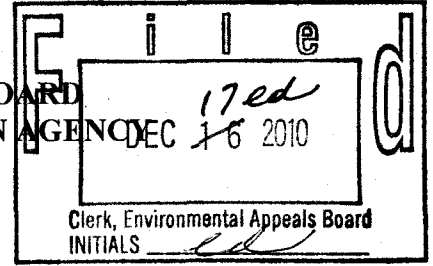


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
)
)
Russell City Energy Center, LLC)
)
PSD Permit No. 15487)
)
)

PSD Appeal Nos. 10-01, 10-02, 10-03,
10-04 & 10-05

**ORDER DENYING MOTION AND SUPPLEMENTAL MOTION FOR
RECONSIDERATION AND/OR CLARIFICATION AND STAY**

On November 29, 2010, pursuant to 40 C.F.R. § 124.19(g), Chabot-Las Positas Community College District (“College District”) filed a timely motion for reconsideration and/or clarification and stay of the November 18, 2010 Order Denying Review (“Order”) the Environmental Appeals Board (“Board”) issued in the above-captioned matter. *See generally* Petition for Reconsideration or Alternatively Clarification and Request for Immediate Stay of Effective Date of November 18, 2010 Order Denying Review (“Motion”). Two days later, on December 1, 2010, the College District filed a supplemental motion for reconsideration and/or clarification and stay of the same Order. *See generally* Supplemental Petition for Reconsideration or Alternatively Clarification and Request for Immediate Stay of Effective Date of November 18, 2010 Order Denying Review (“Suppl. Motion”). The College District’s supplemental motion was also timely filed. The permit issuer, the Bay Area Air Quality Management District (“BAAQMD”), and the permittee, Russell City Energy Company, LLC

("RCEC"), each filed responses to the College District's motions.¹ Another petitioner, Californians for Renewable Energy, Inc. ("CARE"), also submitted a response.

For the reasons discussed below, the Board denies the College District's motion and supplemental motion for reconsideration and/or clarification. The Board also denies the College District's request for a stay.

I. ANALYSIS

A. *Standard of Review for Motions for Reconsideration and/or for Clarification*

The regulation governing motions for reconsideration of final orders, such as the Order in this case, requires the motion to "set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." 40 C.F.R. § 124.19(g). Reconsideration is generally reserved for cases in which the Board has made a demonstrable error, such as a mistake of law or fact. *In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 98-3 through 98-20, at 2 (EAB Feb. 4, 1999) (Order on Motions for Reconsideration); *In re Steel Dynamics, Inc.*, PSD Appeal Nos. 99-4 & 99-5, at 5 (EAB July 13, 2000) (Order Denying IDEM's Motion for Reconsideration or Clarification and SDI's Motion for Reconsideration). The reconsideration process should not be considered "as an opportunity to reargue the case in a more convincing fashion." *Knauf*, at 2-3 (quoting *In re S. Timber Prods., Inc.*, 3 E.A.D. 880, 889 (JO 1992)); accord *Steel Dynamics*, at 5. "A party's failure to present its strongest case in the first instance does not entitle it to a second

¹ BAAQMD had issued a prevention of significant deterioration ("PSD") permit, PSD Permit No. 15487 (the "Final Permit"), to RCEC on February 3, 2010, authorizing RCEC to construct a new, 600-megawatt natural gas-fired combined-cycle power plant in Hayward, California ("Facility"). See Order at 8, 17. BAAQMD issued the Final Permit pursuant to a delegation agreement between it and the United States Environmental Protection Agency ("EPA") Region 9.

chance in the form of a motion to reconsider.” *In re Ariz. Mun. Storm Water NPDES Permits*, NPDES Appeal No. 97-3, at 2 (EAB Aug. 17, 1998) (Order Denying Motion for Reconsideration); *accord Steel Dynamics*, at 5; *In re Haw. Elec. Light Co., Inc.*, PSD Appeal Nos. 01-24 through 01-29, at 5 (EAB Jan. 29, 2002). Federal courts employ a similar standard. *See, e.g., Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (“[M]otion [for reconsideration] should not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.”); *Publishers Res., Inc. v. Walker-Davis Publ’ns, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985) (“Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during the pendency of the [original] motion. * * * Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.”) (citation omitted).

