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

In re:	)	
Russell City Energy Center	)	PSD Appeal No. 10-05
PSD Permit No. 15487	)	

RUSSELL CITY ENERGY COMPANY, LLC'S RESPONSE TO THE PETITION FOR REVIEW FILED BY CALIFORNIANS FOR RENEWABLE ENERGY, INC., BOB SARVEY, AND ROB SIMPSON

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I. INTRODUCTION

Permittee Russell City Energy Company, LLC ("RCEC") hereby submits its Response to the Petition for Review Filed by CAlifornians for Renewable Energy, Inc., Bob Sarvey, and Rob Simpson ("CARE/Simpson" or "Petitioners") (PSD Appeal No. 10-05) ("CARE/Simpson Petition" or "Petition").[1] The Petition challenges the decision by the Bay Area Air Quality Management District ("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.

On April 8, 2010, the Air District and RCEC filed responses requesting summary disposition of the Petition. Air District's Response to Petition for Review Requesting Summary Dismissal, PSD Appeal No. 10-05 (Apr. 8, 2010); RCEC's Response Seeking Summary Disposition, PSD Appeal Nos. 10-01, 10-05, 10-06 & 10-07 (Apr. 8, 2010). On April 14, 2010, the Environmental Appeals Board ("Board") denied these requests for summary disposition and requested that the Air District and RCEC address the merits of the Petition. Order Denying Request for Summary Dismissal of CARE Petition and Requesting Response on the Merits, PSD Appeal No. 10-05 (Apr. 14, 2010). In accordance with the Board's Order, RCEC submits its substantive response and again respectfully requests that the Board dismiss the Petition in its entirety.

As an initial matter, the Petition was filed after the March 22, 2010 filing deadline. If the Board determines in its ongoing investigation that CARE/Simpson's untimeliness was not

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[1] 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." 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 27-28. Because Mr. Sarvey submitted a separate petition on his own behalf, petitioners are referred to herein as "CARE/Simpson."

"solely attributable to a CDX malfunction," the Board should deny the Petition in its entirety for this reason alone.

In addition, the five issues raised by CARE/Simpson all fail for multiple reasons and provide no basis for Board review.

First, CARE/Simpson contend that the Air District circumvented public participation by failing to provide sufficient access to public documents, failing to maintain an electronic docket or database, and issuing flawed documents. This contention has no basis. The Air District considered public comments and made significant substantive changes to the draft permit as a result of such comments. The Air District provided extensive responses to public comments, including responses to the very same issues raised by the Petition. CARE/Simpson fail to acknowledge these responses, let alone identify any clear error. Moreover, the Air District met or even exceeded regulatory requirements with respect to providing and encouraging public participation in the PSD permitting process.

Second, CARE/Simpson allege that the Preliminary Determination of Compliance ("PDOC") and the draft PSD permit are "interdependent" and that the Air District should re-notice the PDOC along with a "new" draft PSD permit. With most of their argument consisting of a summary of federal and Air District regulations that apply to permit proceedings, CARE/Simpson fail to raise any specific issue with respect to the PSD permit or to articulate any error by the Air District. Further, the Air District fully documented both its extensive efforts to comply with all PSD notice requirements and its treatment of the PSD permit as a "new" permit. CARE/Simpson's contention appears to be based on its fundamental misapprehension concerning the relationship between the PSD permitting process and the State-law permitting process previously conducted by the Air District.

Third, CARE/Simpson claim that the Air District erred by not considering greenhouse gases ("GHGs") as regulated pollutants. Given the status of the U.S. Environmental Protection Agency's ("EPA") regulation of GHGs under the PSD program – as clearly explained by the Air District – this claim is patently false. Moreover, as has been widely recognized, RCEC's PSD

permit is the first federal PSD permit to include enforceable BACT limits for GHGs. To that end, the Air District conducted a first-of-its-kind BACT analysis, applying EPA's top-down BACT methodology and establishing enforceable limits on GHG emissions. Thus, even if GHGs were regulated pollutants at this time subject to PSD permitting (which they are not), RCEC's permit would satisfy all PSD requirements.

Fourth, CARE/Simpson purport to list "specific 'amended' permit issues" that warrant review. These issues repeat in large part CARE/Simpson's unsupported and false allegations about public participation. To the extent that CARE/Simpson raise additional issues, their arguments again wholly fail to address the Air District's responses to comments on the issues and also fail on the merits.

Fifth, CARE/Simpson claim that the Air District did not adequately respond to any of the issues that they raised during the public comment periods and note, in particular, 18 issues in an attempt to identify allegedly faulty responses. Neither CARE/Simpson's general claim nor any of the particular issues has merit. The Air District's 235-page Responses to Public Comments more than satisfied regulatory requirements and fully and adequately addressed the 18 particular issues.

Therefore, even if the Board does not deny the Petition based on its untimeliness, it should deny review because CARE/Simpson fall far short of establishing that any of the Air District's permitting decisions were clearly erroneous or otherwise warrant Board review.

II. BACKGROUND

The Russell City Energy Center ("Project") will be a 600-MW natural gas-fired, combined-cycle power plant in Hayward, California. The Project is subject to federal PSD permitting by the Air District, pursuant to a delegation agreement with the EPA. *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. The Air District solicited public comment on the Draft PSD Permit and accompanying Statement of Basis and accepted written comments for nine weeks, until February 6, 2009. Exhibit 1, Statement of Basis for Draft Amended Federal "Prevention of Significant Deterioration" Permit (Dec. 8, 2008) ("Statement of Basis").[2] The Air District also held a public hearing at the Hayward City Hall on January 21, 2009. 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 again solicited public comment on the revised Draft PSD Permit and accompanying Additional Statement of Basis and accepted written comments for 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*. Thus, the Air District accepted public comments on the Draft PSD Permit for a total of more than 15 weeks during two public comment periods, each with a public hearing conducted pursuant to EPA requirements.

