

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

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In re:	)	
	)	
Russell City Energy Center	)	PSD Appeal Nos. 10-01, 10-05, 10-06 & 10-07
	)	
PSD Permit No. 15487	)	
	)	

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**RUSSELL CITY ENERGY COMPANY, LLC'S  
RESPONSE SEEKING SUMMARY DISPOSITION**

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## I. INTRODUCTION

Permittee Russell City Energy Company, LLC (“RCEC”) hereby submits its Response Seeking Summary Disposition with respect to the petitions filed by the California Pilots Association (“CalPilots”) (PSD Appeal No. 10-01), Californians for Renewable Energy, Inc., Bob Sarvey, and Rob Simpson (“CARE/Simpson”) (PSD Appeal No. 10-05),<sup>1</sup> Juanita Gutierrez (PSD Appeal No. 10-06), and Karen D. Kramer (PSD Appeal No. 10-07). The petitions for review challenge the decision by the Bay Area Air Quality Management District (the “Air District”) to issue a Prevention of Significant Deterioration (“PSD”) permit to RCEC to construct a new natural gas fired combined-cycle power plant in Hayward, California.

RCEC respectfully requests that the Environmental Appeals Board (the “Board”) deny these four petitions in their entirety.<sup>2</sup> The CalPilots Petition lacks specificity, fails to demonstrate why the Air District’s response to comments on the issues raised was clearly erroneous or otherwise warrants review, and raises issues outside the Board’s jurisdiction. The CARE/Simpson Petition was untimely; it should be denied for that reason alone. The letters filed by Juanita Gutierrez and Karen D. Kramer were untimely, lack specificity, fail to demonstrate why the Air District’s response to comments on the issues raised was clearly

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<sup>1</sup> The Board’s docket indicates that this petition was filed by “CALifornians for Renewable Energy, Inc., Bob Sarvey, and Rob Simpson.” See Docket No. 5. Although it bears no title, the petition contains a footnote indicating that “Petitioner(s) are CARE, Rob Simpson, and Robert Sarvey.” CARE/Simpson Petition at 4 n.7. It also contains a footer, appearing on pages 1 and 2, that reads “CARE and Rob Simpson Appeal to EAB of the ‘amended’ PSD permit for the Russell City Energy Center Application Number 15487.” The petition was signed as submitted on behalf of CALifornians for Renewable Energy, Inc. (“CARE”) by Michael E. Boyd and Lynne Brown, President and Vice-President, respectively. *Id.* at 27. Because Mr. Sarvey submitted a separate petition on his own behalf, this joint petition is referred to hereafter as the “CARE/Simpson Petition.”

<sup>2</sup> On April 6, 2010, the Board granted RCEC’s Motion for Leave to Participate in the Proceeding and to Respond to the Petitions. *In re Russell City Energy Center, LLC*, PSD Appeal Nos. 10-01, 10-02, 10-03, 10-04, 10-05, 10-06 & 10-07 (EAB, Apr. 6, 2010) (Order Granting Motion to Participate). The Board provided that RCEC may file a response to the petitions for review, “on or before April 8, 2010, if RCEC seeks summary disposition of the petitions, or otherwise by April 23, 2010.” *Id.* at 2. In accordance with this schedule, RCEC will submit its response seeking denial of the remaining petitions – filed by Chabot-Las Positas Community College District (PSD Appeal No. 10-02), Citizens Against Pollution (PSD Appeal No. 10-03), and Robert Sarvey (PSD Appeal No. 10-04) – by April 23, 2010.

erroneous or otherwise warrants review, and raise issues outside the Board's jurisdiction. Because each of these four petitions fails to meet the Board's threshold procedural and jurisdictional requirements for review, RCEC is requesting summary disposition at this time. Should the Board not deny one or more of these petitions in its entirety, RCEC will promptly respond to the contentions made by such petition(s) in accordance with any schedule set forth by the Board. As noted previously, *supra* note 2, RCEC will separately respond to the other three petitions, including one submitted by an individual who is also named as a Petitioner by the CARE/Simpson Petition (Mr. Sarvey), by the specified date of April 23, 2010.

## **II. BACKGROUND**

The Russell City Energy Center will be a 600-MW natural gas-fired, combined cycle power plant in Hayward, California (the "Project"). The Project cannot commence construction without obtaining a federal PSD permit from the Air District, which issues PSD permits in its jurisdiction pursuant to a delegation agreement with the U.S. Environmental Protection Agency ("EPA"), Region 9. *See* U.S. EPA - Bay Area Air Quality Management District Agreement for Delegation of Authority to Issue and Modify Prevention of Significant Deterioration Permits Subject to 40 CFR 52.21 (Feb. 4, 2008). The factual and procedural history of the Project up through mid-2008 is well-known to the Board because the PSD proceedings were subject to two prior petitions for review (PSD Appeal Nos. 08-01 and 08-07). *See In re Russell City Energy Center*, PSD Appeal No. 08-01 (EAB, July 29, 2008); *In re Russell City Energy Center*, PSD Appeal No. 08-07 (EAB, Nov. 25, 2008) (Order Denying Review).