The regulation governing motions for reconsideration allows for the possibility of a stay in such cases, but does not require it. *See* 40 C.F.R. § 124.19(g) (“A motion for reconsideration shall not stay the effective date of the final order unless specifically so ordered by the [Board].”). Thus, the decision whether to grant a stay is within the Board’s discretion.

Regarding motions for clarification, the Board has explained that it will entertain such a motion “where the moving party can demonstrate that an aspect of the EAB’s decision is ambiguous.” *See* EAB Practice Manual at 49 (Sept. 2010). Where the motion requests modification of some aspect of the Board’s decision, however, the Board has treated it as a

motion for reconsideration. *In re Adcom Wire Co.*, RCRA Appeal No. 92-2, at 2 (EAB July 22, 1994) (Order on Adcom's Motion for Clarification).

Keeping these standards in mind, the Board considers the College District's two motions. The Board first addresses the issues raised by the College District's motions for reconsideration and/or clarification. The Board then considers the College District's request for a stay.

B. Issues Raised by the College District's Request for Reconsideration and/or Clarification

In its Motion, the College District asserts that the Board clearly erred in its Order by failing to address several issues the College District had raised in its petition and specifically lists four issues.² *See* Motion at 3-31; *see also id.* at 2 (requesting reconsideration so the Board may "address the[] important issues raised in the College District's petition which remain[] unresolved and not addressed in the opinion"). In its Supplemental Motion, the College District further contends that the Board erred in failing to address one other issue, the College District's challenge to BAAQMD's rejection of an auxiliary boiler. *Suppl. Motion* at 1. The College District contends that, if the Board were to reconsider the issues the Board allegedly did not address in its Order, it will determine that a remand of the Final Permit to BAAQMD is required.³

² As a preliminary matter, the Board notes that it did address each of the listed issues in its Order. Several of these issues were dismissed on procedural grounds, and thus the Board did not address the substance of the issue. The Board reads the College District's arguments in part, therefore, to be a challenge to the Board's procedural determinations.

³ Based on the College District's contention that the Board should remand the permit, the Board believes the College District's motion is more properly considered a motion for reconsideration and not for clarification. As noted above in Part I.A, a motion for clarification does not include a request for modification of any aspect of the Board's decision, which a request for a remand would be.

Motion at 31. The Board briefly addresses each of the College District's contentions more specifically below.

1. *Claim That the Board Erred In Analyzing the College District's Arguments Related to PM_{2.5}*

The College District first claims that the Board erred in its analysis of the College District's PM_{2.5} arguments. Motion at 3-16. In particular, the College District asserts that the Board "attempts to portray the College District's arguments on this point as 'confusing,' not sufficiently raised in the petition, and refuses to consider much of the College District's substantive arguments [concerning PM_{2.5}], contending its reply, to which RCEC and BAAQMD enjoyed sur-replies, raises 'new arguments.'" Motion at 5-6; *see also id.* at 8.

In its petition, the College District had claimed that BAAQMD's PSD "air analysis for 24-hour PM_{2.5}, concluding that there is no violation of the NAAQS, is clearly erroneous." *See* Petition for Review of PSD Permit and Request for Oral Argument by Chabot-Las Positas Community College District ("College Dist. Pet.") at 1, 26 (initial capitalization omitted). In their responses to the petition, both BAAQMD and RCEC argued that the College District's claim had essentially been rendered moot by EPA's recent designation of the Bay Area as nonattainment for 24-hour PM_{2.5} NAAQS. *See* Order at 118. In light of this threshold argument, the Board considered the mootness question first before reaching petitioner's substantive arguments. *Id.* at 118-19. Following a lengthy analysis of the mootness issue, the Board concluded that EPA's designation had indeed mooted the College District's challenge to the substance of BAAQMD's 24-hour PM_{2.5} analysis.⁴ Order at 126-27. Accordingly, the Board did

