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

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| In re:<br>Russell City Energy Center<br><br>PSD Permit No. 15487 | ) | PSD Appeal No. 10-02 |

**RESPONDENT BAAQMD'S OPPOSITION TO**
**PETITION FOR RECONSIDERATION AND REQUEST FOR STAY**

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Pursuant to the Board's December 3, 2010, Order in this matter, Respondent the Bay Area Air Quality Management District ("BAAQMD") hereby submits this Opposition to the Petition for Reconsideration and Request for Stay filed by Petitioner Chabot-Las Positas Community College District ("CLP"). BAAQMD respectfully submits that CLP has not provided any reasons why the Board should reconsider its November 18, 2010, decision in this matter. CLP's request for reconsideration should therefore be denied.[1]

## I. Legal Standard For Reconsideration

CLP requests reconsideration pursuant to 40 C.F.R. section 124.19(g). That provision provides for reconsideration where a requestor sets forth a matter that has been erroneously decided and explains the nature of the alleged error. CLP's request does not satisfy this standard for reconsideration, as explained herein. Rather than to explain how the Board could have erred in reaching its well-considered decision, CLP uses its reconsideration motion – set forth in two separate Petitions totaling 41 pages of argument[2] – primarily as an opportunity to re-argue its case. Such a motion does not satisfy the EAB's standard for granting reconsideration. *See* Order Denying Motion for Reconsideration, *In re Dist. of Columbia Water and Sewer Auth.*, NPDES Appeal Nos. 05-02, 07-10, 07-11, & 07-12 (EAB Apr. 23, 2008) at 3; Order Denying Motion for Reconsideration, *In re Haw. Elec. Light Co., Inc.*, PSD Appeal Nos. 97-15 through 97-22, at 6 (EAB Mar. 3, 1999). The Board should therefore decline reconsideration and deny CLP's Petition.

[1] BAAQMD also observes that CLP has not shown any need for a stay of the effectiveness of the Board's decision while the facility is under construction. CLP has not challenged the propriety of any of the permit conditions that BAAQMD imposed for construction; CLP's challenges concern only operational emissions. There is no indication that the Board will not be able to rule on the motion for reconsideration, and for CLP to seek any further appellate relief as it deems appropriate, before construction is completed and the facility begins operating.

[2] CLP's first Petition for Reconsideration, filed November 29, 2010, is referred to herein as "CLP First Petition", and its Supplemental Petition for Reconsideration, filed December 1, 2010, is referred to as "CLP Supp. Petition".

## II. CLP's Petition Does Not Provide Any Reason Why The Board Should Reconsider Its Well-Reasoned Conclusion That 24-Hour Average $PM_{2.5}$ Impacts Did Not Need To Be Evaluated as Part of the PSD Analysis

CLP's first argument for reconsideration is that the Board should have addressed in detail CLP's claim that the facility will cause or contribute to a violation of the 24-hour average $PM_{2.5}$ National Ambient Air Quality Standard ("NAAQS"). The Board declined to do so because it found, based on the Clean Air Act and on well-settled Board precedent, that when an area is designated as non-attainment of a NAAQS – as the San Francisco Bay Area has been here for 24-hour average $PM_{2.5}$ NAAQS – Non-Attainment NSR permitting requirements apply and the PSD requirements are no longer applicable. *See* Order Denying Review ("Order") at 117-27. CLP requests that the Board reconsider this conclusion and hold instead that the PSD requirements do apply, which would mean that BAAQMD's analysis of 24-hour average $PM_{2.5}$ impacts (which ultimately found that the facility would not cause or contribute to a violation of the 24-hour standard in any event) would still be part of the required PSD analysis. But none of CLP's arguments provides any reason to reconsider this well-settled issue.

### A. CLP's Arguments Can Fairly Be Described as "Conclusory" and are Indisputably Inconsistent With the Applicable Statutes and Regulations.

