IN RE SUTTER POWER PLANT

PSD Appeal Nos. 99–6 & 99–73

ORDER DENYING REVIEW

Decided December 2, 1999

Syllabus

Two petitioners seek review of a prevention of significant deterioration ("PSD") permit issued by Region IX of the U.S. Environmental Protection Agency to Calpine Corporation for the construction of a new electrical power plant. The plant, which will be situated in rural Sutter County, California, outside Yuba City, is designed to produce 500 megawatts of electricity by burning natural gas and generating steam energy. The PSD permit authorizes the plant's emissions of carbon monoxide, nitrogen oxides, and particulate matter in accordance with section 165 of the Clean Air Act ("CAA"), 42 U.S.C. § 7475.

Ms. Joan Joaquin-Wood filed the first petition for review of the PSD permit on August 17, 1999, alleging that: (1) Region IX failed to conduct an adequate review of alternative sites for the power plant; (2) the plant's emissions will cause the incidence of respiratory illness in Sutter County to increase; (3) Calpine's purchase of emissions credits will preclude an overall reduction in Sutter County air pollution; and (4) Sutter County's economically disadvantaged farming communities should not be subjected to "tiny particulate matter" and other pollutant emissions from the power plant. Mr. and Mrs. Bob Amarel, Jr. filed the second petition for review on September 29, 1999.

Held: The petitions for review of the Sutter Power Plant PSD permit are denied. Taking Ms. Joaquin-Wood's allegations in the order listed above, review is denied on the first issue because petitioner failed to identify any error in Region IX's decision not to reconsider, in the context of issuing a PSD permit, the plant siting decision. The Environmental Appeals Board ("Board") finds no clear error, in the circumstances of this case, in the Region's decision to defer questions regarding the siting of the facility to the other federal and state agencies that evaluated the project in this regard. Review is denied on the second and fourth issues (regarding alleged causation of an increase in respiratory illnesses and impacts on economically disadvantaged farming communities) because these issues were not properly preserved for appellate review. With respect to Ms. Joaquin-Wood's third issue regarding emissions credits, the Board lacks jurisdiction to decide it because the emissions credit requirement relevant here springs from the CAA nonattainment area program, not the PSD program. Thus, Ms. Joaquin-Wood's petition for review is denied. As for the Amarels, their petition is denied because it is untimely. The petition was filed more than two months after Region IX issued the final PSD permit, rather than within the requisite thirty days.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Fulton:

The Environmental Appeals Board ("Board") is presented in this case with two petitions seeking review of a prevention of significant deterioration ("PSD") permit issued by Region IX of the U.S. Environmental Protection Agency ("EPA") to Calpine Corporation for the construction of a new electrical power plant. The plant, which will be situated in rural Sutter County, California outside Yuba City, is designed to produce 500 megawatts of electricity by burning natural gas and generating steam energy. The PSD permit authorizes the plant's emissions of carbon monoxide, nitrogen oxides, and particulate matter in accordance with section 165 of the Clean Air Act ("CAA"), 42 U.S.C. § 7475. For the reasons expressed below, we deny the petitions for review.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

Congress enacted the PSD provisions of the CAA in 1977 for the purpose of, among other things, "insur[ing] that economic growth will occur in a manner consistent with the preservation of existing clean air resources." CAA § 160(3), 42 U.S.C. § 7470(3). To that end, parties must obtain preconstruction approval (i.e., PSD permits) to build new major stationary sources, or to make major modifications to existing sources, in areas of the country deemed to be in "attainment" or "unclassifiable" with respect to federal air quality standards called "national ambient air quality standards" ("NAAQS"). *See* CAA §§ 107, 160–169B, 42 U.S.C. §§ 7407, 7470–7492.

NAAQS are established on a pollutant-by-pollutant basis and are currently in effect for six air contaminants: sulfur oxides (measured as sulfur dioxide ("SO_2")), particulate matter ("PM_{10}"),[1] carbon monoxide ("CO"), ozone, nitrogen dioxide ("NO_2"), and lead. 40 C.F.R. § 50.4–.12. In areas deemed to be in "attainment" for any of these pollutants, air quality meets or is cleaner than the NAAQS for that pollutant. CAA § 107(d)(1)(A)(i), 42 U.S.C. § 7407(d)(1)(A)(i); *In re Maui Elec. Co.,* 8 E.A.D. 1, 4 (EAB 1998).