⁴ As the Board explained, the PSD permitting requirements only apply to attainment (or unclassifiable) pollutants in a geographic area. Order at 119. For pollutants that are designated

not address any of the College District's substantive challenges to BAAQMD's PSD air quality analysis. Order at 126-27; *see also id.* at 118 n.110. In its Motion, the College District fails to demonstrate that the Board's mootness analysis and conclusion were incorrect.⁵

The College District also fails to demonstrate that the Board clearly erred by declining to consider arguments the College District had raised for the first time in its reply brief because it found them to be untimely. *See, e.g.,* Order at 125-26 n.115. The College District notes several times that RCEC and BAAQMD "enjoyed sur-replies," thereby allowing them to respond to arguments the College District raised in its reply brief. *See* Motion at 5, 8. Insofar as the College District is suggesting that because other parties had the opportunity to respond to its late arguments, it should be allowed to raise them, the Board disagrees. The fact that the Board allows a petitioner to file a reply and the permit issuer to file a sur-reply in response does not change the fact that new issues raised at the reply brief stage are equivalent to late-filed appeals and thus must be denied as untimely.⁶ Order at 70 (citing cases); *see also id.* at 125-26 n.115

nonattainment, the nonattainment area New Source Review requirements of the Clear Air Act and implementing regulations apply instead of the PSD requirements. *Id.* Thus, "[b]ecause the Bay Area was designated nonattainment for 24-hour PM_{2.5} at the time BAAQMD issued the Final Permit, BAAQMD properly concluded that it was no longer required to address 24-hour PM_{2.5} in the PSD permit." *Id.* at 126.

⁵ Insofar as the College District is unhappy with the nonattainment area new source review requirements for 24-hour PM_{2.5}, *see* Motion at 3, 5, the Board notes that it lacks jurisdiction over issues that are not governed by the PSD regulations and are not related to the federal PSD program. *See* Order at 132.

⁶ The College District also seems to be arguing that these arguments were not "new" because, as reflected in its comments on the draft permit, "this has been a long standing debate between commentators and BAAQMD." Motion at 6. First of all, even if an issue had been raised in comments on a draft permit, the issue must also be raised in the petition seeking review to be considered timely raised. Second, the comments to which the College District refers do not appear to fairly raise this issue. In fact, the College District holds several statements in its comment that discuss the "surrogate policy," *see id.*, an Agency policy concerning the use of PM₁₀ data as a surrogate for PM_{2.5} data. The Board does not see how the surrogate policy is even remotely relevant to the argument the College District raises in

(same). This is particularly true in this matter, where the Board, in its Order granting petitioners' requests to file reply briefs, specifically instructed petitioners that it would not consider issues raised for the first time in their reply briefs.⁷ *See id.* at 70 (citing Order of May 19, 2010 at 7; Order of May 6, 2010 at 1; *see also* EAB Oral Arg. Tr. at 9).

The College District also appears to argue that it had raised its "construction moratorium" argument prior to its reply brief. In support of this argument, it quotes from its comments on the draft permit where it stated that "absent from the Additional [Statement of Basis] is the required analysis for nonattainment as outlined above in the 40 C.F.R. parts 50 and 51." *See* Motion at 9-10 (quoting its Sept. 16, 2009 comments). As explained in note 6 *supra*, even if an issue has been raised in comments on a draft permit, the issue must also be raised in the petition seeking review to be considered timely on appeal. Moreover, assuming the College District had cited to 40 C.F.R. parts 50 and 51 in its petition, such a general citation to a lengthy part of the regulations is insufficient to raise a specific concern about a specific subsection of that lengthy regulation. Notably, the College District did not argue that the "analysis for nonattainment" it had "outlined above" had mentioned the construction moratorium provision. In fact, the nonattainment provisions it did "outline above" did not contain the construction moratorium provision. *See* Motion at 9-10.

its Motion.