CLP first takes issue with the Board's characterization of its argument that PSD requirements apply in non-attainment areas as "conclusory" and "seemingly inconsistent with the statutes and regulations." CLP First Petition at 16. But the term "conclusory" fairly describes CLP's arguments, because CLP never presented a colorable legal theory to support its position.[3] CLP merely continued to assert time and again that PSD still applies for 24-hour-average $PM_{2.5}$ impacts, notwithstanding the well-settled precedents to the contrary. CLP cited some inapplicable regulatory requirements without explaining how they supported its argument (*see, e.g.*, CLP Petition for Review at 31-32), and criticized the way this regulatory program works on

[3] CLP states that there has been a "long standing debate" between it and BAAQMD regarding whether PSD requirements apply in a non-attainment area (CLP First Petition at 6), and states that it has "consistently" been claiming that PSD should apply in these areas (*id.* at 7). But consistency does not equal merit. CLP has consistently been making conclusory assertions that PSD should apply in non-attainment areas, contrary to well-settled law.

policy grounds (*see, e.g.*, *id.* at 18, 32), but nowhere did it attempt a legal justification for its argument. CLP has similarly claimed generally that the different parts of the Clean Air Act must be construed together (*see, e.g.*, Oral Argument Transcript at 27), but has not offered any specific reasoning as to how the Act could be construed to require that PSD requirements must apply in a non-attainment area, in direct contravention of well-settled precedent. CLP simply cannot point to any specific legal argument it ever presented to support its contention that BAAQMD was required to conduct a 24-hour-average $PM_{2.5}$ analysis as part of this PSD permitting action.[4]

Moreover, whether or not "conclusory" is the most appropriate term to describe CLP's arguments,[5] CLP's position is certainly inconsistent with the applicable statutes and regulations. The Board clearly explained the legal authorities that establish that where an area is designated as non-attainment of a standard, as the San Francisco Bay Area is for 24-hour-average $PM_{2.5}$, then PSD no longer applies. Indeed, CLP quotes the Board's discussion of this issue at length in its reconsideration motion. *See* CLP First Petition at 3-4. CLP does not point to any reason how the Board could have erred in applying this well-settled principle here.

CLP does point out in several places that the facility is below the applicability threshold for Non-Attainment NSR permitting requirements for $PM_{2.5}$ under 40 C.F.R. Part 51, Appendix S. *See* CLP First Petition at 4-5. Although CLP may disagree with this applicability threshold, it has provided no argument that the Board erred in any way in addressing it. Nor does CLP provide any argument as to how a facility in a non-attainment area with emissions below the Non-Attainment NSR applicability threshold for a certain pollutant can somehow be subject to

[4] Note that CLP did make a specific argument in its reply brief regarding the so-called "construction moratorium" provision in 40 C.F.R. section 52.24, which BAAQMD addresses below. But this was raised for the first time in its reply brief, and even if it had been properly raised it is not an argument that PSD requirements should somehow apply in non-attainment areas. It is an argument that no permit should have been issued at all, not an argument that a permit should have been issued with a PSD analysis for 24-hour-average $PM_{2.5}$ impacts.

[5] The Board also described some of CLP's arguments as "confusing", to which CLP also objects. *See* CLP First Petition at 5. This term is also far from inappropriate in describing CLP's attempts to justify its position, for similar reasons.

PSD permitting requirements for that pollutant, contrary to the clear statutory and regulatory provisions of the Clean Air Act.

For all of these reasons, CLP has not identified any reason why the Board should reconsider its conclusion that PSD permitting requirements do not apply in non-attainment areas.

### B. CLP's Arguments Regarding the Construction Moratorium Were Properly Rejected As Untimely; and They Have No Substantive Merit In Any Event

CLP also objects to the Board's dismissal of its argument that the so-called "construction moratorium" provision in 40 C.F.R. Section 52.24 prohibited BAAQMD from issuing a permit for this facility. *See* CLP First Petition at 8-12. The Board declined to consider this argument because CLP did not raise it in its Petition and instead raised it for the first time in its reply brief. *See* Order at 125-26 n.115. CLP claims that it had raised this issue in its September 16, 2009, comment letter. But CLP does not point to anywhere in its comment letter where the construction moratorium was ever mentioned, and there is none. To the contrary, the comment letter conceded that BAAQMD could issue a permit for the facility – it simply claimed that BAAQMD must evaluate 24-hour-average $PM_{2.5}$ impacts and ensure that there would be no NAAQS violation before doing so. *See* CLP First Petition at 9-10 (citing CLP 9/16/09 comments at 1-2). CLP also notes that it cited generally 40 C.F.R. Parts 51 and 52, and points out that the construction moratorium provision in 40 C.F.R. Section 52.24 is in Part 52. *See* CLP First Petition at 10. But Part 52 has thousands of individual sections within it, and simply making a general citation to Part 52 is not sufficient to raise the construction moratorium provision with specificity. Moreover, even if CLP had raised this issue in comments, it failed to raise it in its Petition for Review, and instead waited until its reply brief to discuss it, which is the reason the Board gave for not considering the issue. This defect remains regardless of what CLP said in its comments. CLP has therefore not provided any viable reason why the Board should reconsider its decision on this issue.