[1] PM_{10} is comprised of particulate matter with an aerodynamic diameter of 10 microns or less. 40 C.F.R. § 50.6(c); U.S. EPA, Office of Air Quality Planning & Standards, *New Source Review Workshop Manual* A.18 (draft Oct. 1990) ("*Draft NSR Manual*").

In "unclassifiable" areas, air quality cannot be classified on the basis of available information as meeting or not meeting the NAAQS. CAA § 107(d)(1)(A)(iii), 42 U.S.C. § 7407(d)(1)(A)(iii). Areas may also be designated as "nonattainment," meaning that the concentration of a pollutant in the ambient air exceeds the NAAQS for that pollutant. CAA § 107(d)(1)(A)(ii), 42 U.S.C. § 7407(d)(1)(A)(ii). The PSD program is not applicable, however, in nonattainment areas.[2] *See* CAA § 161, 42 U.S.C. § 7471.

Applicants for PSD permits must demonstrate, through analyses of the anticipated air quality impacts associated with the construction and operation of their proposed facilities, that their facilities' emissions will not cause or contribute to a violation of any applicable NAAQS or PSD "increment."[3] CAA § 165(a)(3), 42 U.S.C. § 7475(a)(3); 40 C.F.R. § 52.21(k)–(m). In addition, applicants for PSD permits must employ the "best available control technology," or "BACT," to minimize emissions of pollutants that may be emitted by the new source in amounts greater than applicable "significant" levels established by the PSD regulations.[4] CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 52.21(j)(2). As the Board has noted on prior occasions, "[t]he requirements of preventing violations of the NAAQS and the applicable PSD increments, and the required use of BACT to minimize emissions of air pollutants, are the core of the PSD regulations." *In re Encogen Cogeneration Facility,* 8 E.A.D. 244, 247 (EAB 1999); *accord In re Hawaii Elec. Light Co.,* 8 E.A.D. 66, 73 (EAB 1998).

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[2] In nonattainment areas, the New Source Review requirements of CAA §§ 171–193, 42 U.S.C. §§ 7501–7515; 40 C.F.R. §§ 51.160–.165, apply in lieu of the PSD requirements. Notably, a single geographic area may be designated as attainment or unclassifiable for one or more of the six pollutants and as nonattainment for one or more of the others. *See Draft NSR Manual* at 4. In such cases, the PSD program will apply in that geographic area, but only to the attainment/unclassifiable pollutants.

[3] PSD increments represent the maximum allowable increase in concentration that may occur above a baseline ambient air concentration for a pollutant. *See* 40 C.F.R. § 52.21(c) (increments for six regulated air pollutants).

[4] The significance levels are as follows:

POLLUTANT	SIGNIFICANCE LEVEL
CO	100 tons per year ("tpy")
NO_x	40 tpy
SO_2	40 tpy
PM_{10}	15 tpy
Ozone (as VOCs)	40 tpy
Lead	0.6 tpy

40 C.F.R. § 52.21(b)(23).

B. *Factual and Procedural Background*

In 1998, Calpine filed an application with Region IX for permission to construct a new power plant consisting of two combustion turbine generators ("CTGs"), two heat recovery steam generators ("HRSGs") with duct burners, a steam turbine generator ("STG"), and associated equipment. Each CTG is expected to produce approximately 170 megawatts of electricity. The exhaust gases from the CTGs will be piped to the HRSGs, which will generate steam that will in turn be piped to the STG for the production of an additional 160 megawatts of electricity. Calpine proposed to site the facility in a portion of Sutter County designated as attainment or unclassifiable for CO, NO_2, PM_{10}, and SO_2 and nonattainment for ozone. 40 C.F.R. § 81.305. The plant's CTGs and HRSGs have the potential to emit NO_x, CO, and PM_{10} in quantities sufficient to trigger the protections of the PSD program,[5] and hence necessitated Calpine's application.

Calpine also had to apply for permits and approvals to construct its proposed plant under several other federal laws, as well as under applicable state and local laws. For example, given the magnitude of the proposed project and its potential impacts on the environment, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4370d, and the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–1534, both applied to the project. The U.S. Department of Energy's Western Area Power Authority ("WAPA") acted as the lead agency under NEPA and, in conjunction with the California Energy Commission ("CEC") and others, prepared an environmental impact statement for the project. As for the ESA, WAPA conducted a biological assessment and engaged in formal consultation with the U.S. Fish & Wildlife Service regarding impacts of the proposed plant on endangered and threatened species and critical habitat. Under state law, the CEC has primary authority for power plant siting issues, Cal. Pub. Res. Code §§ 22519(c), 25500, and it conducted its own environmental review and plant siting analysis for the project. In addition, given the status of Sutter County as a nonattainment area for ozone, Calpine was required under the CAA to obtain a nonattainment area permit from the Feather River Air Quality Management District ("AQMD") for its prospective emissions of the ozone precursors NO_x and volatile organic compounds ("VOCs").