In the approximately 18 months since the Board remanded the Project's PSD permit to the Air District, the Air District completed PSD permit proceedings pursuant to 40 C.F.R. part 124 and the Board's July 29, 2008 Order. On December 8, 2008, the Air District issued a Draft PSD Permit for the Project. Exhibit 1, Statement of Basis for Draft Amended Federal "Prevention of Significant Deterioration" Permit (Dec. 8, 2008) ("Statement of Basis"). The Air District solicited public comments on the Draft PSD Permit and accompanying Statement of Basis and accepted written comments for nine weeks, until February 6, 2009. Exhibit 2, Letter

from Brian Bateman, Director of Engineering, Bay Area Air Quality Management District, to Rick Thomas, Vice President of Development (Feb. 4, 2010) at 1 (“February 4, 2010 Letter”). The Air District also held a public hearing at the Hayward City Hall on January 21, 2009. *Id.* Based on the comments received during this first comment period and the Air District’s additional review and analysis, the Air District issued a revised Draft PSD Permit and Additional Statement of Basis on August 3, 2009. Exhibit 3, Additional Statement of Basis, Draft Federal “Prevention of Significant Deterioration” Permit (Aug. 3, 2009) (“Additional Statement of Basis”). The Air District solicited public comments on the revised Draft PSD Permit and accompanying Additional Statement of Basis and accepted written comments for more than six weeks, until September 16, 2009. Exhibit 2, February 4, 2010 Letter, at 2. The Air District held a second public hearing at the Hayward City Hall on September 2, 2009. *Id.* Altogether, since the Board remanded the permit to the Air District, the Air District accepted additional public comments on the Draft PSD Permit for more than 15 weeks during two public comment periods, each with a public hearing conducted pursuant to EPA requirements.

On February 3, 2010, the Air District issued the Final PSD Permit for the Project. Exhibit 4, Prevention of Significant Deterioration Permit Issued Pursuant to the Requirements of 40 CFR § 52.21 (“Final PSD Permit”). It also issued a 235-page Responses to Public Comments that responds to comments received during both public comment periods. Exhibit 5, Responses to Public Comments, Federal “Prevention of Significant Deterioration” Permit (Feb. 2010) (“Responses to Public Comments”). The Air District served notice of the Final PSD Permit by electronic mail (“email”) and regular mail on February 4, 2010. Exhibit 6, Email from Barry Young, Subject: Russell City Energy Center – Notice of Issuance of Final PSD Permit (Feb. 4, 2010) (“Email Notice”); Exhibit 7, Email from Alexander Crockett to Kevin Poloncarz (Apr. 6, 2010), attaching Notice of Issuance of Final Prevention of Significant Deterioration (PSD) Permit for the Russell City Energy Center (“Mail Notice”).

The Final PSD Permit specifies that “Petitions for Review must be received by the EAB no later than March 22, 2010.” Exhibit 4, Final PSD Permit at 2. Similarly, the Responses to

Public Comments provides that “[p]ermit appeals must be actually received and filed with the Environmental Appeals Board no later than March 22, 2010, to be considered timely.” Exhibit 5, Responses to Public Comments at i. Both the Email Notice and Mail Notice provide that “[a]ny such members of the public must file any appeal no later than March 22, 2010. Appeals must be received by the EAB by this date to be timely.” Exhibit 6, Email Notice at 1; Exhibit 7, Mail Notice at 1.

Petitions for review of the Final PSD Permit were filed by the following seven parties: (1) CalPilots (PSD Appeal No. 10-01); (2) Chabot-Las Positas Community College District (PSD Appeal No. 10-02); (3) Citizens Against Pollution (PSD Appeal No. 10-03); (4) Robert Sarvey (PSD Appeal No. 10-04); (5) CARE/Simpson (PSD Appeal No. 10-05); Juanita Gutierrez (PSD Appeal No. 10-06); and (7) Karen D. Kramer (PSD Appeal No. 10-07). For the reasons discussed below, the petitions filed by CalPilots, CARE/Simpson, Ms. Gutierrez, and Ms. Kramer should be denied in their entirety at this time.

### **III. DISCUSSION**

#### **A. Standard of Review**

The Board will grant review of a PSD permitting decision only if it involves a “finding of fact or conclusion of law which is clearly erroneous,” or “an exercise of discretion or an important policy consideration which the [Board] should, in its discretion, review.” 40 C.F.R. § 124.19(a)(1)-(2). The Board has noted repeatedly that its “power of review should be only sparingly exercised” and that “most permit conditions should be finally determined at the [permitting authority] level.” *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 6-7 (EAB 2000) [*“Knauf II”*] (quoting 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)).

In determining whether to grant review of a petition, the Board “first looks to whether the petition meets the threshold procedural requirements of the permit appeal regulations.” *Id.* at 5 (citing 40 C.F.R. § 124.19; *In re Sutter Power Plant*, 8 E.A.D. 680, 685 (EAB 1999)). The threshold procedural requirements include timeliness, standing, and preservation of an issue for review. *Id.* The Board “strictly construes threshold procedural requirements, like the filing of a



thorough, adequate, and timely petition.” *In re Town of Marshfield, Massachusetts*, NPDES Appeal No. 07-03, slip op. at 4 (EAB, Mar. 27, 2007) (Order Denying Review). For every issue raised, the petitioner bears the burden of demonstrating that review is warranted. *In re Steel Dynamics, Inc.*, 9 E.A.D. 740, 744 (EAB 2001). Petitions for review “must meet a minimum standard of specificity.” U.S. Environmental Protection Agency, *The Environmental Appeals Board Practice Manual* 33 (June 2004) (“EAB Practice Manual”). Petitioners “must not only state their objections to a permit but must also explain why the permitting authority’s response to those objections (for example in a response to comments document) is clearly erroneous or otherwise warrants review.” *In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04, slip op. at 87-88 (EAB, Sept. 27, 2006). To do so, “the petitioner must address the permit issuer’s responses to relevant comments made during the process of permit development; the petitioner may not simply reiterate comments made during the public comment period, but must substantively confront the permit issuer’s subsequent explanations.” *Id.* at 88. Failure by a petitioner to do so will result in a denial of review. *In re Zion Energy, L.L.C.*, 9 E.A.D. 701, 705 (EAB 2001). Although the Board “tries to construe petitions filed by persons unrepresented by legal counsel broadly,” such petitions must still “provide sufficient specificity such that the Board can ascertain what issue is being raised” and “articulate some supportable reason as to why the permitting authority erred or why review is otherwise warranted.” *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 127 (EAB 1999) [*“Knauf I”*].