Furthermore, even if CLP had argued the construction moratorium in its Petition, it still would not have provided any grounds to grant review, as BAAQMD explained in detail in its

Sur-Reply Brief at pp. 2-3. There simply is no construction moratorium in effect here because BAAQMD is still in the process of developing its $PM_{2.5}$ implementation regulations – and still has plenty of time to complete that process before any construction moratorium could possibly be imposed. The fact that BAAQMD has not yet completed the process does not mean that there are no Non-Attainment NSR regulations in place for $PM_{2.5}$, as CLP seems to imply; it simply means that the Non-Attainment NSR regulations in 40 C.F.R. part 51, Appendix S, apply instead, as the Board correctly held.

### C. CLP's New Arguments Raised For The First Time In Its Reconsideration Petition Should Be Rejected on Both Procedural And Substantive Grounds.

CLP also presents two new arguments that it raises for the first time in its Petition for Reconsideration. These new arguments should be rejected on procedural grounds because CLP should have presented them in its Petition for Review if it wanted the Board to consider them. Moreover, even if the Board were to address the substance of the arguments, it should reject them because they have no merit.

CLP cites the Ninth Circuit's decision in *Friends of Pinto Creek v. EPA*, 504 F.3d 1007 (9th Cir. 2007), a case involving an NPDES permit issued under the Clean Water Act. That case is irrelevant because it involves a different statute with different regulatory provisions. CLP makes no argument whatsoever as to how the Ninth Circuit's discussion of the Clean Water Act NPDES requirements could have any impact on how the Clean Air Act PSD requirements at issue in this case should be applied.

CLP also cites the provision in the statutory definition of "Lowest Achievable Emission Rate" ("LAER") in Clean Air Act Section 171(3), 42 U.S.C. § 7501(3), which provides that a LAER emissions limit cannot be less stringent than an applicable New Source Performance Standard. CLP First Petition at 14. CLP claims that this provision "[c]learly" requires consideration of 24-hour-average $PM_{2.5}$ impacts when issuing a PSD permit in an area that has been designated as non-attainment for the 24-hour-average $PM_{2.5}$ NAAQS. *Id.* In fact, this provision is completely irrelevant to PSD permitting. As CLP concedes, this provision is in Part

D of Title I of the Clean Air Act, which sets forth "requirements for non-attainment areas," not for PSD permits. *Id.* CLP has not attempted to cite anything in this provision to suggest that the Board's decision was erroneous in this regard, and there is none.[6]

## III. CLP Has Not Provided Any Reason Why the Board Should Reconsider Its Decision on CLP's Environmental Justice Claims.

CLP next objects to the Board's rejection of its environmental justice argument. CLP's environmental justice argument asserted that BAAQMD's environmental justice analysis was flawed because BAAQMD failed to properly analyze whether the facility will cause or contribute to a violation of the 24-hour-average $PM_{2.5}$ NAAQS. *See* CLP Petition for Review at 36-37. The Board concluded that since the 24-hour $PM_{2.5}$ NAAQS is no longer applicable for this facility, then any alleged failure to properly conduct an analysis for that standard cannot have undermined BAAQMD's conclusion that there will be no significant adverse impacts to any environmental justice community resulting from the PSD permit. *See* Order at 127 n.116.