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[5] The proposed Sutter Power Plant has the potential to emit 483 tpy of CO, 205 tpy of NO_x, 31.5 tpy of SO_2, 92.5 tpy of PM_{10}, 23.7 tpy of VOCs, and 0.0 tpy of lead. Region IX's Response to Petition for Review attachment 2 tbl.2 (Ambient Air Quality Impact Report).

In response to Calpine's PSD application, Region IX initiated a course of action designed to encourage public participation in the permit decisionmaking process. *See In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121, 124 (EAB 1999) (CAA "emphasizes the importance of public participation and input into the decisionmaking process"). On June 14, 1999, the Region solicited public comments on its proposal to issue a PSD permit for the construction of the Sutter Power Plant. The Region received only one set of comments, in a letter from Ms. Joan Joaquin-Wood. *See* Letter from Joan Joaquin-Wood to Barbara Witter, EPA Region IX (July 14, 1999) ("Wood Comments"). The Region responded to each of Ms. Joaquin-Wood's comments and concluded that "the comment letter does not provide any basis for withdrawing its proposed decision to issue the [Sutter Power Plant] PSD Permit to Calpine and does not contain any basis for making changes in specific conditions." EPA Region IX, Response to Comments from Joan Joaquin-Wood on Draft PSD Permit for Calpine Corporation (NSR 4–4–4, SAC 98–01) at 1 ("Response to Comments"). Accordingly, on July 21, 1999, Region IX issued the final PSD permit to Calpine without making any changes to the proposed permit. Two appeals, and ensuing filings, followed, as described in the following paragraphs.

1. *Joaquin-Wood Petition*

On August 17, 1999, Joan Joaquin-Wood filed a petition for review of the final PSD permit. Ms. Joaquin-Wood's petition raises four allegations: (1) Region IX failed to conduct an adequate review of alternative sites for the power plant; (2) the plant's emissions will cause the incidence of respiratory illness in Sutter County to increase; (3) Calpine's purchase of emissions credits will preclude an overall reduction in Sutter County air pollution; and (4) Sutter County's economically disadvantaged farmers should not be subjected to "tiny particulate matter" and other pollutant emissions from the power plant. Letter from Joan Joaquin-Wood to Environmental Appeals Board 1 (Aug. 16, 1999) ("Wood Pet.").

In response to Ms. Joaquin-Wood's petition, Region IX filed a motion for an expedited briefing schedule, arguing that the issues raised in the petition were issues of law and would not require extensive argument. Region IX's Motion for Expedited Briefing Schedule at 1. The Board denied the motion, and Region IX subsequently filed a response to the petition on September 9, 1999. Region IX's Response to Petition for Review ("RIX Resp."). Calpine also filed a response to the petition on September 3, 1999. Calpine's Response to Petition for Review ("Calpine Resp.").

On September 15, 1999, Ms. Joaquin-Wood filed a motion for leave to file a reply to the responses submitted by Region IX and Calpine. The Board granted the motion and ordered petitioner to file a reply by close of business on October 3, 1999. Order Granting Motion for Leave to File Reply Brief at 2. Ms. Joaquin-Wood filed a timely reply. *See* Petitioner's Reply Brief ("Reply Br."). On October 21, 1999, the Board granted Region IX's request for leave to file a "supplemental response" to petitioner's reply memorandum and ordered that the response be filed by October 27, 1999. Order Granting Motion for Leave to File Supplemental Response at 1–2. The Region filed its supplemental response on October 28, 1999, one day late. *See* Region IX's Supplemental Response to Petition for Review ("RIX Supp. Resp."). Finally, on November 3, 1999, Ms. Joaquin-Wood filed a motion for leave to file a supplemental reply to the Region's supplemental response, which the Board hereby denies.[6]

2. *Amarel Petition*

Meanwhile, on September 29, 1999, Mr. and Mrs. Bob Amarel, Jr. filed a petition for review of the Sutter Power Plant PSD permit. Letter from Mr. & Mrs. Bob Amarel, Jr. to Environmental Appeals Board (Sept. 26, 1999). Region IX filed a response to this petition on November 2, 1999, and Calpine filed a motion for leave to file a response (which we hereby grant in light of Calpine's status as permittee), as well as the associated response, on October 25, 1999.