The Board will also assess whether the issues raised in petitions for review are subject to the Board’s jurisdiction. *Zion Energy*, 9 E.A.D. at 706; *Sutter*, 8 E.A.D. at 688. The Board’s jurisdiction to review PSD permits extends only to those issues relating to permit conditions that implement the federal PSD program. *In re Hawaii Elec. Light Co.*, 10 E.A.D. 219, 238 (EAB 2001). As the Board has explained, “[t]he 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.” *Knauf I*, 8 E.A.D. at 127. If an issue is not governed by the PSD regulations, the Board lacks

jurisdiction over them and will deny review. *Id.*

**B. The CalPilots Petition (PSD Appeal No. 10-01) Should Be Denied in its Entirety**

On March 22, 2010, CalPilots filed a letter with the Board,<sup>3</sup> requesting that “you do not approve the P\_S\_D Permit” and that “the P\_S\_D Permit be remanded back to the [Air District] for further comment by the [Federal Aviation Administration (“FAA”)] and others.” *See* Letter from Andy Wilson, CalPilots Director at Large to Clerk of the Board, Environmental Appeals Board (Mar. 18, 2010) (“CalPilots Petition”) at 2. In its petition, CalPilots provides background information on the Hayward Executive Airport airspace and requests (1) that RCEC’s PSD permit be remanded back to the Air District for further comment by the FAA and others based on the Project’s proximity to the Hayward Executive Airport and the California Energy Commission’s (“CEC”) Staff Assessment recommendation not to approve the Project, and (2) that a risk analysis for “mobile sensitive receptors” (pilots and passengers) be conducted to address specified concerns such as hazardous material releases and visual and thermal plumes.<sup>4</sup> *Id.* at 2-7. The letter states that it is “based on but not limited to 40CFR Part 52.21 (12)”, referencing the definition of Best Available Control Technology (“BACT”). *Id.* at 8.

The CalPilots Petition should be dismissed in its entirety because it fails to articulate any specific objections to any condition of the Final PSD Permit. Indeed, it does not provide a single citation to a permit term or condition that it contends is based on a clearly erroneous finding of fact or conclusion of law or that the Board, in its discretion, should review. *See* 40 C.F.R. § 124.19(a). Its allegation that RCEC’s PSD permit must be remanded back to the Air District for further comment by the FAA and others ignores the fact that the Air District accepted public

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<sup>3</sup> CalPilots’ letter is dated March 18, 2010, but it was not electronically filed with the Board until March 22, 2010. *See* Docket No. 1.

<sup>4</sup> The CalPilots Petition “refers to and incorporates” the comments of Citizens Against Pollution and Chabot-Las Positas Community College District in addition to the issues set forth in the petition. CalPilots Petition at 1-2. As stated above, *supra* note 2, RCEC will submit its response seeking dismissal of these petitions by April 23, 2010.

comments on the Draft PSD Permit for more than 15 weeks and held two public hearings, far beyond the minimum requirements of the PSD regulations. *See* 40 C.F.R. § 124.12. Further, there is simply no basis in the PSD regulations for remanding a permit for additional consideration of issues that will reportedly be addressed by a forthcoming FAA plume safety study, which, according to the CalPilots Petition, is scheduled for completion of data gathering and research by June 2010, with “a hypothesis, conclusion and recommendations” available “sometime after June of 2010.” CalPilots Petition at 2. CalPilots’ petition fails to allege any relationship between the results of the pending FAA study and any condition of the PSD permit. Similarly, CalPilots does not specify any permit condition that relates to its request for a mobile sensitive receptor risk analysis. *Cf. In re Beeland Group, LLC*, UIC Appeal Nos. 08-01 & 08-03, slip op. at 4 (EAB, May 23, 2008) (“Although the Board will construe a *pro se* petition broadly, it nonetheless must clearly identify the permit conditions at issue and state why those provisions warrant review.”).

Moreover, the CalPilots Petition fails to demonstrate why the Air District’s response to comments on the issues it has raised was clearly erroneous or otherwise warrants review. In its Responses to Public Comments, the Air District responded to comments on the potential impacts of thermal plumes and emissions from the Project to aircraft, pilots, crews, and passengers as follows:

The Federal PSD Program is designed to address certain air quality issues, not to address safety issues such as potential hazards to aviation and aircraft operations. Safety issues such as these are obviously a very important public concern and there are comprehensive regulatory requirements in place to address them, but the Federal PSD Permit is not the mechanism to do so. Such concerns could potentially have an impact in a Federal PSD BACT analysis if there was a choice between alternative control technologies that had greater or lesser safety impacts, but that is not the case here. None of the comments has provided any information to suggest that different control technologies should be used or that permit conditions should be changed based on the potential for aviation hazards.

Exhibit 5, Responses to Public Comments at 227 (footnote omitted).

Putting aside the jurisdictional requirement that a petitioner’s contentions must relate to an issue covered by the PSD regulations and/or a condition of the PSD permit, the concerns

raised by CalPilots with respect to aviation hazards were, in fact, fully addressed during the CEC's licensing process, as explained by the Air District in its Responses to Public Comments:

*Moreover, the potential for aviation hazards was examined in detail by the Energy Commission during the licensing proceedings for the facility. The Commission reviewed a sophisticated analysis of vertical plume velocities and a 2006 FAA study entitled "Safety Risk Analysis of Aircraft Overflight of Industrial Exhaust Plumes", and concluded that the FAA would characterize this risk as extremely remote and within acceptable ranges. The Energy Commission therefore found that the impact from potential aviation hazards would be less than significant. The Energy Commission similarly found that restrictions on airspace as a result of the facility would be less than significant. While it may be true that CEC staff recommended against the project because of aviation issues, the Commission disagreed and concluded that these were not significant concerns because they could be mitigated, as recommended by the FAA, by pilot notification, among other reasons. This considered analysis by the Energy Commission is how such issues are addressed, not through the Federal PSD program.*

*Id.* (footnote omitted; emphasis added).