CLP now maintains that there was more to its environmental justice argument than simply its 24-hour-average $PM_{2.5}$ claims. But a review of the record shows this assertion to be false. Nowhere in any of its briefs has CLP ever alleged any other shortcoming in BAAQMD's environmental justice analysis besides its concerns regarding the 24-hour-average $PM_{2.5}$ NAAQS. Indeed, CLP itself characterized its 24-hour-average $PM_{2.5}$ argument as the "foundation" of its environmental justice claim. CLP Petition for Review at 37 (arguing for remand because "BAAQMD's environmental justice analysis is built on a faulty foundation . . . ."). Similarly, at oral argument, CLP's counsel did not dispute the characterization of CLP's environmental justice claims as being "an offshoot" of the 24-hour-average $PM_{2.5}$ concerns. Oral Argument Tr. at 29 (cited in CLP First Petition at 19). Given CLP's own characterization of its argument as

[6] Note also that CLP has not argued that the facility's emissions would be in excess of what is allowed by any New Source Performance Standard. (New Source Performance Standards are regulatory requirements adopted pursuant to CAA § 111 and codified in 40 C.F.R. Part 60.) Accordingly, even if this Non-Attainment NSR provision were relevant in a PSD permitting context (which it is not), it would not provide any reason to find that the permit was improperly issued.

being derivative of its 24-hour-average $PM_{2.5}$ claims, and the fact that there is nothing in the record whatsoever to indicate that CLP ever asserted any other grounds for its challenge on this issue, the Board should reject CLP's attempt to expand its argument in a reconsideration motion.

CLP does cite a statement by its counsel at oral argument that the "offshoot" description was "somewhat limited", which CLP now attempts to mean that it was arguing that there was more to its environmental justice argument than simply the 24-hour-average $PM_{2.5}$ issue. *See* CLP First Petition at 19. But CLP's counsel did not go on to point out any other alleged defect in the environmental justice analysis besides the 24-hour-average $PM_{2.5}$ concerns. In fact, the remainder of her sentence goes on to discuss in more detail CLP's specific concerns with the 24-hour-average $PM_{2.5}$ analysis. *See* Oral Argument Tr. at 29 ll. 10-18. There is nothing in these statements whatsoever that points to anything further in CLP's environmental justice claim, and nothing to suggest that the Board should reconsider its rejection of that claim as being wholly derivative of the 24-hour-average $PM_{2.5}$ claim.[7]

## IV. CLP's Arguments Regarding EAB Precedents Provide No Grounds For Reconsideration

CLP also argues that the Board erred in applying earlier precedents approving permitting agencies' environmental justice analyses based on a finding that an applicable PSD NAAQS would not be violated. *See* CLP First Petition at 20-26 (citing *In re Knauf Fiber Glass GMBH*, 9 E.A.D. 1 (EAB 2000) ("*Knauf II*"), *In re Shell Offshore, Inc.*, OCS Appeal Nos. 07-01 & 07-02 (EAB Sept. 14, 2007), *In re Ecoelectrica, L.P.*, 7 E.A.D. 56 (EAB 1997), and *In re AES Puerto Rico L.P.*, 8 E.A.D. 324 (EAB 1999)). But CLP is wrong that there is any inconsistency between its decision in this case and these prior precedents. In each of those cases, the NAAQS that was evaluated was applicable as a PSD permitting requirement. None of those cases involved a

[7] Note also that even if the Board were to decide that it should revisit the 24-hour-average $PM_{2.5}$ issue in the environmental justice context, BAAQMD found as a matter of fact that the facility would not cause or contribute to a violation of the 24-hour-average $PM_{2.5}$ NAAQS even if the standard were applicable. Thus even if the Board were to grant reconsideration on this issue, it should not remand the permit but conduct a further evaluation of BAAQMD's robust technical analysis on this issue.

NAAQS for which the region was designated as non-attainment, as is the case here with the 24-hour-average $PM_{2.5}$ NAAQS. The Board carefully explained why the 24-hour-average NAAQS is no longer applicable for PSD permitting in the San Francisco Bay Area now that it has been designated as non-attainment for that NAAQS. *See* Order at 119-27. CLP has not provided any reason how this conclusion could be incorrect, and its citations to cases where the NAAQS was applicable to PSD permitting do not do so.

