

RECEIVED
U.S. E.P.A.

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

JAN 18 AM 9:59
ENVIR. APPEALS BOARD

In the matter of
Russell City Energy Center

)
) PSD Appeal No. 08-01
)
)
)

**RESPONSE TO PETITION FOR REVIEW
REQUESTING SUMMARY DISMISSAL**

Pursuant to the January 8, 2008, letter from the Clerk of the Board, the Bay Area Air Quality Management District ("District") hereby submits this Response to the Petition for Review in the above-captioned matter, and respectfully requests that the Petition be summarily dismissed. As explained herein, the Petition must be summarily dismissed because it does not satisfy the threshold requirements for Environmental Appeals Board review in that (i) the Petitioner lacks standing; (ii) the issues raised in the Petition were not preserved for review; and (iii) the Petition is untimely. Furthermore, many of the issues raised are unrelated to the federal PSD program and not within the jurisdiction of the Environmental Appeals Board. To the extent the Petition is not dismissed in its entirety, all such non-PSD issues should be stricken.

SUMMARY

In filing this Petition for Review, Petitioner belatedly seeks to inject himself into the permitting process for the Russell City Energy Center ("RCEC" or "Project") after all of the final permits and approvals for the Project have been granted. His attempt is belated in that the District, along with the California Energy Commission ("Energy Commission" or "CEC"), have conducted a thorough review of the environmental impacts of the Project (as well as other types of impacts) in a long and comprehensive process with substantial opportunities for public input

on many levels, which is now finally complete. Despite repeated opportunities to do so, Petitioner never once sought to give input to the District or the CEC, or to raise before either of these agencies any of the purported air quality concerns he now presses. Instead, he has waited until this point, after the District and the CEC have taken their final permitting actions with respect to the Project, and after the District's PSD Permit was supposed to have become effective, to sandbag the District by claiming that the PSD permit is defective. The District respectfully submits that this Board should not allow Petitioner to proceed in this manner.

The District is confident that it was correct in issuing the PSD permit for this project, and that if the Environmental Appeals Board examines the District's permitting action it will come to the same conclusion. The Board need not reach those issues in ruling on this Petition, however, as the Petition fails to satisfy the important threshold procedural requirements for EAB review of standing, preservation of issues, and timeliness. As such, the Petition should be summarily dismissed.

At the very least, to the extent the Board does allow Petitioner to proceed, the issues for adjudication can be greatly narrowed by striking all non-PSD portions of the Petition.

BACKGROUND

The Russell City Energy Center is a 600 MW natural-gas fired power plant in Hayward, California. The Project was subject to PSD permitting review by the District, and also underwent a comprehensive permitting process before the California Energy Commission ("CEC" or "Commission"), which has jurisdiction over power plant siting in California. In order to provide some context for how this appeal has arisen, and how Petitioner failed to avail himself of the ample opportunities he was afforded to raise his concerns before any final permitting action was taken, the District here provides a brief overview of the integrated state-law and

federal PSD permitting process for new power plants in California, and how the process was followed in this case.¹ The District's arguments why the Petition must be dismissed follow, beginning on page 8.

I. Integrated Power Plant Permitting in the San Francisco Bay Area

Under California law, new thermal power plants of 50 MW or more in generating capacity must obtain a certificate from the California Energy Commission pursuant to the Warren-Alquist State Energy Resources Conservation and Development Act ("Warren-Alquist Act" or "Act"), California Public Resources Code §§ 25000 *et seq.* That statute gives the California Energy Commission ("CEC") the lead role under state law in the regulatory review process for such projects. It grants the CEC exclusive licensing authority for all such power plants in California, which supersedes all other local and state permitting authority. *Id.* §§ 25000, 25120. The Act provides that the CEC license "shall be in lieu of any permit, certificate, or similar document required by any state, local, or regional agency, or federal agency to the extent permitted by federal law . . . and shall supercede any applicable statute, ordinance, or regulation of any state, local or regional agency, or federal agency to the extent permitted by federal law." *Id.* § 25500.

Power plants that trigger federal PSD requirements also require a federal PSD Permit, which must be issued by EPA or by the District on delegated authority from EPA. As a federal permitting requirement, the Warren-Alquist Act's preemption provision does not apply, and the PSD permit is not subsumed within the CEC's license. For facilities such as the Russell City

¹ None of the background facts provided here is necessary to the District's argument that the Petition should be dismissed for failing the threshold tests as set forth herein, as the Petition fails on its face to establish standing, preservation of issues, timeliness, and (with respect to non-PSD issues) EAB jurisdiction. The District provides this summary simply to give this Board a background understanding of the substantial public process that was provided for this project.

Energy Center at issue here, the District acts as the permitting agency pursuant to a delegation agreement with EPA Region 9. *See* Declaration of Weyman Lee, P.E. (“Lee Decl.”) submitted herewith, ¶ 8.