Furthermore, to the extent that alleged health impacts to pilots and passengers might be attributable to choice of a particular control technology as part of the BACT analysis, the Air District conducted an evaluation that went significantly beyond the requirements of the Federal PSD regulations to demonstrate that no significant impacts would result. More specifically, the Air District evaluated the impacts of ammonia emissions on air crews and passengers as an ancillary impact associated with selection of Selective Catalytic Reduction ("SCR") as a control technology for nitrogen dioxide ("NO<sub>2</sub>") and nitrogen oxides ("NO<sub>x</sub>"). *Id.* at 59, 188-89, 227 n.393. Not only does CalPilots fail to identify any error or deficiency in the Air District's response to its comments in this regard; it repeats verbatim the same comments it previously submitted during the first public comment period,<sup>5</sup> without evincing any recognition whatsoever that the Air District undertook substantial additional analysis in response to those comments and

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<sup>5</sup> Except for minor formatting and pagination changes, the text of the CalPilots Petition is, from the second full paragraph of page 3 through its conclusion on page 8, nearly identical to the text appearing on pages 2-6 of the letter CalPilots submitted to the Air District during the first public comment period. See Exhibit 8, Letter from Carol Ford, Vice-President, California Pilots Association, Jay White, General Council, California Pilots Association and Andy Wilson, to Weymen [*sic*] P. Lee, P.E. (Feb. 6, 2009).

presented the results of that analysis in both the Additional Statement of Basis and the Responses to Public Comments. Such verbatim restatements of earlier comments fall short of establishing any legitimate basis for Board review. *See* EAB Practice Manual at 33 (“Petitioners for review may not simply repeat objections made during the comment period; instead they must demonstrated why the permitting authority’s response to those objections warrants review”) (citing *Knauf II*, 9 E.A.D. at 5).

Notably, one of the primary contentions CalPilots makes in its petition is a request for a complete study of the potential short- and long-term impacts of the proposed facility’s emission on the health of pilots and their passengers. CalPilots Petition at 5 (“1. Request Risk Analysis for Mobile Sensitive Receptors (Pilots and Passengers)”). However, in response to CalPilots’ prior comments which sought just such an analysis, the Air District performed a health risk analysis for airborne receptors, which demonstrated that “there will not be any significant ancillary environmental impacts with respect to ammonia or other toxics exposures to aircrews or passengers that would rule out the selection of SCR as the BACT control technology.” Exhibit 5, Responses to Public Comments at 59 (citing Additional Statement of Basis at 94-95). This additional evaluation was based on very conservative exposure assumptions that a pilot or passenger would remain at the particular location within the airspace where the maximum modeled impact was predicted to occur for a complete hour. *Id.* at 188.

Further, in response to a comment received during the second comment period that suggested that aircraft could be exposed to facility exhaust for extended periods of time if they had to circle the airport or perform repeated takeoffs, landings, or other maneuvers for practice or training purposes, the Air District explained that, even with repeated passes through the facility’s exhaust stream, “the aircraft would still not be within the stream continuously and so the exposure assumptions would still be overly conservative.” *Id.* Moreover, according to the Air District’s conclusions, “even if for some reason an aircraft did remain directly within the exhaust stream for a continuous hour, the acute hazard index was well below 1.0, demonstrating that even continuous exposure during that time would not cause any risk of adverse health

effects.” *Id.*

In addition, the Air District specifically responded to a comment alleging that its Health Risk Assessment should use a lower exposure threshold for aircraft pilots, crews, and passengers than for the general population, given the nature of aircraft operation. *Id.* at 188-89. According to the Air District’s response to this suggestion, “[t]he Reference Exposure Levels on which the Health Risk Assessment analysis is based are already designed to take into account sensitive populations (with an appropriate margin of safety), and there is no reason to conclude that pilots, aircrews, or passengers would experience a risk of adverse health effects where the hazard index is well below 1.0.” *Id.* at 189.

Not only does CalPilots proffer no new information or contention that might call into question the Air District’s methods or conclusions in performing these analyses; its petition evinces no recognition whatsoever that the Air District even undertook any additional analysis in response to CalPilots’ comments and then provided further explanation of this analysis in both the Additional Statement of Basis and Responses to Public Comments. As a consequence, CalPilots fails to demonstrate that the Air District’s analyses of aviation concerns for purposes of PSD permitting was clearly erroneous or otherwise warrants review. *See, e.g., Indeck-Elwood*, slip op. at 87-88 (petitioners “must not only state their objections to a permit but must also explain why the permitting authority’s response to those objections (for example in a response to comments document) is clearly erroneous or otherwise warrants review.”).

In sum, CalPilots identifies no deficiency or error in any permit condition or in the Air District’s Responses to Public Comments that would in any way warrant review. Because CalPilots has not met the threshold procedural and jurisdictional requirements for Board review, its petition should be dismissed in its entirety.

**C. The CARE/Simpson Petition (PSD Appeal No. 10-05) Should Be Denied in its Entirety**

On March 23, 2010, CARE/Simpson submitted a petition for review requesting remand of RCEC's PSD permit.<sup>6</sup> Because the CARE/Simpson Petition was not filed with the Board by the March 22, 2010 deadline for filing a petition for review, it was not filed in a timely manner and, for this reason alone, should be dismissed in its entirety.