CLP also quotes at length two passages from *In re Chemical Waste Management of Indiana, Inc.*, 6 E.A.D. 66 (EAB 1995), a case involving a permit issued under the Resource Conservation and Recovery Act ("RCRA"). *See* CLP First Petition at 24-25. But neither of these passages supports CLP's reconsideration request in any way. The first passage addresses a statutory provision unique to RCRA, the so-called "omnibus clause". CLP has not pointed to any similar provision in the Clean Air Act. Instead, the Clean Air Act has the PSD requirements and non-attainment NSR requirements and all of its other regulatory requirements, all of which BAAQMD has complied with. Merely citing the *Chemical Waste Management* decision does nothing to alter this reality. The second passage addresses the fact that although Executive Order 12,898 does not create a right of judicial review, environmental justice issues are still something that the EAB can consider in its administrative review of agency permit decisions. This point is irrelevant here because the EAB did not reject CLP's environmental justice claims on the grounds that it could not review them. To the contrary, the Board presumed that environmental justice issues are properly issues that it can consider when reviewing a PSD permit, but rejected CLP's claims here because CLP has not shown that there would be any disproportionate impact on any community from this PSD permit that could implicate environmental justice concerns. This holding is entirely consistent with the *Chemical Waste Management*.

## V. CLP Has Not Shown Any Grounds For Reconsideration Based on BAAQMD's PSD Analysis For The Annual-Average $PM_{2.5}$ NAAQS.

CLP also attempts a last-ditch effort to resuscitate its arguments about BAAQMD's $PM_{2.5}$ analysis by claiming that even if $PM_{2.5}$ is no longer subject to PSD requirements for the 24-hour-

average NAAQS, it is still relevant in the context of the annual-average NAAQS. CLP First Petition at 26-31. CLP correctly notes that PSD requirements still apply for facilities in the San Francisco Bay Area for the $PM_{2.5}$ annual-average standard, and therefore that BAAQMD was required to evaluate whether the facility would cause or contribute to a violation of that annual-average standard. CLP therefore argues that its concerns about BAAQMD's modeling analysis – and specifically about (i) whether BAAQMD should have used an emissions rate of 9 pounds per hour of $PM_{2.5}$ instead of the maximum permitted emissions rate of 7.5 pounds per hour and (ii) whether BAAQMD should have included additional roadway segments in its multi-source modeling exercise that BAAQMD found would not cause a significant concentration gradient at any location of concern – are still relevant and should have been considered in more detail.

The flaw in this argument is that CLP has never before in this proceeding raised any concerns regarding compliance with the annual-average standard. CLP has never argued that the alleged defects in BAAQMD's modeling analysis undermine BAAQMD's conclusions regarding the annual standard. That is, CLP has never argued that the failure to use a 9 lb/hr emissions rate and to include additional roadway segments in the modeling analysis could potentially lead to a finding that the facility would cause or contribute to a violation of the annual-average NAAQS. To the contrary, the only claim that CLP has ever asserted is that this facility would violate the 24-hour-average NAAQS. If CLP had concerns that the facility would cause or contribute to a violation of the annual-average standard as well, it was incumbent upon CLP to bring its concerns to the Board's attention in its Petition for Review (as well as to BAAQMD's attention during the comment period). CLP may not use a motion for reconsideration as an opportunity to raise new arguments, such as a challenge to BAAQMD's annual-average NAAQS analysis, where they were not properly raised in CLP's Petition.

## VI. CLP Has Not Shown Any Error In The Board's Rejection Of CLP's Claims That An Auxiliary Boiler Should Have Been Required as BACT For Startups

Finally, in its Supplemental Petition for Reconsideration, CLP requests reconsideration of the Board's ruling that BAAQMD was correct in declining to require an auxiliary boiler as

BACT to reduce CO emissions from startups.[8] CLP cites four elements of the Board's decision which it purports to challenge, from pages 54-56 of the Order:

1. CLP cites the Board's observation that using *either* (i) CLP's asserted auxiliary boiler cost of $11,515 per ton of CO reduced based on estimates from the Caithness facility, *or* (ii) BAAQMD's calculated cost of $21,140 per ton based on its review of the Caithness estimates, the auxiliary boiler would not be sufficiently cost-effective to require as BACT. Specifically, CLP cites the Board's observation that the issue of which specific number the Caithness data actually support is therefore "irrelevant", because no matter which party's number ends up being correct, BAAQMD's ultimate conclusion – that the auxiliary boiler is not sufficiently cost-effective – is correct and fully supported by the record.[9]

2. CLP further cites the Board's observation that CLP did not challenge BAAQMD's conclusion that a cost of $11,515 per ton of CO reduced would not be sufficiently cost-effective to require as BACT.