In order to streamline the overlapping CEC and federal PSD permitting processes, the District and the CEC engage in a coordinated permit review process, but with distinct elements that satisfy the respective requirements of the California Warren-Alquist Act and the federal PSD program. This integrated permitting process works as follows.²

The District conducts an initial analysis of air quality issues implicated by the project and determines whether the project will comply with all applicable District regulations. At the same time, the District examines the project to determine whether it will comply with applicable PSD requirements. This initial review is governed by District Regulations 2-2 and 2-3. Once the District has determined that the project complies with all such applicable requirements, it adopts a Preliminary Determination of Compliance (“PDOC”) pursuant to District Regulation 2-3-201 and 2-3-403, which also serves as the Draft PSD Permit. The PDOC and Draft PSD Permit are subject to public notice and comment pursuant to District Regulations 2-3-404 and 2-2-405.

After receiving and considering any public comments, the District then issues a Final Determination of Compliance (“FDOC”) for purposes of state law permitting requirements. *See* District Regulations 2-3-201 & 2-3-405. The FDOC is required under the CEC’s regulations implementing the Warren-Alquist Act to identify the applicable regulations with which the project will be required to comply and to specify the required air pollution control technology

² The EAB has condoned conducting integrated state and federal permitting actions in this manner. *See, e.g., In re Metcalf Energy Center*, PSD Appeals Nos. 01-07 and 01-08, Order Denying Review (EAB August 10, 2001), *aff’d sub nom., Santa Teresa Citizens Action Group v. EPA*, No. 01-71611 (9th Cir. Nov. 21, 2002) (federal PSD permit integrated with state-law Authority to Construct); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 110 n.5 (EAB 1997) (federal PSD Permit integrated with state-issued Title V operating permit).

and mitigation measures to be implemented. *See* 20 Cal. Code Regs. § 1744.5(b). Upon issuance of the FDOC, the CEC then incorporates the FDOC's findings into its own environmental review process, *id.* § 1742.5(d), and uses them as a basis for the air quality analysis in its own environmental assessment of the proposed project, *id.* § 1747.

Once the Energy Commission completes its review and issues its certification for the project, the District is then tasked with implementing the conditions of certification addressing air quality issues into an Authority to Construct permit. *See* District Regulation 2-3-405. This issuance is a limited, ministerial action consisting simply of make a final check to ensure that all applicable conditions were correctly incorporated into the CEC certification. If so, the District issues the Authority to Construct. The District has no discretion at this point to revisit the substance of the conditions: if the conditions were duly incorporated, the District must issue the permit. *See id.* (“[If] the Certificate contains all applicable conditions . . . the APCO *shall* grant an authority to construct.” (emphasis added)).

After receiving and considering any public comment on the draft PSD Permit, the District also issues the final PSD Permit pursuant to its delegation agreement with EPA. There is no legal reason why the District could not issue the final PSD permit immediately upon considering and responding to the comments received, before completion of the CEC's licensing process, but as a matter of practice the District normally waits until that process is complete and issues the final PSD permit at the same time as the Authority to Construct.

II. The Permitting History of the Russell City Energy Center

The District and CEC followed these procedures in this case. The facility was initially licensed in 2002, but before construction the site was relocated and so the facility had to be re-licensed and re-permitted. *See* Declaration of J. Mike Monasmith (“Monasmith Decl.”)

submitted herewith, ¶ 1; Lee Decl., Exhibit B, p. 3. The CEC and District therefore reinitiated the process for the amendment proceeding. The District conducted an analysis of air quality issues, and issued its Proposed Determination of Compliance and Draft PSD Permit on April 2, 2007. *See* Lee Decl., ¶ 2 and Exhibit A. The District published the notice the Oakland Tribune, a newspaper of general circulation in Alameda County, on April 12, 2007. *Id.* The District established a 30-day public comment period, ending on May 12, 2007. *Id.* ¶ 3. The notice provided that the opportunity for public comment was being provided pursuant District Regulation 2-2-405, which contains the procedures for public notice, public comment, and public hearings for proposed District permitting actions. *Id.* The District also caused the PDOC and Proposed PSD Permit to be mailed to interested parties and governmental agencies, including all of the parties on the CEC's service list for the Project,³ as well as to EPA Region 9. *Id.* ¶ 2.; *see also* Monasmith Decl., ¶ 4.

The District received only one comment during the comment period, from the Project Applicant, suggesting a few minor changes to the wording of certain permit conditions. Lee Decl., ¶ 4. The District did receive a letter from the staff of the Energy Commission addressing certain points in the PDOC/Draft PSD Permit, but not until May 29, 2007, after the end of the public comment period. *Id.* ¶ 5. The District therefore did not treat it as a comment, although it did respond to the points raised as a courtesy to the CEC. *Id.* ¶¶ 5, 6. The District did not hold a public hearing, as none was required.