**1. The CARE/Simpson Petition Was Untimely**

The federal rules provide that a petition for review of any condition of a PSD permit decision must be filed with the Board within 30 days after the final permit decision. *See* 40 C.F.R. § 124.19(a). The 30-day period “begins with the service of notice of the Regional Administrator’s action unless a later date is specified in that notice.”<sup>7</sup> *Id.* If a permitting authority specifies a later date beyond the 30-day appeal period, that extended deadline becomes the date by which a petition for review must be filed. *See, e.g., In re Envotech, L.P.*, 6 E.A.D. 260, 265-66 (EAB 1996) (filing deadline established by notice which specified date petitions for review “must arrive at the Board’s office”). To be considered timely, documents must be *received* by the Board by the specified filing date. *See* EAB Practice Manual at 11.

Petitions for review filed after the filing deadline will be considered untimely and dismissed by the Board. *See, e.g., Town of Marshfield*, slip op. at 8-9; *In re Town of Hampton*, 10 E.A.D. 131, 134 (EAB 2001); *In re Puna Geothermal Venture*, 9 E.A.D. 243, 276-77 (EAB 2000); *Sutter*, 8 E.A.D. at 695; *Envotech*, 6 E.A.D. at 266. As the Board has emphasized, “[i]t is

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<sup>6</sup> The CARE/Simpson Petition is dated March 22, 2010, but was not submitted to the Board until March 23, 2010. *See* Docket No. 5.

<sup>7</sup> Where service of notice is accomplished upon a party by mail, the 30-day period during which review must be requested will be extended by three days for such party. *See* 40 C.F.R. § 124.20(d). This extension of the appeal period by three days does not apply in cases where the permitting agency establishes an effective date for the permit and, by virtue of that, a deadline for submittal of appeals later than 30 days from the date of permit issuance and service of notice. *See In re Town of Hampton*, 10 E.A.D. 131, 133-34 (EAB 2001) (upholding permitting agency’s establishment of filing deadline based on receipt of notice, even though it yielded an earlier filing deadline than would apply if the 30-day period were to begin upon mailing of the notice and three additional days were added for those served by mail).

a petitioner's responsibility to ensure that filing deadlines are met, and the Board will generally dismiss petitions for review that are received after a filing deadline." *In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 329 (EAB 1999), *aff'd*, *Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000); *see also Puna Geothermal*, 9 E.A.D. at 273 ("failure to ensure that a petition for review is received by the filing deadline will generally lead to dismissal of the petition on timeliness grounds."). The Board "strictly construes threshold procedural requirements, like the filing of a thorough, adequate, and timely petition." *Town of Marshfield*, slip op. at 4.

In this case, the Air District served notice of the Final PSD Permit by email and by regular mail on February 4, 2010. Exhibit 6, Email Notice; Exhibit 7, Mail Notice. The Final PSD Permit specifies that "Petitions for Review must be received by the EAB no later than March 22, 2010." Exhibit 4, Final PSD Permit at 2. Similarly, the Responses to Public Comments provides that "[p]ermit appeals must be actually received and filed with the Environmental Appeals Board no later than March 22, 2010, to be considered timely." Exhibit 5, Responses to Public Comments at i. In addition, both the Email Notice and Mail Notice provide that "[a]ny such members of the public must file any appeal no later than March 22, 2010. Appeals must be received by the EAB by this date to be timely." Exhibit 6, Email Notice at 1; Exhibit 7, Mail Notice at 1. Thus, consistent with the governing regulations at 40 C.F.R. part 124, the Air District specified a "later date" by extending the PSD Permit's effective date and, as a consequence, the deadline for filing a petition for review by more than two weeks beyond the required 30-day period. According to the Air District's notices, "[t]his date provides 45 days from permit issuance to file appeals, which is greater than the minimum 30 days required . . . ." Exhibit 6, Email Notice, at 1; Exhibit 7, Mail Notice, at 1.

To be considered timely, documents must be *received* by the Board by the specified filing date of March 22, 2010. *See* EAB Practice Manual at 11. CARE/Simpson, however, submitted their petition on March 23, 2010. Thus, the CARE/Simpson Petition was untimely and should be denied by the Board for this reason alone.



2. **Despite Mr. Simpson's Awareness of Filing Procedures, the CARE/Simpson Petition Was Not Filed on Time or in Accordance with the Board's Procedures**

The Board will consider untimely petitions in only rare cases with special circumstances. Special circumstances include delays caused by extraordinary events outside the petitioner's control, such as natural disasters and terrorist threats. *See, e.g., AES Puerto Rico*, 8 E.A.D. at 328-29 (hurricane and its aftermath caused delay); *In re Avon Custom Mixing Services, Inc.*, 10 E.A.D. 700, 703 n.6 (EAB 2002) (mail sterilization procedure in response to anthrax contamination caused delay). We are not aware of any natural disaster or terrorist threat faced by CARE/Simpson that precluded them from timely filing. Special circumstances also include cases where mistakes by the permitting authority caused the delay. *See, e.g., In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 123-24 (EAB 1997) (mistaken instruction to petitioners to file appeals with EPA's Headquarters Hearing Clerk); *In re Hillman Power Co., L.L.C.*, 10 E.A.D. 673, 680 n.4 (EAB 2002) (agency's failure to serve final permit decision on petitioner).