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[2] All references to Exhibits 1-26 are to RCEC's Consolidated Exhibits to Its Responses to Petitions for Review, which were previously filed with the Board by RCEC and are docketed on the Board's website as Docket Nos. 52 and 62. References to Exhibits 27-34 are to RCEC's Consolidated Exhibits to Its Responses to Petitions for Review Filed by the California Pilots Association and CAlifornians for Renewable Energy, Inc., Bob Sarvey, and Rob Simpson, which RCEC is filing in support of this response and its related response to another petition.

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 (Feb. 3, 2010) ("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 10 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) CAlifornians for Renewable Energy, Inc., Bob Sarvey, and Rob Simpson (PSD Appeal No. 10-05); Juanita Gutierrez (PSD Appeal No. 10-06); (7) Karen D. Kramer (PSD Appeal No. 10-07); (8) Hayward Area Recreation and Park District (PSD Appeal No. 10-08); (9) Minane Jameson (PSD Appeal No. 10-09); and (10) Idojine J. Miller (PSD Appeal No. 10-10).

For the reasons discussed below, the CARE/Simpson Petition should be dismissed in its entirety.

III. 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." *Knauf II*, 9 E.A.D. 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. *Knauf II*, 9 E.A.D. at 5. 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). 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 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) ("*HELCO*"). 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.*

For every issue raised, the petitioner bears the burden of demonstrating that review is warranted. *See* 40 C.F.R. § 124.19(a); *accord In re Steel Dynamics, Inc.*, 9 E.A.D. 740, 744 (EAB 2001). A petitioner seeking review of a technical issue bears an especially "heavy burden." *In re Three Mountain Power, LLC,* 10 E.A.D. 39, 50 (EAB 2001) ("[w]e generally accord deference to permitting agencies when technical issues are in play. As such, we assign a heavy burden to persons seeking review of issues that are quintessentially technical.") (citations omitted).

IV. THE CARE/SIMPSON PETITION WAS UNTIMELY AND GENERALLY FAILS TO MEET A MINIMUM STANDARD OF SPECIFICITY

RCEC sought summary disposition of the Petition on the basis that it was not timely filed. *See* RCEC's Response Seeking Summary Disposition, PSD Appeal Nos. 10-01, 10-05, 10-06 & 10-07 (Apr. 8, 2010) at 11-16. In its brief, RCEC noted that the filing deadline was March

22, 2010. *Id*. at 11-12 (citing Exhibit 4, Final PSD Permit at 2; Exhibit 5, Responses to Public Comments at i; Exhibit 6, Email Notice at 1; Exhibit 7, Mail Notice at 1). 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. The Air District specified 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; *see also* Exhibit 4, Final PSD Permit at 2; Exhibit 6, Email Notice at 1; Exhibit 7, Mail Notice at 1.

Notwithstanding this explicit mandate, CARE/Simpson submitted their petition on March 23, 2010. Due to assertions of several participants in this proceeding that they experienced filing problems with the Central Data Exchange ("CDX") portal on the evening of March 22, 2010, prior to the 11:59PM ET filing deadline, the Board is currently investigating whether there was indeed a problem with the CDX portal that evening. *See* Order Denying Request for Summary Dismissal of CARE Petition and Requesting Response on the Merits, PSD Appeal No. 10-05 (Apr. 14, 2010) at 2. If the Board determines that Petitioner's untimeliness was not "solely attributable to a CDX malfunction," the Board should deny the Petition in its entirety based on its untimeliness.[3]

The CARE/Simpson Petition also fails to meet the Board's minimum standards of specificity. *See* EAB Practice Manual at 33. The Petition is replete with incomplete and run-on sentences, and far from "specifically identify[ing] disputed permit conditions and demonstrat[ing] why review is warranted" (*In re LCP Chemicals—N.Y.*, 4 E.A.D. 661, 665 n.9 (EAB 1993)), the formatting and citation errors make it almost impossible in some instances to

[3] According to the Board, "[a]t all times, a litigant filing electronically assumes the risk of all errors not solely attributable to a CDX malfunction that may result in the inability to complete an electronic transmission." Environmental Appeals Board, Electronic Submission; *available at*: http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/Electronic+Submission?OpenDocument.

determine CARE/Simpson's meaning or intent. As but one example of this, the Petition states the following:

> Nothing in these comments suggested that there was anything defective in how the Air District has undertaken the integrated permitting process here, and so the District finds nothing in the comments to provide cause to change any permit conditions or decline to issue the
> permit. 199
>
> both notices to see what had changed.
>
> 377 The District also received several comments regarding the use of the "Russell City" name for the facility. . . .

Petition at 19. The intervening "both notices to see what had changed" is unintelligible; the paragraphs above and below it lack citations. Later in the Petition, CARE/Simpson refer to "Exhibit xx," and misnumber several exhibits, such as "ERNIE EXHIBIT 5." *Id.* at 23-24. Other exhibits are inexplicably numbered "3a 1," "3a 2," "3a 3," and "3a 4." *See* Docket Nos. 5.02-5.05.