⁷ Several times in its Motion, the College District relies on arguments it had first raised in its reply brief or at oral argument. *See, e.g.*, Motion at 8, 11-12. As discussed in the text, such arguments were untimely. Similarly, entirely new arguments raised in its Motion, such as its reference to and discussion of *Friends of Pinto Creek v. EPA*, 504 F.3d 1007 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 896 (2009), are also untimely.

In sum, the College District fails to address the central point in the Board's Order, i.e., that the nonattainment designation rendered its PM_{2.5} claims moot, nor does it show any factual or legal error in the Board's decision on that point. It also fails to show the Board made an error in fact or law in declining to consider late arguments. Consequently, the College District has not demonstrated that the Board's Order warrants reconsideration based on its first ground.

2. *Claim That the College District's Environmental Justice Challenge Was a "Sufficiently Distinct" Issue From Its 24-Hour PM_{2.5} Issue*

The College District, in its motion for reconsideration, next argues that its "environmental justice challenge was sufficiently distinct entitling the community to an opinion on those issues." Motion at 16. In its petition for review, the College District had raised an issue contending that BAAQMD's environmental justice analysis was flawed.⁸ See College Dist. Pet. at 36.

In the Order, the Board did not address the substantive aspects of the College District's environmental justice claim because it found that the issue was predicated on the College District's 24-hour PM_{2.5} issue, see Order at 118, 126-27 & n.116,⁹ an issue that the Board determined, in a lengthy analysis, had been mooted by the EPA's designation of the Bay Area as nonattainment for 24-hour PM_{2.5}. See *id.* at 117-27. Consequently, the Board concluded that the environmental justice claim had likewise been mooted. *Id.* at 126-27 & n.116; see also *id.* at 118-19 & n.110. The College District, in its Motion, appears to disagree with the Board's

⁸ The heading of the College District's third "argument for remand" was: "BAAQMD Did Not Engage in an Environmental Justice Analysis Considering the Environmental and Social Cost to a Community Already 'At Risk.'" College Dist. Pet. at 36.

⁹ As the Board explained in its Order, "the College District asserts that BAAQMD's 'environmental justice analysis is built on a faulty foundation' because of the alleged errors BAAQMD made in its PM_{2.5} analysis." Order at 118 (quoting Petition at 37).

reading of its environmental justice claims as being solely predicated on the College District's 24-hour PM_{2.5} claims. Motion at 16-19. Nothing the College District argues in its Motion demonstrates that the Board clearly erred in its interpretation of the College District's arguments in its petition. Significantly, in its petition, the College District's discussion of the environmental justice issue referred extensively to its earlier arguments challenging BAAQMD's 24-hour PM_{2.5} analysis. *See* College Dist. Pet. at 36-37 (referring to the PM_{2.5} concentration levels, the PM_{2.5} air modeling, and the roadway issue, all of which were part of the College District's 24-hour PM_{2.5} issue). Nowhere in its discussion of this issue does it clearly reference anything outside of the 24-hour PM_{2.5} context. *See id.* The Motion does not explain why this apparent linkage of the environmental justice claims to the College District's 24-hour PM_{2.5} issue is not dispositive. Contrary to the College District's arguments that its statements at oral argument showed that its environmental justice claims went beyond the 24-hour PM_{2.5} issue, a close reading of the oral argument transcript shows just the opposite.¹⁰

¹⁰ The College District contends that, at oral argument, it "attempt[ed] to explain that there was limited reliance" on 24-hour PM_{2.5} in its environmental justice argument. Motion at 19. The College District cites the following discussion:

Judge Reich: And the way [BAAQMD] at least, interprets your environmental justice issue, they also see it as an offshoot of your concern about the effects of PM_{2.5} 24-hour. Is that an accurate statement of your environmental justice concern?

Ms. Hargleroad: Well, I would say it is somewhat limited because part of the environmental justice argument also relies on the fact that the run, which we obtained from [BAAQMD], essentially, inadvertently shows that there is a violation and that there are 2,400 additional sensitive receptors which have not been mapped out and not plotted –

Judge Reich: Okay.

Ms. Hargleroad: – and we do not know where they are located.