During the PDOC/Draft PSD Permit comment period, the CEC did not receive any letters raising air quality concerns or addressing the District's Preliminary Determination of

³ The District mailed a copy of the PDOC and Draft PSD Permit to the CEC's docket section, which as a matter of practice mails all docketed items to all parties on its service list. Mailing to the CEC's docket section is therefore effective as mailing to the service list directly. (*See* Lee Decl. ¶ 2, Monasmith Decl. ¶¶ 3, 4.)

Compliance or Draft PSD permit. Monasmith Decl., ¶ 7. The CEC did not hold any hearings during the comment period, either. *Id.*

The CEC did hold extensive hearings and received a number of letters from the public on air quality issues, but not until after the close of the District's comment period on May 12, 2007. Petitioner was not among those who raised concerns about the project, however. Monasmith Decl., ¶¶ 5-6 and Exhibit A.

The CEC ultimately licensed the project on September 26, 2007. Monasmith Decl., ¶ 1.

On November 1, 2007, after the CEC licensed the project, the District issued the Authority to Construct and final PSD Permit. Lee Decl., ¶ 7. The District mailed notice of issuance of the permit to the Applicant, as required by 40 C.F.R. Section 124.15(a). *Id.* ¶ 7. Section 124.15(a) did not require any other notice to be given, as no one other than the Applicant had submitted comments on the Draft PSD Permit or requested notice of the final permit decision.

The District was required under District Regulation 2-2-407 to publish notice of the issuance of the Authority to Construct in the newspaper, which it did by publication in the Oakland Tribune on December 6, 2007. Lee Decl., ¶ 9.

The District did not initially mail notice of the issuance of the ATC and PSD Permit to Petitioner, as he had not commented nor requested a copy of the final permit. The District did fax him a copy of the ATC/PSD Permit on November 29, 2007, however, in response to his inquiries about it. *Id.*, ¶ 10. The District also emailed Petitioner the EAB's publication *A Citizens' Guide to EPA's Environmental Appeals Board*, which contains information on how to appeal PSD Permits, on November 30, 2007. *See* Original Petition for Review, Docket Entry No.

2, pp. 16-17, referencing email communication from Alexander Crockett, Assistant Counsel, BAAQMD, to Petitioner, dated 11/30/07.

Petitioner ultimately filed this appeal with the Environmental Appeals Board on January 3, 2008, 63 days after notice of final permit issuance was mailed pursuant to 40 C.F.R. Section 124.15(a) on November 1, 2007. *See* Original Petition for Review, Docket Entry No. 2.⁴ The Appeal challenges the federal PSD Permit, and also the District's state-law Authority to Construct permit for the project. The Appeal also purports to challenge the issuance of Emission Reduction Credits ("ERCs") for the project, no ERCs have been issued in connection with this project. The project will require the applicant to submit ERCs for the project to offset project emissions, no ERCs have been issued as a result of the project.

ARGUMENT

The Environmental Appeals Board's analysis of a Petition for Review of a PSD permit beings with an assessment of (i) whether the Petition satisfies "a number of important threshold procedural requirements;" and (ii) whether the issues raised in the Petition "fall within the purview of the PSD program and are thus subject to the Board's jurisdiction." *In re Sutter Power Plant*, 8 E.A.D. 680, 685 (EAB 1999). The Petition here fails on both of these threshold questions.

The Petition fails to satisfy the threshold procedural requirements because (i) Petitioner lacks standing because he did not comment on the Draft PSD Permit; (ii) the issues raised were

⁴ Appellant sent what appears to be the text of his Petition for Review to the Clerk of the Board electronically in the body of an email message on January 2, 2008. *See* email communication from Rob Simpson, Grandview Reality, to Eureka Durr, EPA, Docket Entry No. 1. But the actual, signed Petition conforming (substantially, at least) to the EAB's requirements for Petitions for Review was not received by the Clerk until January 3, 2008. Original Petition for Review, Docket Entry No. 2. *See also* Electronic Mail to Rob Simpson clarifying the correct filing date for the petition for review, Docket Entry No. 7.

not preserved for review by being raised to the District at the draft stage; and (iii) the Petition was not timely filed. The Petition must be dismissed for failure to satisfy these important prerequisites for EAB review.

In addition, the bulk of the issues raised in the Petition involve matters of state law that are not federal PSD issues, and the Environmental Appeals Board has no jurisdiction over them. Thus, to the extent that the Petition is not dismissed in its entirety for failure to satisfy the threshold requirements of standing, preservation of issues, and timeliness, all non-PSD portions of it should be stricken so as to narrow the issues to those over which the EAB has jurisdiction.

I. Standard of Review

The Environmental Appeals Board has made clear that it “strictly construes threshold procedural requirements, like the filing of a thorough, adequate, and timely petition.”⁵ In doing so, it has always been mindful of the direction in the Preamble to 40 C.F.R. Section 124.19, the regulation governing PSD permit appeals, which states that the Board’s power of review “should be only sparingly exercised.” 45 Fed. Reg. 33,412 (May 19, 1980). Thus, where the Petitioner has not satisfied the minimum prerequisites for a permit appeal, the Board should decline review.