Because the Petition fails to meet the Board's requirement for a minimum level of specificity and because it fails to describe any condition of the PSD Permit that is allegedly in error or otherwise presents an issue warranting review, the Petition should be dismissed. Nevertheless, RCEC has endeavored to discern CARE/Simpson's arguments and to provide meaningful responses to each of them below.

V. RESPONSE TO PETITIONERS' SPECIFIC ISSUES

The Petition raises five broad concerns with RCEC's PSD permit, which it describes as follows: (1) the Air District "is circumventing public participation" (Petition at 4, capitalization omitted); (2) "BACT is part of the CAA[,] and the PDOC includes the Air 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 16

(capitalization omitted).

As shown below, none of these issues has merit or provides a basis for Board review.

A. CARE/Simpson's Allegations That the Air District Circumvented Public Participation Have No Merit

CARE/Simpson assert that the Air District "continues to fail to implement 40 CFR 52.21, 40 CFR 124 and the Clean Air Act in its consideration of PSD permit" for the Project. Petition at 4. In particular, CARE/Simpson allege that the Air District is "circumventing public participation" by failing to provide access to the administrative record, by not providing a "discernible docket for the facility as would be provided if the EPA issued the permit," and by issuing "fatally flawed" documents. *Id.* at 4-5.

These allegations, addressed in turn below, all fail. As an initial matter, CARE/Simpson's allegations are near verbatim reproductions of comments submitted during the public comment periods. *See* Exhibit 23, Letter from CARE and Rob Simpson to Weyman Lee, P.E. (Feb. 5, 2009) ("CARE/Simpson Comments 2/5/2009") at 4-6 ("II. District Is Circumventing Public Participation"). The Air District already responded at length to CARE/Simpson's comments in its Responses to Public Comments, but CARE/Simpson largely ignore the Air District's responses here. Moreover, CARE/Simpson fail to show that the Air District's administrative procedures were legally deficient in any way. As discussed below, the Air District complied with all applicable regulations governing public participation throughout the permitting process and, in many instances, went above and beyond what was required of it.

1. The Air District Complied with All Regulatory Requirements Governing Public Inspection of Administrative Materials

CARE/Simpson begin by alleging that the Air District "is circumventing public participation by failing to provide access to the administrative record." Petition at 4. They assert that "Petitioner(s) have requested access to the record Since September 11 2008 without satisfaction. After no less than 10 requests in writing in person and by telephone the District has provided limited response providing no basis for the permitting." *Id.*; *see also id.* at 15 (alleging that Petitioners made "at least a dozen calls" to the District).

These allegations raise two distinct issues, neither of which provides a basis for Board review. To the extent that CARE/Simpson's allegations address their Public Records Act requests and the Air District's response thereto, these allegations are outside the Board's jurisdiction. The Air District's response to a California Public Records Act request is governed not by the federal PSD regulations but by the California Government Code. *See* Cal. Gov't Code §§ 6250-6270. When a member of the public is dissatisfied with an agency's response to his or her request, the regulations direct him or her to file suit in a court of law. Govt. Code § 6258 ("Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter.") This is CARE/Simpson's only recourse with respect to its California Public Records Act requests. Thus, this issue is outside the Board's jurisdiction. *See, e.g., HELCO*, 10 E.A.D. at 238 ("the Board's jurisdiction to review PSD permits extends to those issues relating to permit conditions that implement the federal PSD program"). Moreover, the Air District "has responded to all California Public Records Act requests regarding public records for the facility." Exhibit 5, Responses to Public Comments at 211.

To the extent that CARE/Simpson's allegations address the extent to which the Air District made permit-related documents available for public inspection pursuant to the PSD regulations, CARE/Simpson merely reiterate previously submitted comments. *See* Exhibit 23, CARE/Simpson Comments 2/5/2009 at 4-6 ("II. District Is Circumventing Public Participation"). In response to comments on public availability of the permitting record, the Air District explained that its efforts to make documentation available to the public more than satisfied the requirements of the federal PSD regulations:

> The Air District agrees with the comments expressing praise for how it made its records available, and disagrees with the comments stating that the Air District's efforts were inadequate. The Air District notes that when it issued its initial Statement of Basis in December of 2008, it made all of the documentation supporting the analysis in the Statement of Basis available at that time, and a number of interested members of the public came to District headquarters to review it and to have copies made to take away. When the Air District issued its

> Additional Statement of Basis in August of 2009, it made further documentation available (along with what was initially made available) supporting the additional analysis in that document. At that time, the Air District also compiled an index of all of the documentation it was making available for public review, and published the index on its website. A number of interested members of the public came in to review this additional information as well.
>
> These efforts to make the documentation supporting the Air District's permitting analyses available to the public more than satisfy the public participation requirements of the Federal PSD Regulations. For state agencies issuing PSD Permits pursuant to a Delegation Agreement, the applicable Federal PSD Regulations do not require the agency to make any documentation available, as the applicable requirements for making the permitting record available for public review and inspection apply only when EPA is the permitting authority. (*See* 40 C.F.R. §§ 124.9, 124.11, 124.10(d)(1)(vi).) Nevertheless, despite the absence of a legal requirement, the Air District makes its permitting documents available for public review in order to encourage informed public participation, which is what it did here.

Exhibit 5, Responses to Public Comments at 210. Nowhere do Petitioners reference the District's explanations or responses to comments. On that basis alone, the Board should deny review. *See Indeck-Elwood*, slip op. at 88 (a "petitioner may not simply reiterate comments made during the public comment period, but must substantively confront the permit issuer's subsequent explanations"); *Zion Energy,* 9 E.A.D. at 705 (failure by a petitioner to confront permit issuer's responses will result in a denial of review).