II. *DISCUSSION*

A. *Scope of Board Review*

When the Board receives a petition to review a PSD permit, it begins its analysis by assessing the petitioner's compliance with a number of important threshold procedural requirements. The Board will also determine whether the issues raised in the petition fall within the purview of the PSD program and are thus subject to the Board's jurisdiction. The procedural and jurisdictional requirements are briefly explained in the following sections.

[6] At this time, the Board has sufficient information before it to decide this case. Further briefing is unnecessary.

1. *Threshold Procedural Requirements*

The Board's authority to review PSD permits is set forth in EPA's regulations establishing procedures for the issuance, modification, and termination of such permits. *See* 40 C.F.R. pt. 124. Interested parties may petition the Board for review of PSD permit conditions if:

> (1) They do so within thirty days after issuance of the final permit decision; and
> (2) They filed comments on the draft permit.

40 C.F.R. § 124.19(a). In accordance with these rules, petitions filed more than thirty days after permit issuance will be dismissed as untimely. *Id.; see In re AES Puerto Rico L.P.,* 8 E.A.D. 324, 328 (EAB 1999); *In re Envotech,* L.P., 6 E.A.D. 260, 265–66 (EAB 1996). Moreover, petitions received by parties that did not file comments on the draft permit will be dismissed because the parties lack "standing" to appeal the final permit.[7] *See* 40 C.F.R. § 124.19(a); *In re Encogen Cogeneration Facility,* 8 E.A.D. 244, 249–51 (EAB 1999); *Envotech,* 6 E.A.D. at 266–67.

Petitioners that meet the threshold requirements of timeliness and standing must also submit petitions that:

> (1) Demonstrate that any issues being raised were raised during the public comment period;[8] and
> (2) Show that the permit condition in question is based on:
> (a) A finding of fact or conclusion of law that is clearly erroneous; or
> (b) An exercise of discretion or an important policy consideration that the Board should, in its discretion, review.

[7] Parties who did not file comments on the draft permit may petition only for review of the changes made (if any) from the draft to the final permit decision. 40 C.F.R. § 124.19(a).

[8] Alternatively, a petitioner may demonstrate that an issue for which it seeks review was not "reasonably ascertainable" during the public comment period. *See* 40 C.F.R. § 124.13; *In re Encogen Cogeneration Facility,* 8 E.A.D. 244, 250 n.8 (EAB 1999). Neither of the petitioners in this case have argued that review should be granted under this alternative standard.

40 C.F.R. § 124.19(a). The intent of these rules is to ensure that the permitting authority—here, Region IX—has the first opportunity to address any objections to the permit, and that the permit process will have some finality. *See Encogen,* 8 E.A.D. at 249–50 ("The effective, efficient, and predictable administration of the permitting process demands that the permit issuer be given the opportunity to address potential problems with draft permits before they become final."). "'In this manner, the permit issuer can make timely and appropriate adjustments to the permit determination, or, if no adjustments are made, the permit issuer can include an explanation of why none are necessary.'" *In re Essex County (N.J.) Resource Recovery Facility,* 5 E.A.D. 218, 224 (EAB 1994) (quoting *In re Union County Resource Recovery Facility,* 3 E.A.D. 455, 456 (Adm'r 1990)). As EPA explained when it promulgated the part 124 rules, the Board's power of review "should be only sparingly exercised," and "most permit conditions should be finally determined at the Regional level." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see In re Maui Elec. Co.,* 8 E.A.D. 1, 7 (EAB 1998).

In complying with these requirements, petitioners must include specific information supporting their allegations. It is not sufficient simply to repeat objections made during the comment period; instead, a petitioner "must demonstrate why the Region's response to those objections (the Region's basis for its decision) is clearly erroneous or otherwise warrants review." *In re LCP Chems.,* 4 E.A.D. 661, 664 (EAB 1993); *accord Encogen,* 8 E.A.D. at 251. The burden of demonstrating that review is warranted rests with the petitioner. *See* 40 C.F.R. § 124.19(a); *AES Puerto Rico,* 8 E.A.D. at 328; *In re Hawaii Elec. Co.,* 8 E.A.D. 66, 71 (EAB 1998).