Furthermore, the burden rests with the petitioner to show that these procedural requirements have been satisfied sufficient to warrant review.⁶ To do so, “petitioners must include specific information supporting their allegations.” *Sutter Power Plant*, 8 E.A.D. at 687. Thus, where the Petition does not establish clearly on its face that these threshold procedural requirements have been satisfied, it may be summarily dismissed without further inquiry. “It is

⁵ *In re Town of Marshfield, Mass.*, NPDES Appeal No. 07-03, slip op. at 8 (EAB, March 27, 2007) (collecting cases).

⁶ *See, e.g., In re Avon Custom Mixing Services, Inc.*, 10 E.A.D. 700, 706 and n.12 (EAB 2002); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 249 (EAB 1999); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 119-20 (EAB 1997).

not incumbent upon the Board to scour the record to determine whether an issue was properly raised below.” *Encogen Cogeneration Facility*, 8 E.A.D. at 250 n.30.

II. Petitioner Lacks Standing Because He Did Not Comment On The Draft Permit and Did Not Preserve The Issues He Now Raises

Petitioner has no standing to appeal because he did not comment during the public comment period on the Draft PSD Permit, and the issues on which he seeks review were not preserved for appeal because they were not raised during the comment period. Furthermore, no exceptions to these requirements apply here because all the PSD issues the Petition raises were reasonably ascertainable during the comment period, and the only change from the Draft PSD permit Petitioner complains of concerns Emission Reduction Credits, which is an issue of State law outside of the EAB’s jurisdiction.

A. Petitioner Lacks Standing To Appeal Because He Did Not Comment on the Draft Permit

Under 40 C.F.R. Section 124.19(a), an appeal of a PSD permit may be brought only by a “person who filed comments on [the] draft permit or participated in the public hearing.” The Environmental Appeals Board has consistently denied petitions for review filed by persons who failed to do so.⁷

The Petition here makes no mention of Petitioner having commented on the Draft PSD Permit or having otherwise participated in the process in any way. The Board’s inquiry may end there, as Petitioner has not satisfied his duty to show that he has standing as required by 40 C.F.R. Section 124.19(a). Moreover, a review of the administrative record shows affirmatively that he

⁷ See, e.g., *In re American Soda*, 9 E.A.D. 280, 288-89 (EAB 2000); *In re City of Phoenix, Arizona Squaw Peak and Deer Valley Water Treatment Plants*, 9 E.A.D. 515, 524 (EAB 2000), appeal dismissed by stipulation, No. 07-70263 (9th Cir. Mar. 21, 2002); *In re Envotech, L.P.*, 6 E.A.D. 260, 267 (EAB 1996); *In re Beckman Production Services*, 5 E.A.D. 10, 16-17 (EAB 1994); *In re Robbins Resource Recovery Co.*, 3 E.A.D. 648, § A, 1991 EPA App. LEXIS 36, *3-*5 (Adm’r 1991).

did not in fact submit any comments. (Lee Declaration, ¶ 4.) The Petition should therefore be summarily dismissed for lack of standing.

Petitioner alludes to the CEC's May 29, 2007, letter to the District expressing views on the PDOC and Draft PSD Permit, as well as to general public participation in the CEC's licensing process in which objections to the project were raised. Petition at pp. 2, 3. But the CEC's letter and public comments in the CEC process cannot confer standing on Petitioner here, for at least two reasons.

First, it is well-settled that a petitioner cannot rely on comments filed by others to establish standing; he must make the comments himself.⁸ The decision in *In re Robbins Resource Recovery* is particularly instructive on this point. There, the Illinois attorney general sought to appeal a PSD permit for a solid waste incinerator. He had not submitted any comments, although certain members of the public had. The attorney general conceded that he had not commented, but argued that he had standing as a representative of the People of the State of Illinois and could therefore gain standing based on comments filed by any Illinois citizen. The Administrator rejected this argument as contrary to "the unambiguous language of EPA's regulations on standing . . ." 3 E.A.D. at § A, 1991 EPA App. LEXIS 36, *4-*5. Clearly, if an attorney general cannot gain standing based on comments filed by citizens of the state whose people he represents, then a private citizen such as Petitioner here cannot gain standing based on comments made by unrelated members of the general public.