Moreover, the record belies CARE/Simpson's allegations that the Air District did not provide access to the administrative record. As the Air District explained, the PSD regulations do not mandate that it provide public access to the administrative record. *See* Exhibit 5, Responses to Public Comments at 210. Even if 40 C.F.R. section 124.9's administrative record requirements were applicable to permits issued by state agencies, "the Air District believes that the record it made available for public review would satisfy the requirement." *Id.* at 207 n.379. CARE/Simpson offer no evidence that would call into question the Air District's conclusions in this respect. Thus, CARE/Simpson's allegations about the administrative record provide no basis for Board review.

2. The Air District Was Not Required To Maintain an Electronic Docket or Database of Permit-Related Documents

CARE/Simpson also criticize the Air District for providing "no discernible docket for the

facility as would be provided if the EPA issued the permit." Petition at 4.

Here again, the Air District fully addressed this issue in its Responses to Public Comments:

> The Air District also disagrees that it was required to maintain a formal "docket" for its permitting files and that it was required to make all such documentation available electronically on the internet. As noted above, there is no requirement to make the underlying documentation available at all for permits that are issued by State agencies and not EPA. But even if the requirements applicable for EPA-issued permits were applicable, there is nothing in the regulations that states that a formal "docket" must be maintained, or that they must be made available electronically. Moreover, the Air District did make its index of documents available electronically, which allowed members of the public to review what was available and to request copies of specific documents without having to visit District headquarters in person.

Exhibit 5, Responses to Public Comments at 211. CARE/Simpson simply reiterate their previous comments and fail to identify any clear error in the Air District's response. *See* Exhibit 23, CARE/Simpson Comments 2/5/2009 at 4. Review should be denied on this basis alone. *See Indeck-Elwood*, slip op. at 88 (a "petitioner may not simply reiterate comments made during the public comment period, but must substantively confront the permit issuer's subsequent explanations"); *Zion Energy,* 9 E.A.D. at 705 (failure by a petitioner to confront permit issuer's responses will result in a denial of review).

Moreover, nothing requires the Air District to maintain a formal "docket" for its permitting files or to make all such documentation available electronically on the internet. Exhibit 5, Responses to Public Comments at 211. State agencies are not subject to certain federal regulations that apply "[f]or EPA-issued permits." *See*, *e.g.*, 40 C.F.R. § 124.10(d)(1)(vi). Even if those regulations did apply here, none could be construed to require that a formal "docket" be maintained, or that documents be made available electronically.[4]

[4] Specifically, CARE complains that "[t]he Notice that was included for the PSD Permit at the District's website failed to include a copy of the Application No. 15487." Petition at 4. The Application was provided for public inspection at the Air District's offices, in accord with District Rule 2-2-406. No rule or regulation requires more.

Moreover, as it explained in its Responses to Public Comments, the Air District *did* compile an index of all materials it was making available for public review and published the index on its website, enabling members of the public to request copies of specific documents without having to visit Air District headquarters in person. Exhibit 5, Responses to Public Comments at 211. CARE/Simpson fail here to set forth any fact or provision of law suggesting Air District's understanding of the requirements is in error or that its actions were deficient.

Thus, CARE/Simpson's allegations about an electronic docket or database provide no basis for Board review.

3. The Air District's Documents Were Not "Fatally Flawed"

CARE/Simpson allege that the documents issued by the Air District were "fatally flawed." Petition at 5. In particular, they claim that "[t]he District has recently issued no less than 4 'fact sheets' for RCEC each in conflict with the others and none satisfying the requirements of 40 C.F.R. § 124.8. The public can not rely on any of the 'Fact Sheets' issued by the District." *Id*. (footnote omitted). CARE/Simpson also allege that "[t]he District has also issued 3 different 'Public Notices' and 3 different Statements of Basis, 3 of the 4 'Fact Sheets' the 3 different Public Notices and the 3 different Statements of Basis all make false claims of propriety by claiming that this is an amendment of a PSD permit when no such permit has ever been issued." *Id*. As shown below, none of these allegations has merit.

a. The Air District's Fact Sheets Complied with Applicable Regulations

CARE/Simpson allege that the Air District's "fact sheets" failed to satisfy the requirements of 40 C.F.R. section 124.8(b)(3). Petition at 5 n.11. The referenced regulation requires that a fact sheet for a PSD permit include the "degree of increment consumption expected to result from operation of the facility or activity." 40 C.F.R. § 124.8(b)(3).

First, the Air District expressly clarified how it was using the term "fact sheet" and how its documents complied with the federal PSD regulations:

> 40 C.F.R. sections 124.7 and 124.8 require that a Federal PSD permitting agency prepare either a "statement of basis" or a "fact sheet" to document its permitting

> decisions. The Air District normally uses the term "statement of basis" to refer to a more comprehensive document than a "fact sheet", which the Air District usually considers to be a brief overview rather than a detailed statement of reasons underlying a permitting decision. Given the Air District's historical practice regarding these terms, the Air District has titled this document a "Statement of Basis" for the permit, even though the Federal PSD regulations appear to contemplate that a document called a "fact sheet" should be more detailed and comprehensive than a "statement of basis". These semantic issues notwithstanding, the Air District considers this [Statement of Basis] document to be its full explanation of its proposed permitting decision and the reasons for it, and intends it to satisfy all of the requirements in 40 C.F.R. sections 124.7 and 124.8. The Air District is also issuing a separate, shorter document entitled "fact sheet" to provide the public with a brief overview of the important aspects of the project. That "fact sheet" is not intended to discuss all the detailed information required by 40 C.F.R. section 124 provided in this document.