Despite the apparent stringency of the foregoing procedural requirements, the Board broadly construes petitions filed by persons who are unrepresented by legal counsel. *See In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121, 127 (EAB 1999); *In re Commonwealth Chesapeake Corp.,* 6 E.A.D. 764, 772 (EAB 1997); *Envotech,* 6 E.A.D. at 268; *In re Beckman Prod. Servs.,* 5 E.A.D. 10, 19 (EAB 1994). The Board is concerned that public participation be meaningful and not unduly hampered by process restrictions, and thus does not expect such petitions to contain sophisticated legal arguments or to employ precise technical or legal terms.[9] That being said, however, the Board nonetheless does expect such petitions to provide sufficient specificity to apprise the Board of the issues being

[9] As the First Circuit Court of Appeals has held:

> It would be inconsistent with the general purpose of public participation regulations to construe the regulations strictly. Such a strict construction would have

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raised. *In re Puerto Rico Elec. Power Auth.,* 6 E.A.D. 253, 255 (EAB 1995). The Board also expects the petitions to articulate some supportable reason or reasons as to why the permitting authority erred or why review is otherwise warranted. *Beckman,* 5 E.A.D. at 19.

2. *Board Jurisdiction to Review PSD Permits*

Apart from the procedural issues described above, the Board must also have jurisdiction to review issues raised in a petition. Under the existing regulatory structure, the Board has jurisdiction to review issues directly related to permit conditions that implement the federal PSD program. *Knauf,* 8 E.A.D. at 161. As we have explained, "The PSD review process is not an open forum for consideration of every environmental aspect of a proposed project, or even every issue that bears on air quality. In fact, certain issues are expressly excluded from the PSD permitting process. The Board will deny review of issues that are not governed by the PSD regulations because it lacks jurisdiction over them."[10] *Id.* at 127; *see id.* at 161–73 (denying review based on lack of jurisdiction to consider issues concerning hazardous or unregulated air pollutant impacts, use of landfill for waste disposal, emissions offsets, NEPA issues, opacity limits, and other issues); *Encogen,* 8 E.A.D. at 259–60 (no jurisdiction to consider acid rain, noise, and water-related issues).

B. *Joaquin-Wood Petition*

In her petition for review of Calpine's PSD permit, Ms. Joaquin-Wood raises four objections. *See* Wood Pet. at 1. Each objection is addressed in turn below.

> the effect of cutting off a participant's ability to challenge a final permit by virtue of imposing a scientific and legal burden on general members of the public who, initially, simply wish to raise their legitimate concerns * * * in the most accessible and informal public stage of the administrative process, where there is presumably some room for give and take between the public and the agency.

Adams v. U.S. EPA, 38 F.3d 43, 52 (1st Cir. 1994).

[10] As we noted in *Knauf,* "[i]n determining whether we have jurisdiction, the Board places considerable reliance on how the issue is framed in the petition for review, such as the basis upon which relief is being sought." *Knauf,* 8 E.A.D. at 161–62.

1. *Alternative Sites*

Ms. Joaquin-Wood contends that Region IX did not engage in an adequate review of alternative locations in which to site the proposed power plant. Wood Pet. at 1 ("alternative sites for the project were not adequately reviewed"); *see also* Reply Br. at 9–15. In response, the Region argues that this "generalized objection" simply reiterates the petitioner's comments on the proposed permit without specifically identifying clear errors of law or fact on the Region's part or important policy considerations warranting Board review, as required by the part 124 regulations and Board precedent. RIX Resp. at 5–7. The Region also asserts that multiple federal, state, and local governmental agencies have been involved in approving this power plant. The Region points out that under California law, the CEC has "primary authority over issues concerning the siting of power plants and transmission routes." *Id.* at 7 n.5; *see* Cal. Pub. Res. Code §§ 22519(c), 25500. According to the Region, "[l]and use issues in selecting an appropriate site for the project were subject to consideration and public hearings by the [CEC] and to review under [NEPA] by the federal Department of Energy. Issues concerning land use, including potential alternative sites, were resolved by those agencies prior to EPA's PSD permitting decision." RIX Resp. at 7–8.

In its response to the petition, Calpine echoes many of the arguments raised by Region IX. *See* Calpine Resp. at 7–11. Calpine also alleges that Ms. Joaquin-Wood failed to demonstrate that her objection was raised during the public comment period. *Id.* at 4–6. In particular, Calpine contends that the generalized siting issue petitioner raises before us is not the same siting issue she raised in her comments, in which she singled out "at least three alternative" (yet unidentified) sites as having not received consideration. *Id.* at 5.