Second, even if a petitioner could base standing on comments made by others, the CEC's letter and comments made by others during CEC proceedings would still be insufficient here

⁸ See *American Soda*, 9 E.A.D. at 288-89 (denying standing based on comments made by an entity with a "relationship" to Petitioner); *Robbins Resource Recovery*, 3 E.A.D. at § A, 1991 EPA App. LEXIS 36 at *3-*5 (denying attorney general standing based on comments made by citizens of his state).

because none of them were made in the District's administrative record during the comment period, as is required.⁹ The Environmental Appeals Board has made clear that to gain standing, a petitioner must comment formally on the record during the comment period in order to gain standing.¹⁰ The rationale for this strict rule is simple and compelling. The purpose of the public comment period is for interested persons to bring their issues before the agency at the time it prepares to make its final determination, so it is on formal notice of the specific public concerns it must consider and respond to. If the agency were required to extend its review of potential issues to portions of the administrative record outside of the scope of the formal comment period – and to proceedings of sister agencies outside of the agency's own record, as Petitioner is urging here – “the task would involve a time-consuming and exhausting search of the administrative record, just to assure that all potential comments had been identified.” *City of Phoenix, Arizona* 9 E.A.D. at 527 (relying on *Kawaihae Cogeneration Project*, 7 E.A.D. at 119-20). As the Board has noted, “[t]he folly of such an enterprise is manifest.” *Id.* This rationale is particularly compelling here, with multiple agencies conducting overlapping proceedings, which went back as far as 2002 with respect to the Project as initially licensed.

⁹ See Lee Decl., ¶ 4 (no comments to District during comment period (except from applicant that are not relevant here)); Monasmith Decl., ¶ 7 (no air quality comments during District's comment period).

¹⁰ See, e.g., *Avon Custom Mixing Servs.*, 10 E.A.D. at 705-08 (oral comments during comment period are insufficient to raise issues to agency unless recorded, transcribed, or subsequently summarized in writing); *City of Phoenix, Arizona*, 9 E.A.D. at 527-28 (no standing where concerns were submitted in the administrative record, but before the formal comment period began); *Kawaihae Cogeneration Project*, 7 E.A.D. at 119-20 (no standing to challenge PSD permit where petitioner raised issues “prior to . . . opening of the public comment period” and also “after the close of the public comment period”, but not “during the public comment period” (emphasis in original); *Beckman Prod. Servs.*, 5 E.A.D. at 17 (no standing where comments filed late).

B. The Issues Petitioner Raises Were Not Preserved For Appeal

A threshold requirement closely related to standing is that the issues Petitioner wishes to raise must have been preserved for appeal by having been raised to the agency during the comment period. This issue-preservation requirement is derived from 40 C.F.R. Section 124.13, which provides that:

All persons, including applicants, who believe that any condition of a draft permit is inappropriate or that the Director's tentative decision to deny an application, terminate a permit, or prepare a draft permit is inappropriate, must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period . . . ,

and from 40 C.F.R. Section 124.19(a), which provides that a Petition for Review must demonstrate:

[T]hat any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations

As the Environmental Appeals Board has explained, this issue-preservation requirement "is not an arbitrary hurdle placed in the path of potential petitioners. Rather, the requirement serves an important function related to the efficiency and integrity of the overall administrative permitting scheme." *In re Diamond Wanapa I, LP*, PSD Appeal No. 05-06, slip op. at 5-6 (EAB, Feb. 9, 2006) (citations omitted).

The EAB has strictly construed this requirement and has consistently denied review on issues that were not raised during the comment period.¹¹ Since no comments were received during the comment period (other than from the applicant, raising unrelated issues), *see* Lee Decl.

¹¹ *See, e.g., Diamond Wanapa I, LP*, slip op. at 5-6; *In re Sierra Pacific Industries*, 11 E.A.D. 1, 6-7 (EAB 2003); *Encogen Cogeneration Facility*, 8 E.A.D. at 249-51.

¶ 4, none of the issues Petitioner seeks to raise have been preserved. As such, the Petition should be summarily dismissed.¹²

C. Petitioner Does Not Challenge Any Changes To The PSD Elements of the Final Permit

40 C.F.R. Section 124.19(a) recognizes a limited exception to the standing and issue-preservation requirements for changes made in the final permit from what was noticed in the draft permit, or for issues that were otherwise not reasonably ascertainable during the comment period. But this exception does not apply here.

The only change in the final permit that Petitioner points to is a change in the identity of the Emission Reduction Credits (“ERCs”) that the Applicant will use to offset its emissions as required by District Regulation 2-2-302. But the ERCs are required by *District* permitting regulations and are state-law requirements that are not part of the *federal* PSD Permit. *See* Lee Decl., Exhibit B, pp. 17-18 (requiring offsets pursuant to District Regulation 2-2-302). The EAB has no jurisdiction over this portion of the permit, and these issues must be raised in the state system and not in an EAB appeal.¹³ Where a Petitioner failed to comment on the draft permit

¹² The same principles that prevent the late-filed CEC comment letter and public testimony in CEC proceedings from establishing standing, as discussed above, also prevent these submissions from preserving any issues raised for appeal here. Any comments must be made formally on the record during the comment period. *See* fn. 10, *supra*.