3. CLP further cites the Board's observation that CLP did not challenge BAAQMD's cost estimate for the auxiliary boiler of $1,029,521 in its comments, and therefore is barred from challenging this number on appeal.

4. Finally, CLP cites the Board's ultimate conclusion that, based on the entirety of the record, BAAQMD's approach to the cost-effectiveness analysis was "rational" and that review should therefore be denied.

*See* CLP Supp. Petition at 1-2. CLP apparently is requesting that the Board reconsider its decision on these specific issues. But CLP's arguments do not provide any specific grounds as to how the Board could have erred in any of this discussion.

First, CLP claims that its Petition for Review did in fact "challenge BAAQMD's conclusion that [CLP's] $11,515 value is not cost-effective . . . ." CLP Supp. Petition at 3. As

[8] Note that CLP erroneously states that the additional CO reductions that could potentially be achieved by an auxiliary boiler are an ozone precursor, and that these reductions are therefore associated with ozone non-attainment. *See* CLP Supp. Petition at 1. CLP is wrong that CO is an ozone precursor. NOx and VOC are ozone precursors, not CO. And the San Francisco Bay Area is designated as attainment for CO, which is why CO is subject to PSD requirements as opposed to Non-Attainment NSR requirements.

[9] CLP also objects in a footnote that the Board did not specify where exactly in its Opinion it demonstrated that BAAQMD did in fact address the Caithness data. CLP Supp. Petition at 2 n.2 (citing Order at 55). The Board's discussion of this issue is set forth in the three pages of text leading up to this statement, and so this point is clear from reading the discussion in its entirety and there was no need for a further, more specific reference.

support, CLP quotes from the arguments it presented in its Petition for Review that BAAQMD erroneously used cost estimates based on a similar boiler at the facility in Mankato, Minnesota, rather than basing its cost estimates on a boiler used at different facility. *See id.* At 3-4 (quoting CLP's Supplemental Errata to Petition for Review at 35-36). But CLP never said anything in the quoted passages about whether an $11,515 value would be cost-effective, or about what the appropriate cost-effectiveness threshold should be. Moreover, CLP's claims in these passages that BAAQMD should have based its cost estimates on a different boiler at a different facility were never raised in comments, and so it was improper for CLP to raise this argument in its Petition for Review. As the Board clearly explained, CLP did not object in any way whatsoever to BAAQMD's cost calculation in its comments, and challenged neither BAAQMD's bottom-line cost estimate of $1,029,521 nor any of the information or calculations on which the cost estimate was based. *See* Order at 53 ("Importantly, [CLP] did *not* question the annualized cost calculation BAAQMD had used, and any attempt to do so now is untimely.") (emphasis in original); *see also* BAAQMD Response to Petition 10-02 at 40. There is therefore nothing in the passages that CLP quotes that could provide any grounds for reconsideration.

Second, CLP also claims that its counsel represented during oral argument that CLP did not agree to the auxiliary boiler cost estimate that BAAQMD used. *See* CLP Supp. Petition at 3 n.3. But the transcript of the oral argument shows that CLP's attorney never pointed to anything in the permitting record showing that CLP had objected to the cost estimate during the comment period, which is consistent with the Board's analysis of this issue as noted above. *See* Order at 53. CLP first questioned the cost numbers BAAQMD used in its analysis in its Petition for Review, and the Board properly rejected these claims for not having been adequately preserved. CLP also points out that its counsel stated at oral argument that CLP would like to make an offer of proof that the cost would be less than $2,000 per ton, but this was the first time that CLP had ever mentioned this point. *See* CLP Supp. Petition at 3 n.3. It goes without saying that were a petitioner did not preserve an issue by raising it in comments, and did not raise it in its petition for review or reply brief, it may not be raised for the first time in rebuttal at oral argument.