As pointed out by the Region and Calpine, the land use planning process that yielded the site for the proposed plant had run its course prior to EPA's permitting decision. As the Region explained, it duly analyzed the impacts the proposed facility, as sited, would have on air quality, in keeping with the PSD regulations. RIX Resp. at 8–9; *see id.* attachment 2 (Ambient Air Quality Impact Report). Petitioner has not identified any error in the Region's decision not to reconsider the siting decision in the context of issuing a PSD permit. *See* Wood Pet. Thus, we find no clear error, in the circumstances of this case, in the Region's decision to defer questions regarding the siting of the facility to the other agencies that evaluated the project in this regard. *Cf. In re EcoEléctrica,* L.P., 7 E.A.D. 56, 74 (EAB 1997). Accordingly, review is denied on this ground.

2. *Emissions Reduction Credits*

In her petition for review, Ms. Joaquin-Wood alleges that "the purchase of Emission Reduction Credits by Calpine do[es] not improve or even mitigate the additional pollution that will occur * * *; this means only that pollution that has been removed from other sites will be put back into [Sutter County's] air." Wood Pet. at 1. The Region responds to this allegation the same way it did to the allegation just addressed, arguing that it merely reiterates the petitioner's very general comments without specifically identifying clear errors of law or fact on the Region's part or important policy considerations warranting Board review. RIX Resp. at 5–7, 11. In addition, the Region notes that Calpine's purchase of offset credits is authorized under its nonattainment permit from the Feather River AQMD, not its PSD permit. *Id.* at 11. Accordingly, asserts the Region, Ms. Joaquin-Wood cannot seek review of the Feather River AQMD's nonattainment decision through an appeal of an EPA-issued PSD permit. *Id.* For its part, Calpine again echoes the Region's arguments and also repeats its theme that petitioner failed to demonstrate that the issue raised on appeal is the same as the issue raised during the comment period. Calpine Resp. at 4–9, 12–13.

Petitioner's argument is jurisdictionally flawed. The Board may not review, in a PSD appeal, the decisions of a state agency made pursuant to non-PSD portions of the CAA or to state or local initiatives and not otherwise relating to permit conditions implementing the PSD program. *See Knauf,* 8 E.A.D. 167–68; *see also In re Milford Power Plant,* 8 E.A.D. 670, 675–78 (EAB 1999). According to the Region, the emissions credits at issue here were imposed via Calpine's nonattainment area permit, which the Feather River AQMD issued; petitioner has not shown otherwise. Moreover, the petitioner has not identified any conditions in Calpine's PSD permit or pointed to any PSD provisions in the CAA or regulations calling for emissions reduction credit purchases. Thus, the Board denies review of the PSD permit on this issue due to lack of jurisdiction. *See Knauf,* 8 E.A.D. at 167–68.

3. *Farmers and Particulate Emissions*

Ms. Joaquin-Wood states in her petition for review that "92.4 tons of tiny particulate matter annually, in addition to the other pollutants, should not be loosed on [Sutter County's] economically disadvantaged farming communities." Wood Pet. at 1. In response, both Region IX and Calpine assert that Ms. Joaquin-Wood did not raise this objection during the public comment period. RIX Resp. at 11–12; Calpine Resp. at 6. Region IX also contends that this objection was not reasonably

ascertainable from petitioner's other comments and that, even if it were reasonably ascertainable, the objection is not sufficiently specific to warrant Board review. RIX Resp. at 12. Calpine joins in the Region's argument regarding lack of the requisite specificity. Calpine Resp. at 7. Finally, both parties claim that with respect to the Region's PM_{10} BACT determination, petitioner provides no facts showing that the Region made a clear error of fact or law or abused its discretion, or that any other important issue warrants discretionary Board review of that determination. RIX Resp. at 5–6, 12; Calpine Resp. at 10, 13–14.

Petitioner asserts that this objection was preserved for Board review, claiming that she raised the point in paragraphs 2, 3, 7, and 8 of her comments on the proposed PSD permit. Reply Br. at 15. These paragraphs, however, contain very general, unsupported statements that do not allege any particular error or errors on Region IX's part. For example, petitioner wrote:

> I object to the placement of this project in the middle of rice fields, prune orchards, and homes, and that the power lines will be next to the Sutter Wildlife Refuge.
>
> Construction will disrupt farming for many months.

Wood Comments at 1 ¶¶ 2–3. Paragraph 7 of petitioner's comments contains a claim that an additional hearing is necessary to explain why the proposed power plant may emit NO_2, VOCs, and PM_{10} into the "already polluted air of Sutter County," and paragraph 8 contains allegations regarding rice farmers selling "burn credits" to Calpine, which purportedly will result in a failure to reduce the amount of SO_2 and ozone in Sutter County's air. *Id.* at 1 ¶¶ 7–8.