Judge Reich: Okay. *But that tells me we are still talking PM_{2.5} 24-hour.*

In sum, the College District has not shown that its arguments encompassed anything separate and apart from its PM_{2.5} claim.¹¹ Thus, the College District fails to demonstrate any factual or legal error either in the Board's conclusion that the 24-hour PM_{2.5} issues were mooted or in its determination that the College District's environmental justice analysis was predicated on the PM_{2.5} issue. Moreover, insofar as the College District is now, in its motion, trying to separate its environmental justice claim from its 24-hour PM_{2.5} claim in light of the Board's determination that the PM_{2.5} claim is moot, the College District is attempting to either raise a new issue or to "reargue the case in a more convincing fashion," neither of which are appropriate in a motion for reconsideration.

3. Claim That the Board's Environmental Justice Analysis Was Inconsistent with Board Precedent

The College District's third contention is that the Order "contradicts the Board's precedent that a proposed PSD permit violates environmental justice when it results in a proportionately high and adverse effect on human health or the environment in low-income or minority population areas because the NAAQS would be violated." Motion at 20. The College District cites several Board cases in this section of its motion. *See id.* at 20-25.

As explained in the previous section, *see supra* Part B.2, the Board, in its Order, did not address the substantive aspects of the College District's environmental justice claim because it

EAB Oral Arg. Tr. at 29 (emphasis added). While the College District may have been attempting to separate the two claims, in making its argument, the College District again *solely* referred to issues related to 24-hour PM_{2.5}. The Board even pointed out that this fact to counsel at the time. Nowhere in its rebuttal did the College District attempt to provide any non-24-hour PM_{2.5} arguments in connection with its environmental justice claim or suggest in any way how its environmental justice argument extended beyond its 24-hour PM_{2.5} issue.

¹¹ *See supra* notes 9 and 10.

found that the environmental justice-related issue was predicated on the College District's 24-hour PM_{2.5} issue which, as a procedural matter, had been mooted by the nonattainment designation. *See* Order at 118-19, 126-27 & nn.110, 116. Because all the College District's 24-hour PM_{2.5} issues, including its environmental justice claim, were dismissed on procedural grounds, the Board did not address the substantive aspects of those 24-hour PM_{2.5} claims and noted this fact in the Order. *See id.* at 118 n.110 (explaining that the Board would not reach any of the College District's substantive claims related to 24-hour PM_{2.5}); *see also id.* at 126-27 & n.116 (explaining that the Board's conclusion that the substance of the College District's PM_{2.5}-related claims had been rendered moot also applied to the College District's environmental justice claim). The Board's Order therefore did not and could not "contradict Board precedent" addressing substantive environmental justice issues in the PSD context. The College District fails to show that the Board made a demonstrable error that would warrant reconsideration of the Board's original treatment of this issue.

4. Claim That the College District's Argument Concerning BAAQMD's Exclusion of All Roadways But One in its Cumulative Air Modeling Analysis Was Distinct From Its 24-Hour PM_{2.5} Claims

The College District lastly argues that the Board "clearly erred by not addressing the College District's distinct argument that BAAQMD did not conduct a cumulative air modeling analysis by excluding all roadways but one, which has with [sic] less traffic." Motion at 26. The College District appears to now be arguing that its challenge was to both annual and 24-hour PM_{2.5}, premising its current argument on the fact that BAAQMD "admitted that its air modeling analysis remains relevant for PSD purposes even disregarding the recent designation of the Bay Area as non-attainment for 24 hour PM_{2.5} as it also must take into account the *annual* PM

requirements.” *Id.* (referring to BAAQMD’s Additional Statement of Basis at 141-42) (emphasis added).