Exhibit 1, Statement of Basis at 3 n.1. Moreover, the Air District confirmed that its Statement of Basis and Additional Statement of Basis provided all information required by the regulations, including the degree of PSD increment consumption expected:

> the Air District provided what the regulations call "Fact Sheets" under 40 C.F.R. section 124.8 (what the Air District called the "Statement of Basis" and "Additional Statement of Basis"), which set forth the degree of PSD increment consumption expected, which is less than significant here for the PSD pollutants for which increments have been established; a detailed summary of the basis for the draft permit conditions, with appropriate references to governing authority and to documentation in the Air District's permitting file; a description of how the Air District will make its final decision on the draft permit describing the comment process and the public hearing that was being held; and the name and phone number of a contact person for more information.

Exhibit 5, Responses to Public Comments at 207 (footnote omitted). The Air District's one additional "fact sheet" also reported that "[t]he proposed project will not consume a significant degree of any PSD increment." Exhibit 29, Project Fact Sheet.

CARE/Simpson entirely fail to respond to the explanations provided by the Air District. *See* Petition at 5. Review should be denied on that basis alone. *See Indeck-Elwood*, slip op. at 88; *Zion Energy,* 9 E.A.D. at 705.

CARE/Simpson's argument fails on the merits as well. The Air District made clear in its decision documents that the Project's emissions would not exceed any of the significance thresholds published by EPA for determining whether or not a more detailed increment consumption analysis was required. *See* Exhibit 1, Statement of Basis at 64 ("The [PSD air quality impact analysis] found that the 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.") Where such thresholds and increments had not yet been established, the Air District nevertheless determined that the Project would not significantly consume increment. Exhibit 3, Additional Statement of Basis at 88 ("With respect to exceedance of any PSD Increment for $PM_{2.5}$, the project cannot cause any such exceedance because EPA has not established any $PM_{2.5}$ increments yet. . . . EPA's proposed Class II increments are 9 $\mu g/m^3$ and 4 $\mu g/m^3$ for the 24-hour and annual standards, respectively, and the facility's maximum impacts of 4.9 $\mu g/m^3$ and 0.5 $\mu g/m^3$, respectively, are well below these levels. Thus even if the proposed increments were in effect today, the facility would not cause any exceedance of them.").

In sum, CARE/Simpson's argument about the Air District's fact sheets fails both procedurally and substantively.

b. The Air District Timely Clarified that the Permit Was a Draft PSD Permit, Not an Amendment to an Existing PSD Permit

CARE/Simpson's allegation that the Air District made "false claims of propriety by claiming that this is an amendment of a PSD permit when no such permit has ever been issued" (Petition at 5) is a verbatim restatement of earlier comments that the Air District fully addressed. *See* Exhibit 23, CARE/Simpson Comments 2/5/2009 at 5.

The Air District acknowledged that it had erred in characterizing the permit as an "amendment" to an existing permit and then specifically disputed contentions that it had failed to fully explain this error to the public:

> The Air District disagrees that it has not fully explained for public review that this is a new permit and not an amendment to an existing permit, and further disagrees that it did not adequately inform the public of this situation. *The Air District clearly explained the situation in the Additional Statement of Basis, and corrected the earlier misstatements regarding whether a PSD permit had been issued initially. Any interested member of the public who has been following this permitting proceeding would have been aware of these facts from reviewing the Additional Statement of Basis.* The fact that the public was not misled by this situation is further underscored by the fact that members of the public have not felt constrained to comment only on a subset of issues that they may have believed were involved in an "amendment" to an earlier permit. To the contrary, a review of the comments the Air District has received on a wide variety of issues

> involving this project, including in many areas where the analysis and issues have not changed since the project was initially proposed. Indeed, this situation is not surprising given that the Air District conducted a full review of all aspects of the project, including elements that are not changing, even in the initial Statement of Basis that was put forward as involving an amendment to an existing permit. This breadth of comment that the Air District received controverts the assertion made in these comments that the public was misled in any substantive way by the Air District's treatment this issue.

Exhibit 5, Responses to Public Comments at 202 (emphasis added). Thus, the Air District fully and timely explained that this was a new permit and not an amendment to an existing permit. For CARE/Simpson to assert that such an immaterial error, which was corrected by the Air District upon publication of the last draft of the PSD permit, somehow compromises the validity of the Final PSD Permit is absurd and disregards the ongoing efforts made by the Air District to rectify its error. More importantly, however, by neglecting to confront the Air District's explanation, CARE/Simpson fail to establish a basis for review. *See Indeck-Elwood*, slip op. at 88; *Zion Energy,* 9 E.A.D. at 705.

B. CARE/Simpson's Allegations About the Interdependence of the Determination of Compliance and Draft PSD Permit Do Not Raise Any Issue for Board Review

CARE/Simpson state that "[s]ince BACT is part of the CAA and the PDOC includes the District's BACT analysis therefore clearly the PDOC and draft PSD Permit are interdependent on the findings from the federal BACT analysis conducted by the District purportedly in 2002 and again in 2007." Petition at 8-9 (footnote omitted). On this basis, CARE/Simpson claim that "[t]herefore the District should re-notice the PDOC along with a 'new' draft PSD permit consistent with the requirements of the CAA and the District's Regulations." *Id.* at 27. Most of CARE/Simpson's argument consists of a summary of federal and Air District regulations that apply to permit proceedings. *See id*. at 6-9.