In this case, however, the Air District provided clear instructions on the specified filing deadline, making it clear that petitions had to be actually filed with and received by the Board by March 22, 2010 in order to be considered timely filed. Indeed, the clarity of the Air District's instructions is evidenced by the fact that CalPilots (as but one example) did timely file its petition on March 22, 2010 and did so successfully by use of the Central Data Exchange ("CDX") portal – notwithstanding that the CalPilots Petition was filed without the assistance of legal counsel. The Air District also provided more than two weeks beyond the minimum amount of time required by law. Thus, there simply is no evidence that the Air District committed any error which may have contributed to CARE/Simpson's failing. On the contrary, all evidence points to the Air District's efforts to assure that interested persons had sufficient time to review its permit decision and understood how and when they should file an appeal with the Board. In light of these extraordinary efforts taken by the Air District in this regard, CARE/Simpson cannot credibly claim that the Air District's efforts somehow contributed to their failure to meet the prescribed filing deadline.

Rather, the only special circumstance at issue with respect to CARE/Simpson further underscores the inexcusability of their error in failing to follow the Board's procedures and meet the required deadline: Mr. Simpson has filed several previous petitions for review with the Board. Due to deficiencies or errors in the way some of these were filed, the Board and its Clerk have, on several occasions, instructed Mr. Simpson on the Board's filing procedures and the obligation to observe such procedures. For example, in *In re Russell City Energy Center*, Ms. Durr, the Clerk of the Board, informed Mr. Simpson that "the document that [he] emailed to [her] on January 2, 2008, was not considered 'filed.' The Board does not consider a petition for review to be 'filed' until the hard copy is actually received by mail." Electronic Mail to Rob Simpson clarifying the correct filing date for the petition for review, PSD Appeal No. 08-01 (Jan. 16, 2008) (Docket No. 7). Ms. Durr referred Mr. Simpson to the Board's website for more information on the Board's filing procedures. *Id.* Mr. Simpson responded, "[t]hank you, I understand the filing date now." Electronic Mail from Rob Simpson Understanding Filing Procedures, PSD Appeal No. 08-01 (Jan. 17, 2008) (Docket No. 9). In its subsequent Order, the Board reminded Mr. Simpson that "[d]ocuments are 'filed' with the Board on the date they are **received** by the Clerk of the Board." *In re Russell City Energy Center*, PSD Appeal No. 08-01, slip op. at 2 n.1 (EAB, Jan. 29, 2008) (Order Denying Motion for Continuance and Granting Motion for Extension of Time To File Response). In *In re Gateway Generating Station*, the Board also noted Mr. Simpson's failure to comply with procedural requirements: "Petitioner electronically submitted a reply on July 17, 2009, but did not file the original with the Board. Documents submitted solely through the Board's electronic submission system are not treated as 'filed.'" *In re Gateway Generating Station*, PSD Appeal No. 09-02, slip op. at 3 (EAB, Sept. 15, 2009) (Order Dismissing Petition for Review). The Board again reminded Mr. Simpson of the Board's filing procedures. *Id.* at 3-4 n.5.

In this case, it appears that CARE/Simpson submitted their petition and supporting materials by emailing them directly to the Clerk of the Board, instead of filing them in accordance with the Board's procedures. *See* Exhibit 9, Email from Rob Simpson to Eurika Durr

(undated). The Board requires documents to be filed by paper (mail or hand-delivery) or electronically through the U.S. EPA's Central Data Exchange ("CDX") portal. See EAB Practice Manual at 9-10; Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board Not Governed by 40 C.F.R. Part 22 (Jan. 28, 2010) ("Standing Order"). There is no provision for filing of petitions for review by email. In fact, the Board's Standing Order makes it abundantly clear that merely emailing the document to the Clerk of the Board is insufficient: "[s]ending a document directly to the Board via e-mail, rather than through the CDX portal, does not constitute electronic filing unless otherwise specified by the Board." Standing Order at 3. The Board's docket does not indicate that the CARE/Simpson Petition was ever electronically filed, and a hard copy was not filed until March 30, 2010. See Docket No. 18. Given the Board's and its Clerk's prior admonitions to Mr. Simpson on this very point (specifically, that merely emailing a document to the Clerk does not deem it "filed"), and Mr. Simpson's express acknowledgement of those instructions, CARE/Simpson's failure to observe proper filing procedures is all the more egregious.

Moreover, putting aside their failure to file electronically through the CDX portal, CARE/Simpson nevertheless emailed their petition to the Clerk of the Board *after* the time by which it should have been filed with the Board: 11:59 p.m. Eastern Time on March 22, 2010. See Exhibit 10, Email from Michael Boyd to Rob Simpson and Eurika Durr, Subject: EAB Appeal RCEC by CARE and Rob Simpson (Mar. 22, 2010, 9:06 p.m. Pacific Time) (attaching Word-version of petition). The Board's Standing Order on electronic filing makes it abundantly clear that, if a petitioner wishes to file electronically via the CDX portal, the petition must be received by 11:59 p.m. Eastern Time on the day the document is required to be considered timely filed. See Standing Order at 2 ("[t]o be considered timely, documents submitted electronically must be received by 11:59 p.m. Eastern Time on the day the document is required to be filed with the Board."). It certainly cannot be the case that, because CARE/Simpson chose to send an email directly to the Clerk of the Board instead of filing electronically through use of the CDX portal, they should be afforded additional time to submit their petition beyond the electronic

filing deadline. Rather, in light of the Board’s prior admonitions and instructions to Mr. Simpson on proper filing procedures and *on this very point*, CARE/Simpson cannot credibly claim any confusion as contributing to their failure to properly and timely file their petition with the Board.

As the Board has emphasized, “[i]t is a petitioner’s responsibility to ensure that filing deadlines are met . . . .” *AES Puerto Rico*, 8 E.A.D. at 329. In this case, even with the Air District’s provision of an appeal period more than two weeks longer than required by law, and despite the fact that the Board has repeatedly instructed Mr. Simpson on proper filing procedures, CARE/Simpson failed to meet the Board’s filing requirements in a timely fashion. Because CARE/Simpson cannot credibly claim to be unsophisticated petitioners unfamiliar with the Board’s process or procedures, their error is inexcusable. For the foregoing reasons, the Board should deny the CARE/Simpson Petition in its entirety.