While it is true that BAAQMD mentioned both annual and 24-hour $PM_{2.5}$ in its Additional Statement of Basis, the College District did not indicate in its *petition* that its challenge was related to the annual PM requirements. *See generally* College Dist. Pet. at 26, 33-35. In fact, in its petition, the College District explicitly stated that it was challenging BAAQMD’s “24-hour $PM_{2.5}$ ” analysis, entitling the first of its three “arguments for remand” as follows: “The Air Analysis For 24 hour $PM_{2.5}$ Concluding There Is No Violation Of The NAAQS Is Clearly Erroneous Given The Earlier Modeling By BAAQMD Utilizing The Achievable Emissions Rate Reveals That This Project Violates The Clean Air Act.” Pet. at 26 (Part V.A of the petition) (emphasis added). As part of its first “argument for remand,” the College District included a subargument concerning the roadway, the same issue to which the College District now refers in its Motion. *See id.* at 33-35 (Part V.A.3 of the petition, entitled “No Cumulative Impact Analysis Has Been Performed Because BAAQMD Erroneously Excluded Emissions From All Nearby Roadways But One * * *”). The Board, relying on the College District’s description of its own argument, determined that this issue was mooted along with the other 24-hour $PM_{2.5}$ arguments. Notably, nowhere in Part V.A.3 did the College District state that its subargument went beyond its overarching argument concerning 24-hour $PM_{2.5}$ or in any way included annual $PM_{2.5}$.

Nothing the College District argues in its Motion demonstrates that the Board clearly erred in determining that the College District’s roadways argument was solely connected to its 24-hour $PM_{2.5}$ argument. Insofar as the College District is now, in light of the Board’s

determination that its 24-hour PM_{2.5} was mooted, attempting to argue that its roadways claim was intended to be related to annual PM_{2.5}, its argument is essentially an attempt to raise a new issue, which is impermissible.

5. College District's Claim, in Its Supplemental Motion, That the Board Failed to Address the College District's Challenge to BAAQMD's Rejection of an Auxiliary Boiler
In its supplemental motion, the College District generally contends that the Board's Order

“fails to address the College District's challenge on BAAQMD's rejection of the auxiliary boiler which the College District introduced as achieved in practice BACT.”¹² Suppl. Motion at 1. This general contention is clearly incorrect, as the Board addressed the issue the College District raised in its petition concerning BAAQMD's rejection of an auxiliary boiler. *See* Order at 28-29, 44-56. In fact, the Board addressed the College District's arguments on this issue as part of a larger discussion addressing several arguments from multiple petitioners concerning whether BAAQMD had clearly erred in rejecting an auxiliary boiler as BACT. *See* Order at 23-56. Thus, any generalized claim implying or in any way suggesting that the Board failed to address the issue is incorrect.

The College District also challenges several of the procedural determinations, such as issue preservation and timeliness, that the Board made in connection with the College District's

¹² The issue the College District raised in its petition was somewhat more narrowly framed than in its present form. In its petition, the College District had articulated its “second argument for remand” - the sole issue focused on the auxiliary boiler - as follows: “BAAQMD clearly erred [in] rejecting an auxiliary boiler based on documents which are inapplicable to RCEC.” College Dist. Pet. at 2, 35. As the Board explained above in Part I.A, a petitioner's “failure to present its strongest case in the first instance [i.e., in its petition] does not entitle it to a second chance in the form of a motion to reconsider.” *Steel Dynamics*, at 5. Thus, to the extent the College District is attempting to expand its original argument through its motion for reconsideration, it may not do so.

auxiliary boiler issue. The College District's more specific arguments fail to show that the Board made any demonstrable error of fact or law that would warrant reconsideration.

The College District first claims that a review of its petition shows that, contrary to the Board's conclusion, it did challenge BAAQMD's conclusion that "the College District's \$11,515 value is not cost-effective." Motion at 3 (referring to Order at 54-55). This, however, is not the case.¹³

The College District also appears to dispute the Board's determination that the College District failed to preserve for review its "challenge to BAAQMD's annualized cost estimate of \$1,029,521." *See id.* at 2 (bolding this statement in its quotation from the Board's Order); *see also* Order at 52-53, 55 & n.45 (Board's discussion of this issue). Apparently in support of its