As an initial matter, this argument is a near verbatim reproduction of comments submitted during the public comment periods. *See* Exhibit 23, CARE/Simpson Comments 2/5/2009 at 6-9 ("III. BACT Is Part of the CAA and the PDOC Includes the District's BACT Analysis Therefore Clearly the PDOC and Draft PSD Permit Are Interdependent"). Moreover, CARE does not articulate any specific objections to any condition of the Final PSD Permit.

Indeed, its discussion of this issue provides no citation to a permit term or condition that CARE 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). However broadly construed, CARE/Simpson's "argument" fails to "provide sufficient specificity such that the Board can ascertain what issue is being raised" and to "articulate some supportable reason as to why the permitting authority erred or why review is otherwise warranted." *Knauf I*, 8 E.A.D. at 127. Review can and should be denied on this basis alone. Further, to the extent that CARE/Simpson are arguing that the Air District failed to satisfy certain state-law permitting requirements or to adhere to those requirements in issuing the PSD permit, any such argument would be wholly beyond the purview of the PSD program and, accordingly, the Board's jurisdiction. For that reason as well, review should be denied.

Further, the Air District specifically responded to comments "contending that it should 'withdraw' the Determination of Compliance [*i.e.*, PDOC] that it prepared for use by the [California Energy Commission ("CEC")] in the CEC's licensing proceeding." Exhibit 5, Responses to Public Comments at 216. According to the Air District, "[s]ome comments claimed that the Determination of Compliance process and PSD Permit process are interdependent, and that if the Federal PSD permit process is reopened for additional public comment then the Determination of Compliance process must also be reopened." *Id.* The Air District provided a complete response to these comments, as follows:

> How the project complies with state-law requirements and how the CEC's licensing process was conducted are not issues that are implicated by the Federal PSD Permit requirements. These comments therefore do not raise issues relevant to the Air District's determination on the Federal PSD permit. To the extent that the commenters have any concerns about potential defects in the CEC licensing process that should be revisited at this point, those concerns should be addressed to the CEC directly, not in a PSD permit proceeding.
>
> With regard to the Determination of Compliance that the Air District prepared for use by the CEC in its licensing proceeding, that document is not something that can be withdrawn or vacated at this point. That Determination of Compliance was submitted to the CEC by the District in 2007, and it was then used by the CEC in its licensing proceeding, which culminated in a commission licensing decision, which has long been final and all avenues for appeal have been exhausted. The time for raising any concerns with the District's 2007

> Determination of Compliance came and went long ago. To the extent that these comments suggest that events that have taken place since the CEC proceeding in 2007 have raised new or changed issues that should be revisited and further analyzed at this time, these comments should be directed to the CEC. If the CEC determines that these claims have merit and decides to undertake further proceedings, the Air District would be happy to participate in any such proceeding at the request of the CEC.
>
> Regarding the interdependence of the Federal PSD Permit and the state-law licensing process under the Warren-Alquist Act, although the state and federal permitting mechanisms overlap, they are legally distinct and do not depend on each other. The fact that the Federal PSD Permit was remanded by the EAB did not invalidate the state-law licensing, in the same way that the California Supreme Court's upholding of the CEC's licensing decisions did not validate the Federal PSD permit. The Air District therefore disagrees with the comments stating that the Air District must reopen the state-law permitting proceedings because of the Federal PSD remand and that the Air District cannot issue a Determination of Compliance until after the Federal PSD permitting process is complete.

Id. at 216-17. Not only do CARE/Simpson fail to acknowledge that the Air District even provided this response to their comments on the alleged interdependence of the Determination of Compliance and the PSD Permit; they completely fail to articulate how it results in any error in the PSD Permit that might possibly warrant the Board's review.

To the extent CARE/Simpson intend to argue that, by not republishing the Determination of Compliance along with the PSD permit, the Air District failed to comply with PSD notice requirements, their argument has no merit. The Air District's efforts to comply with all PSD permitting requirements are well documented in the Air District's Responses to Public Comments:

> When the Air District received the Remand Order from the Environmental Appeals Board, it started reviewing its notice procedures for Federal PSD permits in order to ensure that the District would comply with the EAB's requirements going forward. . . .
>
> In addition to reviewing its PSD notice procedures when it received the Remand Order, the Air District also undertook a thorough review of all other aspects of its PSD permitting procedures to determine if there were any other areas in which they may not strictly conform to the requirements of 40 C.F.R. Section 52.21. . . .
>
> This record shows that far from being complicit in allowing violations of federal PSD requirements, the Air District has in fact been careful to ensure that all PSD requirements are fully complied with. After receiving the Remand Order and realizing that it was not appropriate to rely on the language in its PSD Delegation Agreement from Region IX indicating that compliance with Air District regulations would satisfy all PSD requirements as well, the Air District immediately acted to review its PSD permitting procedures and fix any

discrepancies.

Exhibit 5, Responses to Public Comments at 232-34. As discussed above (*see supra* section II), the Air District solicited public comments, first on the Draft PSD Permit and accompanying Statement of Basis in December 2008, and again when it issued a revised Draft PSD Permit and Additional Statement of Basis in August 2009. Since the Board remanded the permit to the Air District on July 29, 2008, the Air District accepted public 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.