3. **None of the Issues Raised by the CARE/Simpson Petition Has Merit or Provides a Basis for Board Review**

The CARE/Simpson Petition includes five main contentions, which it describes as follows: (1) the Air District “is circumventing public participation” (CARE/Simpson Petition at 4, capitalization omitted); (2) “BACT is part of the CAA and the PDOC [Preliminary Determination of Compliance] includes the District’s BACT analysis therefore clearly the PDOC and draft PSD Permit are interdependent” (*id.* at 6, capitalization omitted); (3) the Air District “fails to consider greenhouse gas emissions as regulated pollutants” (*id.* at 9, capitalization omitted); (4) there are “specific ‘amended’ PSD permit issues for remand” (*id.* at 12, capitalization omitted); and (5) the Board “should remand the permit because the District did not adequately respond to comments” (*id.* at 15, capitalization omitted).

In the interest of promoting an expeditious resolution of these appeals and administrative efficiency, RCEC is requesting summary disposition now, so as to avoid having to respond to each of the contentions made by CARE/Simpson on the merits. As noted previously, however, should the Board decide that the Care/Simpson Petition is not subject to disposition in its entirety

due to CARE/Simpson's failure to file their petition on time and/or in accordance with Board procedures, RCEC will respond to each of these contentions.

**D. The Gutierrez Petition (PSD Appeal No. 10-06) Should Be Denied in its Entirety**

On March 23, 2010, Ms. Gutierrez filed a one-page letter opposing the grant of RCEC's PSD permit.<sup>8</sup> *See* Letter from Juanita Gutierrez to Clerk of the Board Environmental Appeals (Mar. 15, 2010). Ms. Gutierrez stated her and other neighbors' objection to the Project and raised concerns that the grant of the permit was "against common sense; against the plan to preserve wetlands; and against the well being of the surrounding residents and wild life." *Id.* She requested the Board to "review all the steps considered to arrive at such decision, and rectify it by doing what is right for all of us." *Id.*

Because Ms. Gutierrez's letter was not filed with the Board by the March 22, 2010 deadline for filing a petition for review, it was not filed in a timely matter. As discussed above, the petition for review should be dismissed in its entirety for this reason alone.

Even if Ms. Gutierrez's letter had been timely, her request for review should be denied because it fails to articulate any specific objections to any conditions of the Final PSD Permit related to wetlands, the well-being of surrounding residents or wildlife, or any other concern. Indeed, Ms. Gutierrez's letter does not provide a single citation to a permit term or condition. Ms. Gutierrez's request to "review all the steps considered to arrive at such a decision" does not meet the Board's minimum standard of specificity. *Cf. Beeland Group, LLC*, slip op. at 4 ("Although the Board will construe a *pro se* petition broadly, it nonetheless must clearly identify the permit conditions at issue and state why those provisions warrant review."); *In re Sierra Pacific Indus.*, 11 E.A.D. 1, 8 (EAB 2003) (request during public hearing to ensure that the agency's actions are consistent with applicable codes lacks specificity).

Furthermore, Ms. Gutierrez's letter fails to demonstrate why the Air District's response to

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<sup>8</sup> Ms. Gutierrez's letter is dated March 15, 2010, but it was not filed with the Board until March 23, 2010. *See* Docket No. 6.

comments on these issues was clearly erroneous or otherwise warrants review. With respect to the well-being of surrounding residents, the Air District conducted a PSD air quality impact analysis, in accordance with federal PSD regulations and corresponding District regulations, and found that “emissions from the proposed facility would not cause or contribute to air pollution in violation of any applicable National Ambient Air Quality Standard or applicable PSD increment.” Exhibit 1, Statement of Basis at 64. To meet non-PSD requirements, the Air District conducted a health risk assessment to determine the potential impact of toxic air contaminants on public health and found that the carcinogenic risk, chronic hazard index, and acute hazard index resulting from the Project are all less than significant. *Id.* at 14-16, App. B. When the Air District issued the revised Draft PSD Permit and Additional Statement of Basis, it updated the air quality impact analysis based on comments received and additional investigation and analysis conducted by the Air District. *See* Exhibit 3, Additional Statement of Basis at 80-91. The Air District provided extensive responses to public comments received during both comment periods on these issues. *See* Exhibit 5, Responses to Public Comments at 132-169 (Air Quality Impacts Analysis), 184-191 (Health Risk Assessment).

With respect to wetlands preservation and the well-being of wildlife, the Air District’s air quality impacts analyses in the Statement of Basis, and as revised and expanded in the Additional Statement of Basis, found no significant impacts from air emissions on soils and vegetation. *See* Exhibit 1, Statement of Basis at 64; Exhibit 3, Additional Statement of Basis at 89-91. The Air District specifically considered the potential for soils and vegetation impacts in the Hayward Regional Shoreline, in several park areas in the East Bay hills, and on aquatic resources, including coastal habitats along the eastern shore of the San Francisco Bay. *See* Exhibit 5, Responses to Public Comments at 169-80. The Air District also responded directly to public comments criticizing its soils and vegetation analysis for failing to address specifically the potential for impacts to wildlife:

Although potential impacts to wildlife are very important resource considerations, they are addressed primarily through other regulatory mechanisms such as the Endangered Species Act and [the California Environmental Quality Act], not

through Federal PSD regulations. Looking specifically at the requirements of the Federal PSD regulations, they address only impacts to soils and vegetation. The Air District has evaluated the potential for such impacts as explained in its soils and vegetation analysis and has found that there will not be any significant soils and vegetation impacts as a result of air emissions from the facility. Soils and vegetation issues can often be related to wildlife issues because soils and vegetation provide habitat and food for wildlife, and so to the extent that there is such a connection here, the Air District's findings of no significant impact on soils and vegetation would support a finding of no significant impacts on wildlife, either. Moreover, EPA Region 9 and the US Fish and Wildlife Service have evaluated the potential for wildlife impacts in more detail and have concluded that the facility is not likely to adversely affect any endangered species, which further supports the Air District's conclusion on this point.

