n.203. Again, the Board should dismiss Petitioner's claim here for the same sound policy reasons it found in *Dominion Energy*.

Finally, the District also notes that although the recently-promulgated NO₂ standard is new, NO₂ is already well-regulated under the earlier regulatory requirements that the District has applied for this facility. The facility is already subject to BACT requirements for NO₂ based on the original annual standard, and the District conducted an NO₂ BACT analysis and has implemented NO₂ BACT limits. Furthermore, the facility is subject to Non-Attainment NSR requirements for NO_x as an ozone precursor, and as a result is subject to the Non-Attainment NSR requirement to provide offsets for NO_x – in the form of NO₂ emission reduction credits – that will more than make up for the facility's new emissions of NO₂. These offsets are described in Appendix C to the June 19, 2007, Final Determination of Compliance the District prepared for the Energy Commission Licensing Process, which document is attached as Appendix D to the Statement of Basis (sequentially numbered as p. 150 of the Statement of Basis). As that Appendix C show, the facility will be providing 154.8 tons of NO₂ emissions offsets to make up for its own NO₂ emissions. *See* Statement of Basis at 150. While these existing requirements that the facility will be complying with are not necessarily identical to what a full PSD review would require for the NO₂ 1-hour standard, they do provide important substantive safeguards to ensure that NO₂ emissions are reduced in the Bay Area and that compliance with the new 1-hour NO₂ standard will be attained and maintained as required by the Clean Air Act. The fact that the facility is already complying with these existing requirements provides further reason for the Board to reject this argument in accordance with *Dominion Energy*.

For all of these reasons, the Petition's citations to the new 1-hour NO₂ NAAQS provide no reason for the Board to remand the final PSD permit.

VI. The Permit Conditions Are Enforceable

Finally, Petitioner also requests that the EAB remand the permit for the District to “include a mechanism to provide meaningful penalties for violations of permit conditions for the Russell City project” *See* Petition 10-04 at 18. But Petitioner does not suggest what kind of “mechanism” would be appropriate for inclusion in a PSD permit, which is not surprising as permit conditions are not the place where the enforcement mechanism is established. PSD enforcement – and the mechanism for imposing appropriate penalties for violations of federal PSD permit conditions – is codified in the PSD provisions of the Clean Air Act. *See* Clean Air Act Section 113(a), 42 U.S.C. 7413 ; *see also* 40 C.F.R. § 52.23. If the facility violates any condition of its PSD permit, it will be subject to appropriate civil penalties under Section 113(a). There is no need for anything additional in the permit as issued to make the permit conditions enforceable.

Moreover, Petitioner has not cited any legal basis in the Clean Air Act or in 40 C.F.R. Section 42.21 for including a “mechanism” in a PSD permit to provide penalties for violations of the permit. As noted above, the mechanism is set forth in the enforcement provisions of the Clean Air Act, not in the PSD permit provisions. *Cf.* Clean Air Act § 113 (enforcement provisions), § 165 (PSD requirements). Thus even if the District agreed that there was some additional enforcement-related provision to be included in the permit, there is no legal basis for doing so. The District has therefore not committed any error by not including an enforcement mechanism in the permit, and indeed it would have been error if the District had included one where it lacked the legal authority to do so.

To the contrary, Petitioner explains that his concern arises out of the District’s “enforcement policies”, which he claims are “lax” and “do not deter repeat offenders”. *See* Petition 10-04 at 18. The District strongly disagrees with any contention that it does not appropriately enforce air quality regulations in the Bay Area. But in any event, as a federal permit the enforcement of PSD violations is primarily the responsibility of EPA region 9. The Clean Air Act enforcement mechanism also includes a citizen suit provision, which will allow

members of the public such as Petitioner here to take enforcement matters into their own hands if they believe the government is not doing an appropriate job. *See* Clean Air Act Section 304(a), 42 U.S.C. § 7604(a). Thus even if Petitioner's unsupported allegations that the District has been lax in enforcing the law were true – and they are not – there would be no need to add anything in the permit itself to provide additional enforcement authority.

Petitioner also points to another facility, the Gateway Generating Station, which he claims supports his argument that an enforcement mechanism should be included within the four corners of the permit itself. But the Gateway Generating Station only serves to disprove his argument. As Petitioner himself explains, EPA has issued a Finding and Notice of Violation to the facility's owner, Pacific Gas & Electric Co., over its PSD violations. (*See* Sarvey Petition at 19.¹⁴) EPA has also taken the case a step further and has filed a complaint in the United States District Court for the Northern District of California (Civil Action No. 09-4503), and a citizens' enforcement group has intervened under the Clean Air Act's citizen suit provision. These actions show indisputably that there is no need to include an enforcement mechanism in a PSD permit to provide for appropriate enforcement.¹⁵

¹⁴ The Board has heard arguments regarding the Gateway facility in PSD Appeal No. 09-02, in which it dismissed a Petition for Review for lack of jurisdiction. *See* Order Dismissing Petition For Review, *In re Gateway Generating Station*, PSD Appeal No. 09-02 (EAB Sept. 15, 2009.) The Board noted the issuance of the Finding and Notice of Violation in footnote 12 of that Order.

¹⁵ Although nothing about the Gateway situation is relevant to the PSD permitting analysis for Russell City, the District did receive comments relating to Gateway during the second Russell City comment period. The District responded that these comments were not relevant to the Russell City permit, but then went on to address the substance of the comments in order to clarify the situation for the record. *See* Response to Comments p. 232-34, Comments XIX.21 (Air District Permitting of the Gateway Generating Station) and XIX.22 (EPA Enforcement Action Regarding Gateway Generating Station).

CONCLUSION

For the foregoing reasons, the Petition should be DISMISSED.

Dated: April 23, 2010

Respectfully Submitted

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

By: _____
Alexander G. Crockett Esq.
Assistant Counsel