¹³ *See, e.g., In re Sutter Power Plant*, 8 E.A.D. at 688, 690 (E.A.B. 1999). As the Board explained in that case,

[T]he emission credits at issue here were imposed via Calpine’s [State law] nonattainment area permit [T]he 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.

8 E.A.D. at 690 (citation omitted).

during the comment period, and the only change made in the final permit involves non-PSD, state law issues, the Petition should be summarily dismissed for lack of standing.¹⁴

Moreover, even if the ERC issues could be raised before the EAB, Petitioner has not described how the change in the identity of the ERCs provided violates any law or regulation. And he cannot, as the identity of the particular credits is irrelevant to the offset analysis under District Regulation 2-2-302. That regulation simply requires that credits must be surrendered to offset the emissions, and does not require that any particular credits be used.

Beyond this single change involving Emission Reduction Credits over which the Board has no jurisdiction, the Petition does not raise any issues that were not reasonably ascertainable during the public comment period. As Petitioner has not met his burden to show with specificity that any other issues were unascertainable during the comment period, he cannot avail himself of the exception to the standing and issue-preservation requirements. Moreover, even a brief perusal of the Petition shows affirmatively that there are no such issues. Aside from the change in the identity of the ERCs, all of the other alleged defects in the PSD permit involve issues that were clearly evident when the Draft Permit was issued. For example, the allegation that the District lacked delegated authority to issue the PSD Permit (Petition, p. 1) is founded on the Delegation Agreement between EPA Region 9 and the District, which was effective January 20, 2006, well before the Draft Permit was issued. *See* Lee Decl., ¶ 8. The allegations regarding mis-application of the Best Available Control Technology (BACT) requirement and a purported “deficit” in Emissions Reduction Credits (Petition, pp. 1-3, 24) are founded on the District’s BACT and offsets analyses, which were clearly set forth in the PDOC/Draft PSD Permit. *See*

¹⁴ *See Robbins Resource Recovery Company*, 3 E.A.D. 648 at § B, 1991 EPA App. LEXIS 36, at *12-*15 (dismissing challenge to BACT determination that was changed in the final permit, but only with respect to pollutant regulated under state law and not the PSD regulations).

Lee Decl., Exhibit A at pp. 7-16. And the allegations regarding deficiencies in the public notice that was given for the PDOC/Draft PSD permit (Petition, pp. 2, 3) were, by definition, evident (or at least reasonably discoverable) at the time the notice was given at the commencement of the public comment period.¹⁵ Any information that Petitioner may have that he believes shows that the noticing of the PDOC/Draft Permit was deficient was clearly as discoverable during the comment period as it is now. If Petitioner believed he was prejudiced by some alleged deficiency, he had a duty to bring it to the District's attention at the time so the District could cure it, and he should not be allowed to wait in the weeds until after the issuance of the FDOC, the CEC's license, the District's ATC and the final PSD Permit to cry foul.

III. The Appeal Was Not Timely Filed

In addition to the lack of standing, Petitioner's Appeal is also defective because it was not timely filed.

40 C.F.R. Section 124.19(a) requires that an appeal of a PSD permit must be filed within 30 days after permit issuance. Section 124.19(a) specifies that "[t]he 30-day period within which a person may request review under this section begins with service of the notice . . ." of issuance of the permit. The Environmental Appeals Board has strictly applied this time limit, and has consistently denied Petitions for failing to comply with it in order to ensure "uniform application of the requirement."¹⁶

¹⁵ The Petition alleges on page 2 that the PDOC/Draft PSD Permit was not noticed in any newspapers. This is false. The issuance of the PDOC/Draft PSD Permit was noticed in the Oakland Tribune on April 12, 2007, soliciting public comment. See Lee Decl., ¶¶ 2-3. The Petition admits as much on page 3, where it states that "BAAQMD subsequently opening and closed its public comment period with one notice in the English newspaper."

¹⁶ *In re Town of Hampton, New Hampshire*, 10 E.A.D. 131, 132 (EAB 2001); see also *In re Town of Marshfield, Mass.*, NPDES Appeal No. 07-03, slip op. at 4 (EAB, March 27, 2007) (timely petition requirement "strictly construe[d]"); *Envotech*, 6 E.A.D. at 265-66; *Beckman*

Here, notice of the issuance of the permit was mailed on November 1, 2007 (Lee Decl., ¶ 7), and so any appeal had to be filed by December 3, 2007 (as December 1 fell on a Saturday).¹⁷ But Petitioner did not file his appeal until January 3, 2008, a month late. The Board should therefore dismiss the Petition as untimely.