Third, CLP notes that it submitted estimates from Siemens of the amount of emission reductions that the Caithness facility could achieve using its auxiliary boiler, and quotes its comment that BAAQMD should reexamine the cost-effectiveness analysis in light of these estimates. *See* CLP Supp. Petition at 4. But the Siemens data sheets CLP submitted – as well as the substance of the comments that CLP made based on the Caithness facility – went to the amount of emissions reductions that could be achieved using an auxiliary boiler, not to the costs that would be involved in doing so. Put another way, the Siemens estimates went to the denominator in the dollars-per-ton cost-effectiveness analysis, not to the numerator. And BAAQMD *did* consider this Siemens information in the context of how it would impact the denominator (*i.e.*, the emissions reductions that could be achieved). That information led to the $11,515 or $21,140 per ton cost-effectiveness values discussed in the Board's Order, both of which fully support the conclusion that the auxiliary boiler should not be required as BACT. The mere fact that CLP commented that BAAQMD should have used a different *emission reduction* number based on the Caithness facility does not mean that CLP preserved an argument that BAAQMD should have used a different *cost* number.

Fourth, CLP notes that in its comments it stated that the $1,029,521 cost estimate for the auxiliary boiler came from information "provided" by Calpine and that emissions reductions were "calculated" by Calpine. CLP Supp. Petition at 4. CLP appears to be claiming now that its comments were implying that BAAQMD's cost estimate was flawed, on the grounds that BAAQMD used information that was "provided" and "calculated" by Calpine and that anything provided by Calpine must inherently be suspect. This is the only reasonable reading of CLP's argument here, because CLP has not pointed to any reason why the information from Calpine that BAAQMD used in its analysis could be unreliable, other than that it was provided by Calpine.[10] But nothing in CLP's comments provided any specific argument that BAAQMD's

[10] Note that CLP argued in its Petition for Review that BAAQMD should have looked to a different facility to develop a cost estimate for the auxiliary boiler, and should have ignored the information it received from Calpine. In making this argument, CLP has never claimed that the information from Calpine was technically incorrect in any way, it simply claimed that Calpine's

cost estimate was flawed in this way, and so this point cannot belatedly be raised at this stage. And even if CLP could be allowed to make this point now, it still has not pointed to any reason why BAAQMD's cost estimate could be erroneous simply because of the fact that it used information from Calpine. CLP even seems to recognize this point itself, as it notes that its concern here is an (alleged) improper "deflating [of] the emissions reduction benefits of the auxiliary boiler," not an improper cost value – *i.e.*, a concern with the denominator, not with the numerator. CLP Supp. Petition at 4.

Fifth, CLP cites a 1999 letter from EPA staff commenting on a BACT analysis in a PSD permit being reviewed by the Michigan Department of Environmental Quality – a document which has never previously been made part of this proceeding, either during the permitting process or on appeal. *See* CLP Supp. Petition at 4-5 and Exh. B. The fact that CLP has never raised this letter before is fatal to any attempt now to use it to argue for reconsideration. But even if the Board were to look at the substance of the letter, it does not support reconsideration here. The portion of the letter CLP quotes expresses two opinions: (i) that a cost of $3,700 per ton of sulfur dioxide and sulfuric acid mist removed could be considered cost-effective, absent other information; and (ii) that where controls have been successfully applied to similar sources, the cost-effectiveness analysis "should concentrate on documenting significant cost differences" between the controls at other facilities and using them at the facility under review. The point regarding the $3,700 cost-effectiveness number is inapposite here because it was made in the context of a different pollutant (sulfur dioxide and sulfuric acid mist, not CO); and also because even a cost-effectiveness value of $3,700 per ton of CO reduced is still well below what the cost per ton of using an auxiliary boiler would be here (*i.e.*, it would cost well over $3,700 per ton of

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information was not from an analogous facility. BAAQMD has always disagreed with CLP on this point, and has also pointed out that CLP did not timely reserve this point in any event. But even viewing CLP's argument on this point in a light most favorable to CLP, it cannot be said that CLP has ever claimed that the information from Calpine was incorrect. The most that CLP can be said to have argued is simply that BAAQMD should have ignored the information from Calpine as irrelevant, and used information from other facilities instead.

CO reduced to use an auxiliary boiler here). The point regarding documenting significant cost differences between this facility and other facilities is similarly inapposite because BAAQMD did carefully document the costs that would be involved and how they would greatly exceed what other facilities are typically required to bear to reduce CO emissions; and because CLP has not pointed to any evidence that any other facility has used an auxiliary boiler as a BACT control technology to achieve CO reductions at a cost-effectiveness level similar to what would be involved in doing so here.[11] For all of these reasons, nothing in this letter provides any reason for the Board to reconsider its decision.