¹³ In its petition, the College District raised two concerns with BAAQMD's consideration and rejection of an auxiliary boiler: first, that BAAQMD had erroneously understated the emissions reductions by relying on inappropriate records, and second, that BAAQMD had erroneously relied on cost estimates from inapplicable facilities. College Dist. Pet. at 35; *see also* Order at 28-29, 44 & n.15 (Board's description of College District's issue). The College District fails to point to anywhere in its petition where it questions BAAQMD's conclusion in the Responses to Public Comments document that "[e]ven [the College District's estimate of] \$11,515 is well above the costs of achieving a ton of CO reductions that [BAAQMD] found to be justified in its cost-effectiveness analysis." *See* Order at 54 (quoting RTC at 115). Nor does it point to anything challenging BAAQMD's discussion of the appropriate cost-effectiveness threshold. *See* Order at 54 (referring to RTC at 70, in which BAAQMD discusses the appropriate cost-effectiveness cutoff value). The College District merely quotes its arguments challenging the emissions reduction numbers and the cost estimates. *See* Suppl. Motion at 3-4. The College District also relies on the fact that it attempted to challenge the cost-effectiveness issue during oral argument. *Id.* at 3 & n.3 (referring to Oral Arg. Tr. at 123-24. Just as the Board considers issues raised for the first time in a reply brief to be untimely because they are akin to a late-filed appeal, *see* Order at 45, 70-71 & n.35 (citing cases and several Board orders in the matter), the Board also considers issues raised for the first time at oral argument to be untimely. *See supra* note 7. The College District further asserts that it challenged cost-effectiveness in its comments on the draft permit. Suppl. Motion at 4. While the Board does not read the College District's comments to explicitly raise the issue of cost-effectiveness, even assuming *arguendo* that the College District's contention is true, it is irrelevant nonetheless. In determining what issues are raised in a permit appeal, the document the Board considers is the petition, not the comments submitted on the draft permit. The Board looks at the underlying comments to ensure that the issue was properly preserved for review and not to find additional appeal issues. *See supra* note 6.

argument,¹⁴ the College District contends that it raised this issue in its comments by “specifically qualif[y]ing] that these are costs ‘provided’ and ‘calculated’ by” the permittee. Suppl. Motion at 4 (referring to its comments of Sept. 16, 2009). The Board is not persuaded that these qualifying phrases were sufficiently specific and clear to put BAAQMD on notice that the College District was questioning the basis of the annualized cost estimate. *See* Order at 44 (explaining that, to preserve an issue for review, an issue must be raised with a reasonable degree of specificity and clarity during the comment period); 40 C.F.R. § 124.19(a); *In re ConocoPhillips Co.*, 13 E.A.D. 768, 801 (EAB 2008); *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 394 n.55 (EAB 2007)). In this section of its motion, in addition to relying on these qualifying phrases, the College District also relies on newly raised, but not newly discovered, evidence and arguments.¹⁵ *See* Suppl. Motion at 4-7. The purpose of a motion for reconsideration is not to reargue issues by referencing information that could have been, but was not, provided in the petition. *See supra* Part I.A.

Finally, the College District also requests the Board reconsider its determination that an issue raised for the first time in the College District’s reply brief – an issue concerning the applicability of BAAQMD’s BACT Workbook to the cost-effectiveness analysis – was

¹⁴ While it is not entirely clear whether these arguments are connected with the College District’s cost-effectiveness argument or its cost argument, the Board reads them to be related to both. BAAQMD and RCEC also read these arguments to be related to the College District’s cost issue. *See* BAAQMD Response to Motion at 12-13; RCEC Response to Motion at 10-11. The Board discusses these arguments in connection with the cost-effectiveness issue in the previous footnote.