In the final paragraph of the section, CARE/Simpson review some of the pre-2008 permit proceedings. *See* Petition at 9. To the extent CARE/Simpson intend to argue that the Air District should re-notice "the PDOC along with a 'new' draft PSD permit" (*id*. at 27), their argument ignores the Air District's notice and comment proceedings described above, as well as the Air District's treatment of the PSD permit as a new permit:

> The Air District disagrees that it has not fully explained for public review that this is a new permit and not an amendment to an existing permit, and further disagrees that it did not adequately inform the public of this situation. . . .
>
> Some of the comments appear to criticize the Air District's August 2009 public notice for not having explicitly called out this issue in the text of the notice, and for instead referring interested members of the public to the Additional Statement of Basis. The Air District disagrees that it misled or misinformed the public in this regard. Correcting such a misstatement in an additional statement of basis document is not something that needs to be specifically identified in the public notice on the document under the Federal PSD notice requirements where it is made clear in the statement of basis document. (See 40 C.F.R. § 124.10(d).) Moreover, the public notice clearly referenced the Additional Statement of Basis for more information, and that document provided the full explanation of the amendment/new permit issue. Interested members of the public therefore had full notice of the Air District's further explanation, and any interested members of the public who followed up by reviewing the Additional Statement of Basis would have seen the Air District's full explanation.
>
> For all of these reasons, the Air District disagrees with these comments stating that it should provide further public notice regarding the fact that this is a new permit, not an amendment to an existing permit.

Exhibit 5, Responses to Public Comments at 202. Again, CARE/Simpson neglect to confront the Air District's responses to comments and, thus, fail to establish a basis for review. *See Indeck-Elwood*, slip op. at 88; *Zion Energy,* 9 E.A.D. at 705.

CARE/Simpson's main contention with respect to the relationship of the Determination of Compliance and the Draft PSD Permit appears to be based on their misunderstanding of the relationship of the two separate, state-law and federal permitting proceedings. While the two proceedings were instituted in an integrated fashion when the Air District first proposed the PSD permit, since the time when the Board remanded the PSD permit, the Air District has been very clear in explaining that it was issuing the PSD permit separately from the completed State-law permitting process. *See* Exhibit 5, Responses to Public Comments at 216-17.

In sum, Petitioner's allegations about the interdependence of the Determination of Compliance and the Draft PSD Permit should be dismissed because they lack specificity and merit, merely reiterate previous comments without confronting the Air District's explanations, and are beyond the Board's jurisdiction.

C. CARE/Simpson's Arguments About Greenhouse Gas Emissions Are Incorrect and Unfounded

CARE/Simpson "disagree[]" with the permit "because it does not consider greenhouse gas emissions as regulated pollutants." Petition at 9. They state that "Carbon Dioxide, CO_2, ammonia, NH_3, and Nitrous Oxide, N_2O, are components of the emissions expected from the Russell City Energy Center and yet they are not included as regulated emissions. The [EPA] website recognizes the climate change impacts of these emissions and yet these impacts were not included as pollutants." *Id.* at 9-10 (footnote omitted). In addition, CARE/Simpson assert that "[t]his project has been located so as to disparately place environmental burdens upon low-income, minority residents, and this project significantly increases emissions of greenhouse gases responsible for global warming." *Id*. at 11.

As shown below, the Air District's treatment of greenhouse gas ("GHG") emissions in the Project's PSD permit and its Responses to Public Comments on GHG issues are not erroneous in any way. Nor do they raise any issue that the Board in its discretion should review.

1. RCEC's PSD Permit Imposes Limits on GHG Emissions, Despite the Fact that GHGs Are Not Yet Subject to Regulation

CARE/Simpson allege that "the finding in error is 'The Air District therefore disagrees

with these comments that greenhouse gases are subject to PSD requirements' or that [the Air District's] finding that 'the issue is moot because the facility would satisfy all PSD requirements for greenhouse gas emissions even if they were legally applicable at this time.'" *Id.* at 12. CARE/Simpson appear to be citing the Air District's Responses to Public Comments. *See* Exhibit 5, Responses to Public Comments at 19.

In support of their position, CARE/Simpson note the ruling in *Massachusetts v. EPA*, 549 U.S. 497 (April 2, 2007), which established that the EPA has authority to regulate GHGs. Petition at 12. CARE/Simpson seem to acknowledge, however, that GHGs are *not* yet regulated: CARE/Simpson cite the EPA's endangerment finding, which states that "it is EPA's current position that these Final Findings do not make well-mixed gases 'subject to regulation' for purposes of the CAA's [PSD] and title V programs." *Id*. at 11 (citing "memorandum entitled 'EPA's Interpretation of Regulations that Determine Pollutants Covered By Federal Prevention of Significant Deterioration (PSD) Permit Program' (Dec, 18, 2008)"). CARE/Simpson further note that, although the EPA is reconsidering the findings and conclusions set forth in that memorandum, the "effectiveness" of the positions set forth therein was not stayed. *Id*.

As has been widely recognized, RCEC's PSD permit is the first federal PSD permit to include enforceable BACT limits for GHGs.[5] RCEC voluntarily agreed to accept binding, enforceable GHG emissions limits, notwithstanding that such limits are *not yet required* by law:

> In the Statement of Basis and Additional Statement of Basis, the Air District summarized the state of the current state of recent regulatory developments regarding whether greenhouse gases are subject to regulation under the federal PSD program. As the Air District noted in those documents, EPA's Environmental Appeals Board found in November of 2008 in the *Deseret Power* case that EPA as an agency has the discretion to determine whether greenhouse gases should be subject to PSD regulation or not, but had not at that time adopted any definitive policy position on the issue. The EAB also suggested that it may be more appropriate for EPA to address this issue through a nationwide rulemaking, rather than through individual case-by-case PSD permitting

[5] *See, e.g.*, Exhibit 33, Robin Bravender and Colin Sullivan, *Planned Calif. Power Plant Would Include GHG Limits*, New York Times (Feb. 4, 2010).