Petitioner will undoubtedly point out that the District did not mail him a copy of the permit at the time of issuance, and therefore that he was initially unaware that the time for appeal had started to run. But the District did not mail him a copy because he had not commented on the draft permit or requested notice of final issuance, and so he was not a party entitled to receive notice under 40 C.F.R. Section 124.15. Petitioner therefore has only himself to blame for any prejudice he may suffer from being initially unaware that the time for appeal had started. Any such self-inflicted prejudice cannot create good cause for failing to comply with the 30-day appeal deadline.¹⁸

Moreover, the District did in fact fax a copy of the permit to Petitioner on November 29, 2007, after he inquired about it, and also emailed him a copy of the EAB's publication *A Citizens' Guide to EPA's Environmental Appeals Board* the next day, which contains information

Prod. Servs., 5 E.A.D. at 15-16; *Robbins Resource Recovery*, 3 E.A.D. 648 at § A, 1991 EPA App. LEXIS 36 at *6-*8.

¹⁷ Persons who are entitled to notice of permit issuance, by having commented, requested notice, or otherwise, are entitled to an extra 3 days to file a Petition where notice is sent by mail. 40 C.F.R. § 124.20. Persons who did not comment or request notice, however, are not eligible for the extra 3 days provided for in Section 124.20, even where the notice to those entitled to it was sent by mail. See *Robbins Resource Recovery*, 3 E.A.D. 648 at § A, 1991 EPA App. LEXIS 36 at *6-*8.

¹⁸ *Accord Robbins Resource Recovery Co.*, 3 E.A.D. 648 at § A, 1991 EPA App. LEXIS 36 at *6-*8 (time for appeal runs from date notice mailed to parties entitled to it, even for a Petitioner who did not actually receive notice because he had not submitted comments).

on how to appeal and on the threshold requirements such as standing and timeliness.¹⁹ Petitioner thus had actual notice of the issuance at least four days before the appeal deadline, with time still remaining to get the Petition filed by the due date. Alternatively, Petitioner could have at least have requested an extension of time to file his Petition during these four days if he believed that he had good cause therefore, but he failed even to take that limited protective action.²⁰ Any claims of prejudice by Petitioner from lack of notice of the permit issuance will therefore ring hollow, given that the District did in fact give him actual notice and a copy of the permit, as well as detailed notice of the EAB's appeal procedures, in time to appeal by the December 3 deadline.

But of course, even if Petitioner could claim that the time for him to appeal ran from the date of notice to *him* of the issuance (as opposed to notice to the persons specified in 40 C.F.R. Section 124.15), 30 days from when the District faxed him the permit on November 29, 2007, would have made the Petition due Monday, December 31, 2007 (as December 29 was a Saturday), and he did not file by this date, either. Thus, even if the Board were to grant Petitioner 30 days from when *he* was given actual notice, in contravention of the clear language in 40 C.F.R. Section 124.19(a), his Petition is still untimely.

Finally, Petitioner is apparently falling back on a theory that the time for him to file his Petition ran from publication of notice of the issuance of the District Authority to Construct in the newspaper, which occurred on December 6, 2006. Lee Decl., ¶ 9. Again, the language of 40 C.F.R. Section 124.19(a) is very clear. The time for filing the petition runs from "service of the notice", which is required only to those who commented or requested notice of the final action as

¹⁹ See Lee Decl., ¶ 10 (Permit faxed 11/29/07); Original Petition for Review, Docket Entry No. 2, at p. 17-18 (attaching 11/30/07 email from Alexander Crockett, Assistant Counsel, BAAQMD, transmitting the *Citizen's Guide*).

²⁰ Cf. *In re Town of Marshfield, Mass.*, NPDES Appeal No. 07-03, slip op. at 8 (EAB, March 27, 2007) (denying late petition as untimely where petitioner could have filed a request for an extension but did not).

set forth in 40 C.F.R. Section 124.15, and not from any newspaper publication.²¹ Indeed, 40 C.F.R. Part 124 does not even require newspaper notice of issuance of a PSD Permit, so publication of the newspaper notice could not have had any affect whatsoever on the 30-day appeal time for the PSD Permit. Petitioner had all the notice he was legally entitled to, as well as actual notice, in November of 2007. There can be no reason, legal or equitable, to start counting the 30-day appeal time from December 6, 2007.

For all of these reasons, the appeal must be dismissed as untimely.

IV. Many of the Issues Petitioner Raises Are Non-PSD Issues Over Which The EAB Has No Jurisdiction

To the extent that the Environmental Appeals Board does not dismiss the Petition summarily because of the threshold defects outlined above, it should at least strike portions of the Petition raising non-PSD issues outside of the Board's jurisdiction. As the Board has previously 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.

In re Sutter Power Plant, 8 E.A.D. 680, 690 (EAB 1999). Where issues do not involve requirements of the PSD regulations, the Board has no jurisdiction over them and cannot address them.

²¹ See also *Town of Hampton, New Hampshire*, 10 E.A.D. at 133 (30-day period runs from date of mailing of notice); *Beckman Prod. Servs.*, 5 E.A.D. at 15-16 (same); *Robbins Resource Recovery*, 3 E.A.D. 649 at § A, 1991 EPA App. LEXIS 36 at *6-*8 (30-day period runs from mailing of notice, even as to parties who did not receive notice because they did not comment).