¹⁵ In support of this argument, the College District cites to (and attaches as exhibit B to its motion) a 1999 letter from EPA to the Michigan Department of Environmental Quality, *see id.* at 4-5, refers to (and attaches as exhibit C) information about another facility prepared by BAAQMD in 2008, *see id.* at 6, and cites to a 2003 article prepared by Calpine’s Los Medanos Operations Manager, *see id.* at 6-7. None of these documents were mentioned in the College District’s discussion of the auxiliary boiler issue in its petition nor do any of these appear to be “newly-discovered” evidence. The cited documents, in fact, all appear to be publically available data dating back at least two years. Furthermore, it is not clear whether any of these documents are even part of the administrative record. BAAQMD indicates that at least some of them are not. *See* BAAQMD Resp. to Motion at 13.

procedurally barred. *Id.* at 7-9. Notably, the Board, in its Order, explained that the issue was procedurally barred for several reasons. *See* Order at 45 n.35. In challenging the Board's conclusion, the College District contends that its petition "reflected" this issue as did "the general theme of its comments to BAAQMD." Suppl. Motion at 8 & n.4. Neither of these contentions is persuasive¹⁶ and thus are insufficient to demonstrate clear error in the Board's conclusion that the argument was procedurally barred.

In sum, in its Supplemental Motion, not only is the College District incorrect in suggesting that the Board failed to address the auxiliary boiler issue the College District had raised in its petition, but it also fails to demonstrate that the Board committed an error of fact or law in making several procedural determinations it challenges.¹⁷

C. Stay Request

In both its motions, the College District requests that the Board issue an immediate stay of the Order pending consideration of its motions. Motion at 1, 3; Suppl. Motion at 9. The primary reason the College District provides to justify a stay is "so that this Board's jurisdiction may be

¹⁶ The excerpt the College District quotes from its petition does not mention BAAQMD's guidance document or its applicability whatsoever. *See* Suppl. Motion at 8 n.4 (quoting College Dist. Pet. at 22). Moreover, the "general theme" of comments a petitioner sent to a permit issuer cannot provide the basis for allowing a petitioner to raise an issue for the first time in its reply brief.

¹⁷ The College District also notes that, in the Order, the Board had stated that: "[the College District] only challenges BAAQMD's alleged failure to consider the applicable Caithness data, *an argument that has been demonstrated to be factually incorrect.*" Suppl. Motion at 2 (quoting Order at 55) (emphasis added). The College District asserts that the basis for the italicized portion of the statement is unclear. *Id.* at 2 n.2. As BAAQMD correctly points out in its brief, "[t]he Board's discussion of this issue is set forth in the three pages of text leading up to this statement, and so this point is clear from reading the discussion in its entirety and there was no need for a further, more specific reference." BAAQMD Resp. to Motion at 10 n.9.

fully preserved to address these important issues.” Motion at 32. In its Motion, the College District additionally requests that, if the Board stays its November 18, 2010 Order but denies the College District’s motion for reconsideration, the Board “continue the stay order for ten court days” to allow the College District “to move for a stay before the Ninth Circuit with a petition for review.” Motion at 3; *see also id.* at 1.

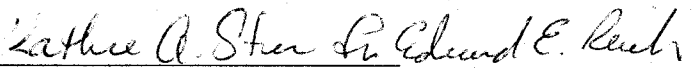
Because the Board is denying the motions for reconsideration and/or clarification on their merits at this time, the College District’s request for a stay pending consideration of its motion for reconsideration has been rendered moot. The Board finds no good cause to support the College District’s further stay request, and it is denied.

II. CONCLUSION

The College District’s Motion and Supplemental Motion for reconsideration must be rejected because the College District has not shown that the Board made a demonstrable error of fact or law. The request for a stay is denied.

So ordered.

ENVIRONMENTAL APPEALS BOARD


Edward E. Reich
Environmental Appeals Judge

Date: *December 17, 2010*

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Motion and Supplemental Motion for Reconsideration and/or Clarification and Stay in the matter of Russell City Energy Center, PSD Appeal Nos. 10-01, 10-02, 10-03, 10-04, and 10-05, were sent to the following persons in the manner indicated:

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Dated: 12/17/2010

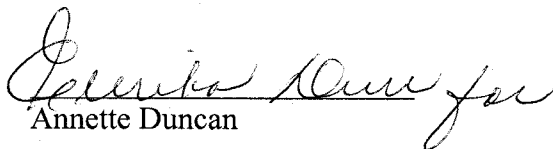
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