*Id.* at 174-75. In raising only general objections, Ms. Gutierrez's letter fails to demonstrate why the Air District's extensive responses to comments on these issues were clearly erroneous or otherwise warrant review. Indeed, Ms. Gutierrez does not even mention the Air District's Responses to Public Comments. *Cf. Zion Energy*, 9 E.A.D. at 707 (denying petition that "merely reiterates comments previously submitted to [the permitting agency] during the comment period without indicating why [the permitting agency's] responses to these comments were erroneous" and that "does not even mention [the permitting agency's] Responsiveness Summary.").

To the extent that Ms. Gutierrez's concerns address alleged public health, wetlands, or wildlife issues not related to air emissions regulated by the PSD program, they are not within the Board's jurisdiction. *See, e.g., Zion Energy*, 9 E.A.D. at 706 (emissions of hazardous air pollutants outside purview of PSD program); *Knauf I*, 8 E.A.D. at 127 ("[t]he 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.").

Because Ms. Gutierrez has not met the threshold procedural and jurisdictional requirements for Board review, her petition for review should be denied in its entirety.

**E. The Kramer Petition (PSD Appeal No. 10-07) Should Be Denied in its Entirety**

On March 24, 2010, Ms. Kramer filed a two-page letter raising concerns about the human health impacts of the Project and lack of need for additional generating capacity.<sup>9</sup> *See* Letter

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<sup>9</sup> Ms. Kramer's letter is dated March 18, 2010, but it was not filed with the Board until March 24, 2010. (Footnote Continued on Next Page.)

from Karen D. Kramer to United States Environmental Protection Agency (Mar. 18, 2010). Ms. Kramer's letter alleges that Hayward<sup>10</sup> is already over-polluted from the synergistic effect of many planes overhead, two close highways, and being near an industrial area and that the area is a lower socioeconomic area already subject to stress due to socioeconomic, health, and pollution conditions. Ms. Kramer's letter also questions the need for new generating capacity and whether that need has changed since the Hayward City Council originally signed a contract with Calpine.

Ms. Kramer's request for review should be denied for several reasons. First, the letter was not filed with the Board by the March 22, 2010 deadline for filing a petition for review. Because the letter was not filed in a timely manner, Ms. Kramer's request for review should be denied for that reason alone.

Second, Ms. Kramer's letter fails to articulate any specific objections to any conditions of the Final PSD Permit. Indeed, it does not cite a single permit condition. *Cf. Beeland Group*, slip op. at 4 ("Although the Board will construe a *pro se* petition broadly, it nonetheless must clearly identify the permit conditions at issue and state why those provisions warrant review.").

Third, Ms. Kramer's letter fails to demonstrate that the District's responses on public health issues were clearly erroneous or otherwise warrant Board review. As described above, the District found that emissions from the Project would not cause or contribute to air pollution in violation of any applicable NAAQS or applicable PSD increment and responded extensively to public comments regarding human health impacts of the Project. Exhibit 1, Statement of Basis at 64; Exhibit 5, Responses to Public Comments at 132-169 (Air Quality Impacts Analysis), 184-191 (Health Risk Assessment). The District also concluded in its environmental justice analysis that "[t]here is no adverse impact on any community due to air emissions from the [Project] and

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(Footnote Continued from Previous Page.)

*See* Docket No. 7.

<sup>10</sup> Although Ms. Kramer's letter refers to the "94545 area code," we assume that she means the zip code of Hayward, California.



therefore there is no disparate adverse impact on an Environmental Justice community located near the facility.” Exhibit 1, Statement of Basis at 66. *See also* Exhibit 5, Responses to Public Comments at 192-94 (responding to comments received on environmental justice issues). Ms. Kramer’s letter does not even mention the Air District’s Responses to Public Comments. *Cf. Zion Energy*, 9 E.A.D. at 707 (dismissing petition that “does not even mention [permitting agency’s] Responsiveness Summary.”).

Fourth, Ms. Kramer’s assertions about the need for generating capacity do not relate to any condition of the PSD permit and are therefore beyond the scope of this proceeding. *See* Exhibit 5, Response to Public Comments at 229 (“The demand and supply of electricity in California is overseen by other expert agencies . . . The Air District defers to the judgment of expert agencies such as those in determining how demand will be met and what new generating capacity is needed and how it should be provided. . . . [T]hese issues are not directly related to air quality and whether the facility will meet applicable air quality-related regulatory requirements, and are not relevant to the PSD permitting analysis.”).

Because Ms. Kramer has not met the threshold procedural and jurisdictional requirements for Board review, her petition for review should be denied in its entirety.

#### **IV. CONCLUSION**

Because the petitions filed by CalPilots, CARE/Simpson, Juanita Gutierrez, and Karen D. Kramer do not meet the Board’s threshold procedural and jurisdictional requirements, the Board should deny them in their entirety. Should the Board not deny any of these petitions in its entirety for failure to meet the Board’s threshold procedural and jurisdictional requirements, RCEC will promptly respond to the contentions made by any such petition in accordance with any schedule set forth by the Board.

Respectfully submitted,

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Dated: April 8, 2010

## CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of April, 2010, copies of the foregoing Russell City Energy Company, LLC's Response Seeking Summary Disposition were served via first-class U.S. mail, postage prepaid, to:

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