Here, the only arguably PSD-related issues raised in the Petition are the following:²²

1. Did EPA Region 9 delegate authority to the District to issue the PSD Permit for the Russell City Energy Center?
2. Did the District properly issue the PSD Permit in compliance with applicable procedural requirements, such as providing notice of the Draft Permit and an opportunity to comment?
3. Did the District properly apply the Best Available Control Technology requirement?

All other issues the Petition raises are issues of state law and are not properly part of a PSD appeal.²³ At the very least, to the extent that any of them may contain some nugget of a PSD-related argument, Petitioner has failed to explain with any specificity what PSD provisions in the Clean Air Act or the PSD implementing regulations may be applicable and how they may have been violated, as is required for Environmental Appeals Board Review.²⁴

Thus, to the extent that the Board does not summarily dismiss the Petition in its entirety, the Board should at least make clear that only federal PSD issues are properly within the Board's jurisdiction and subject to whatever proceedings remain after adjudication of the District's request for summary dismissal. The Board should do so by issuing an order striking the non-PSD portions of the Petition for Review, or otherwise making clear that it will consider only the three PSD issues delineated above in further proceedings.

²² Note that no PSD requirements are cited in the Petition, only District regulations and provisions of state law. However, in accordance with the EAB's guidance that *pro se* petitions are to be liberally construed, the District paraphrases allegations made under state law and regulations that can reasonably be read to implicate federal PSD issues.

²³ For example, the Petition purports to challenge the state-law Authority to Construct issued by the District; claims that emissions will violate the District's public nuisance regulation, Regulation 1-301, a matter of state law; and alleges a potential violation of a California NO₂ standard, among other clearly state-law issues.

²⁴ See, e.g., *Sutter Power Plant*, 8 E.A.D. 687 (requiring petitioners to set forth "specific information supporting their allegations").

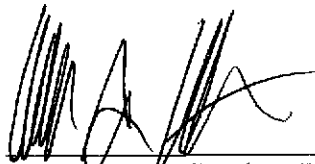
CONCLUSION

For the foregoing reasons, the Petition should summarily be DISMISSED. In the alternative, to the extent the Petition is not dismissed, the Environmental Appeals Board should strike the non-PSD portions of the Petition over which it has no jurisdiction, or otherwise indicate that they are not properly part of the Petition and are not subject to the EAB's review.

Dated: January 17, 2008

Respectfully Submitted

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



By: Alexander G. Crockett Esq.
Assistant Counsel

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

RECEIVED
U.S. E.P.A.

JAN 18 AM 9:59

ENVIR. APPEALS BOARD

In the matter of
Russell City Energy Center

} PSD Appeal No. 08-01
}
}
}

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that Alexander G. Crockett, Esq., Assistant Counsel, Bay Area Air Quality Management District shall and hereby does appear in the above-captioned matter as attorney for Respondent the Bay Area Air Quality Management District and its Air Pollution Control Officer, Jack P. Broadbent.

Mr. Crockett's contact information is as follows:

Alexander G. Crockett, Esq. (California State Bar No. 193918)
Assistant Counsel
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109
Phone: (415) 749-4732
Fax: (415) 749-5103
Email: acrockett@baaqmd.gov

Dated: January 17, 2008

Respectfully submitted,



Alexander G. Crockett, Esq.
Assistant Counsel
Bay Area Air Quality Management District

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

RECEIVED
U.S. E.P.A.

JAN 18 AM 10:03
ENVIR. APPEALS BOARD

In the matter of
Russell City Energy Center

)
)
)
)

PSD Appeal No. 08-01

PROOF OF SERVICE

I, Charlene Forbush, declare as follows: I am over the age of 18, not a party to this action and am employed in the City and County of San Francisco at 939 Ellis Street, San Francisco, CA 94109. On the date set forth below, I served the foregoing documents:

1. Notice of Appearance;
2. Response to Petition for Review Seeking Summary Dismissal;
3. Declaration of Weyman Lee, P.E.;
4. Declaration of J. Mike Monasmith; and
5. Proof of Service.

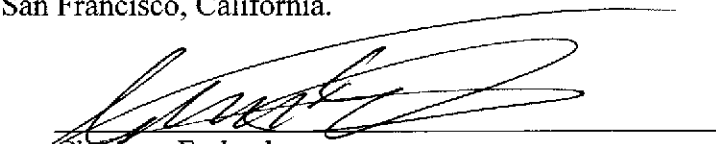


By placing the document(s) in a sealed envelope, with postage thereon fully paid, and depositing said envelope in the United States Mail at San Francisco, California addressed to the person(s) set forth below.

Rob Simpson
27126 Grandview Avenue
Hayward, CA 94542

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on January 17, 2008 at San Francisco, California.


Charlene Forbush