None of the comments referred to by petitioner, or any other comments for that matter, fairly raise the issue advanced on appeal—that the economically disadvantaged farming communities of Sutter County should not be subjected to the proposed plant's particulate and other emissions.[11] Moreover, petitioner does not claim that this issue was not

[11] Ms. Joaquin-Wood did mention the 92.4 tpy PM_{10} limit in her comments, Wood Comments at 1 ¶ 7, but she neither linked the PM_{10} limit to economically disadvantaged farming communities of Sutter County nor identified any errors or abuses allegedly committed by Region IX in establishing this emission limit. Instead, she requested that the Region hold a hearing to "explain why" the proposed plant's NO_x, VOCs, and PM_{10} limits were set where they were. *See id.* The Region responded in reasonable fashion to this comment, explaining that it did not hold such a hearing because it deemed the public

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reasonably ascertainable at the time she filed her comments. *See* 40 C.F.R. § 124.13 (petitioners "must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period"). As we have repeatedly held, the Board will not consider arguments, such as this one, made for the first time on appeal. *See,* e.g., *In re Rockgen Energy Center,* 8 E.A.D. 536, 540 (EAB 1999); *In re Encogen Cogeneration Facility,* 8 E.A.D. 244, 249–50 (EAB 1999); *In re Maui Elec. Co.,* 8 E.A.D. 1, 8–10 (EAB 1998). Thus, review of the PSD permit is denied on this ground.

4. *Increased Incidences of Respiratory Illness*

Finally, Ms. Joaquin-Wood alleges that the proposed power plant "will further pollute [Sutter County's] already "moderately" polluted air, thereby increasing the already higher-than-average respiratory illness in the county." Wood Pet. at 1. In response, Region IX notes that NAAQS "'are set at levels that the Administrator of EPA has determined are necessary to protect the public health and welfare'" and that PSD increments provide an extra measure of safety in this regard. RIX Resp. at 9 (quoting *Knauf,* 8 E.A.D. at 148). According to the Region, the air quality analysis conducted for the proposed plant showed that, as long as the plant complies with its PSD permit, it will not cause or contribute to an exceedence of any NAAQS or PSD increment. With the NAAQS as the bellwether of health protection, the Region argues that this new plant's construction and operation will not compromise the respiratory health of the surrounding community. RIX Resp. at 10. The Region further asserts that the Board should deny review because the petitioner failed to provide data or other information refuting the power plant's air quality impact analysis or challenging the NAAQS and increments as insufficiently protective of the public health. *Id.* Calpine follows the same line of reasoning in its response to the petition. *See* Calpine Resp. at 11–12.

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interest in the project to be low (as evidenced by its receipt of only one comment letter) and because it did not believe any issues in the draft PSD permit required clarification. *See* Response to Comments at 3–4. Petitioner could have but did not object to this finding on appeal. What she cannot do, however, is what she did do: completely change the focus of her underlying comment and raise that for the first time before the Board. *See,* e.g., *In re Rockgen Energy Center,* 8 E.A.D. 536, 546 (EAB 1998) (issues that are reasonably ascertainable but not raised during the comment period are not preserved for review by the Board).

Ms. Joaquin-Wood contends that it is not sufficient to rely solely on the NAAQS to determine whether adverse health impacts will occur as a result of emissions from the new plant. Instead, Ms. Joaquin-Wood claims that collateral environmental impacts caused by emissions of unregulated pollutants may be considered in the determination of BACT. Reply Br. at 3–4. In this case, Region IX chose Selective Catalytic Reduction ("SCR") technology as BACT. SCR uses ammonia as a catalyst to reduce NO_X emissions, and some portion of unreacted ammonia apparently escapes from the exhaust stack as "ammonia slip." According to Ms. Joaquin-Wood, ammonia slip reacts with nitric acid in the ambient air to form ammonium nitrate, which can be measured as PM_{10}. Assuming an average ammonia slip of 5 parts per million dry volume ("ppmvd") from the SCR, Ms. Joaquin-Wood estimates that approximately 438 tons per year ("tpy") of secondary PM_{10} emissions will be added to the air of Sutter County, which is above and beyond the plant's permitted PM_{10} emissions.[12] *Id.* at 5–6. Ms. Joaquin-Wood claims that Region IX's BACT analysis is flawed because these significant secondary impacts were not considered. *Id.* at 2–8.