Sixth, and finally, CLP rehashes its argument that BAAQMD's BACT Workbook – BAAQMD's guidance for conducing Non-Attainment NSR permitting under its SIP-approved Non-Attainment NSR regulations – provides that for Non-Attainment NSR permitting determinations, the agency should not look at cost-effectiveness where a technology has been "achieved in practice". *See* CLP Supp. Petition at 7-8. As CLP correctly notes, the Board rejected this argument because CLP did not raise the BACT Workbook issue in its comments or

[11] CLP does make a number of factual assertions about the use of other auxiliary boilers at other facilities (some of which are based additional new documents that CLP impermissibly seeks to raise for the first time on reconsideration). *See* CLP Supp. Petition at 6-7. But CLP does not explain how any of this factual information – even if it had a proper evidentiary basis – could support a claim that the use of an auxiliary boiler is an "achieved-in-practice" technology for controlling startup CO emissions at a cost-effectiveness level similar to what would be required here. Indeed, much of CLP's argument is aimed at showing that auxiliary boilers used at other facilities have *not* been required there as BACT control devices. For example, CLP explains that at Los Medanos, the purpose of the auxiliary boiler "is not to work with the turbines to reduce start up time . . . . Instead, the purpose of this auxiliary boiler is to provide process steam to a neighboring steelmaking facility . . . ." CLP Supp. Petition at 6. And it appears that the auxiliary boilers at the other facilities CLP has cited are similarly used for other purposes, not as BACT control devices to reduce startup emissions. Those facilities have the flexibility not to use the auxiliary boiler, which necessarily means that the boilers cannot have been required as BACT, which would require them to be used at all times. Moreover, even if they had been required as a BACT control technology for reducing CO from startups, there is no indication that they were required at a cost-effectiveness level similar to what would be involved here. To the contrary, given the information that BAAQMD presented regarding CO cost-effectiveness determinations from around the country, it is highly unlikely that any permitting agency would require additional CO control technologies as BACT in a PSD permit at a cost of several tens of thousands of dollars per ton as would be required here.

in its Petition for Review, and was therefore barred from raising for the first time in its reply brief. *See* Order at 45 n.35. CLP does not dispute that it raised this issue for the first time in its reply brief, but it claims that it should be allowed to do so because "the general theme of its comments" and its Petition was that an auxiliary boiler should be considered "achieved in practice". CLP Supp. Petition at 8. But a "general theme" set forth in comments is not sufficient to preserve for review a specific argument regarding passages from BAAQMD's BACT Workbook. And to the extent that CLP is attempting to reargue the issue generally of whether cost-effectiveness should be a consideration in a PSD BACT analysis or whether a technology that is "achieved in practice" should be required regardless of costs, the Board explicitly rejected that argument in its Order, and CLP has not provided any reason why that analysis should be reconsidered. *See* Order at 45 n.35 ("To the extent [CLP] is reiterating CAP's argument on that point, the Board has already addressed that issue."). CLP asserts that the Board somehow avoided addressing the general "achieved-in-practice" argument on a procedural technicality, but this is simply not the case (*see generally* Order at 24-28, Part VI.B.1.a.i; *and specifically id.* at 28 (BAAQMD interpretation "comports with the statutory provision that requires consideration of costs as part of the BACT analysis.") (citation omitted)), and the Board should not be swayed by CLP's attempts to characterize it as such.

## VII. Conclusion

For the foregoing reasons, BAAQMD respectfully requests that the Board deny CLP's Petition For Reconsideration And Request For Stay.

Dated: December 10, 2010

Respectfully Submitted

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BAY AREA AIR QUALITY
MANAGEMENT DISTRICT

/s/

By: Alexander G. Crockett Esq.
Assistant Counsel

**PROOF OF SERVICE**

I, Alexander G. Crockett, declare as follows:

I am over the age of 18, not a party to this action, and employed in the City and County of San Francisco, California, at 939 Ellis Street, San Francisco, CA 94109. On the date set forth below, I served this document, **RESPONDENT BAAQMD'S OPPOSITION TO MOTION FOR RECONSIDERATION**, by electronic mail to the following email addresses, according to an agreement for electronic service agreed to in writing by all parties and/or their counsel in this proceeding:

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

Executed on December 10, 2010, at San Francisco, California.

_____/s/_____
Alexander G. Crockett