In its supplemental response to petitioner's reply, the Region contends, among other things, that its purported failure to consider secondary PM_{10} emissions associated with the use of SCR as BACT cannot be raised for the first time on appeal. Supplemental Response to Petition for Review at 1–5 ("Supp. Resp."). According to the Region, Ms. Joaquin-Wood "never raised during the comment period the issue of potential environmental effects associated with SCR," *id.* at 4, and the allegation that secondary PM_{10} emissions will approach 450 tpy is wholly new.[13] *Id.* at 5.

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[12] Ms. Joaquin-Wood states:

> Assuming the average ammonia slip over the life of the SCR catalyst is 5 ppmvd, the Project would emit about 93 tons/yr of [ammonia]. * * * Further assuming that one lb mole of [ammonia] reacts to form one lb mole of [ammonium nitrate], up to 438 tons/yr (2,398 lb/day) of secondary PM_{10} could be formed in the stack and downwind assuming adequate [nitric acid] is available.

Reply Br. at 5–6.

[13] Moreover, even if the issue were deemed preserved for review, the Region contends that Ms. Joaquin-Wood committed substantial errors in her calculation of secondary PM_{10} emissions. The Region states:

> The science of secondary PM formation is far more complex and far less certain than presented by Petitioner. To form secondary PM emissions, ambient ammonia must react with ambient nitrates or sulfates. It is the presence or absence of these chemicals in the ambient air that determine[s] the potential for secondary PM emissions. It is also extremely difficult to determine the source of those ambient ammonia emissions which react with [nitric acid]. Further, the reactivity

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The only comments on the permit offered by Ms. Joaquin-Wood relating to this point read as follows:

> No mention of the effect of the plant's emissions on asthma sufferers has ever been made.
>
> * * * * * * *
>
> There should be an additional hearing to explain why this plant is being allowed to emit * * * 92.4 tons of tiny particulate matter into the already polluted air of Sutter County.

Wood Comments at 1. We agree with the Region that the complex issue of ammonia slip/secondary PM_{10} formation from SCR use was not raised in these comments. *See* 40 C.F.R. § 124.13. Indeed, the comments make no reference to ammonia as a pollutant of concern, nor do they indicate concern regarding SCR as a source of PM_{10} emissions not contemplated by the permit. To the contrary, the comments' reference to 92.4 tons of particulate matter—the amount contemplated by the permit—belies the suggestion that they should be read as contemplative of the worry expressed on appeal that SCR technology would result in 438 tons of fine particulate matter beyond that envisioned by the permit. While it is appropriate to hold permitting authorities accountable for a full and meaningful response to concerns fairly raised in public comments, such authorities are not expected to be prescient in their understanding of vague or imprecise comments like those advanced here. "At a minimum, commenters must present issues with sufficient specificity to apprise the permit issuing authority of the issues being raised. Absent such specificity, the permit issuer cannot meaningfully respond to comments." *In re Rockgen Energy Center,* 8 E.A.D. 536, 547–48 (EAB 1999). This principle is no less important in the context of petitioners not represented by counsel. *See,* e.g.*, In re Commonwealth Chesapeake Corp.,* 6 E.A.D. 764, 772 (EAB 1997).

Thus, we must deny review on this ground. *See In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121, 126 n.9 (EAB 1999) ("[n]ew issues raised for

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of the compounds depends on highly variable local conditions, including temperature and meteorologic conditions. It is, therefore, virtually impossible to quantify secondary PM emissions from ammonia slip associated with SCR at this time.

Supp. Resp. at 6–7 (citations omitted). The Region contends that Ms. Wood's calculations contain too many assumptions to be credible. *Id.* at 6–7 & n.4.

the first time at the reply stage of these proceedings are equivalent to late filed appeals and must be denied on the basis of timeliness").

C. *Amarel Petition*

As explained in Part II.A.1 above, petitions for review of PSD permits must be filed within thirty days after the issuance of a final permit decision. *See supra* Part II.A.1; 40 C.F.R. § 124.19(a). Late-filed appeals will be dismissed as untimely. *In re AES Puerto Rico L.P.,* 8 E.A.D. 324, 328 (EAB 1999). Here, the Amarels filed their petition with the Board on September 29, 1999, more than two months after Region IX's issuance of Calpine's final PSD permit on July 21, 1999. The Amarels' petition therefore must be dismissed as untimely. *See* 40 C.F.R. § 124.19(a); *AES Puerto Rico,* 8 E.A.D. at 328–330; *Beckman Prod. Servs.,* 5 E.A.D. 10, 15–16 (EAB 1994).

III. *CONCLUSION*

For the foregoing reasons, the petitions for review of the Sutter Power Plant PSD permit are denied.

So ordered.