> decisions. The issue was thus in a highly unresolved state when the Air District issued its initial proposal on December 8, 2008. Then, on December 18, 2008, EPA issued a policy memorandum in response to the EAB's *Deseret Power* opinion. The impact of EPA's December 18 memorandum is that EPA is not requiring greenhouse gases to be regulated under the Federal PSD permitting program, at least as of this time [citing Memorandum, Stephen L. Johnson, Administrator, *EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program*, December 18, 2008 (hereinafter "PSD Interpretive Memo"); notice provided at 73 Fed. Reg. 80,300 (Dec. 31, 2008)]. This continues to be the case currently.[6] EPA has recently determined that greenhouse gases endanger public health and welfare, which will pave the way for EPA to adopt regulations limiting greenhouse gases from motor vehicles and other sources. EPA has also proposed new regulations for greenhouse gas emissions from cars and trucks which, if finalized, would make greenhouse gases subject to PSD regulation. But these regulations are still only at the proposed stage, and *EPA continues to treat greenhouse gases as not yet subject to the PSD program until such time as specific regulations for greenhouse gases from specific sources are adopted and take effect*. The Air District is therefore finalizing the permit on the basis that greenhouse gases are not subject to PSD at this time, since EPA's new regulations have not yet been finalized. However, as explained in the Statement of Basis and Additional Statement of Basis, *the applicant has voluntarily requested the District to undertake a greenhouse gas BACT analysis and impose enforceable greenhouse gas BACT limits as if greenhouse gases were currently subject to PSD requirements. The Air District has done so, and is imposing greenhouse gas limits in the final permit based on the applicant's voluntary agreement to be subject to these requirements.*

Exhibit 5, Responses to Public Comments at 18-19 (footnotes omitted) (emphases added).

To this end, the Air District conducted a first-of-its-kind BACT analysis, following EPA's five-step "top-down" BACT methodology. *See* Exhibit 1, Statement of Basis at 58-63. In response to public comments on the Draft PSD Permit, its own additional analysis, and RCEC submissions, the Air District substantially revised its BACT analysis and permit conditions in the revised Draft PSD Permit. *See* Exhibit 3, Additional Statement of Basis at 15-41, 111-12. In its

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[6] On March 29, 2010, EPA completed its reconsideration of the December 18, 2008 memorandum from then-EPA Administrator Stephen L. Johnson to EPA Regional Administrators that addressed when the CAA PSD program would cover a pollutant, including GHGs. *See* EPA, "Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs," EPA-HQ-OAR-2009-0597 (March 29, 2010) (pre-publication notice). EPA affirmed its "actual control interpretation," with the refinement that PSD permitting requirements apply to a newly regulated pollutant "at the time a regulatory requirement to control emissions of that pollutant 'takes effect.'" *Id*. at 14. With respect to GHGs, "PSD program requirements will apply to GHGs upon the date that the anticipated tailpipe standards for light-duty vehicles . . . take effect . . . when the 2012 model year begins, which is no earlier than January 2, 2011." *Id*. at 18.

Responses to Public Comments, the Air District addressed comments received on GHG issues during both public comment periods. *See* Exhibit 5, Responses to Public Comments at 18-51. Again, *none of these actions was required*. It is for this reason that the Air District properly concluded that the issue of whether GHGs are subject to PSD is moot, because "the facility would satisfy all PSD requirements for greenhouse gases even if they were legally applicable at this time." Exhibit 5, Responses to Public Comments at 19.

CARE/Simpson fail to "substantively confront" any of the Air District's responses to comments on or explanations of these issues. Review should be denied on that basis alone. *See Indeck-Elwood*, slip op. at 88; *Zion Energy,* 9 E.A.D. at 705.

CARE/Simpson's argument fails on the merits as well because it does not specifically refute any of the above-stated facts or conclusions of law regarding the current status of GHG regulation under the federal PSD program – other than to disagree with the Air District's conclusion that GHGs are not subject to PSD at this time. CARE/Simpson's position is wholly without basis, and even the EPA statements *to which they cite* undermine it. *See* Petition at 11 (acknowledging that "it is EPA's current position that these Final Findings do not make well-mixed greenhouse gases 'subject to regulation'" under PSD). They have failed to establish any basis for review under 40 C.F.R. section 124.19(a). Moreover, even if CARE/Simpson had cleared these hurdles, they fail to establish that any permit term or condition relating to GHGs would differ if it were based on EPA's regulation of GHGs as opposed to RCEC's voluntary acceptance of GHG limits. For this reason, CARE/Simpson fail to demonstrate any error in the Air District's determination or reasoning that would warrant review by the Board.

2. The Air District Adequately Considered the Project's Impacts on Low Income and Minority Households and Specifically Considered the Impacts of the Project's GHG Emissions on Air Quality and Public Health

Also in this section on GHG emissions, CARE/Simpson state that "[t]his project has been located so as to disparately place environmental burdens upon low-income, minority residents." Petition at 11. Given the context in which Petitioners make this statement and CARE/Simpson's

prior comments on this point, RCEC takes this to imply that the Project should be subject to GHG emissions limits because those emissions will disparately impact the low-income communities in the vicinity of the Project. *See* Exhibit 23, CARE/Simpson Comments 2/5/2009 at 10 ("This project has been located so as to disparately place environmental burdens upon low-income, minority residents, and this project significantly increases emissions of greenhouse gases responsible for global warming.")

As an initial matter, CARE/Simpson's "issue" here is nothing more than an unfounded allegation, and one that merely recites previously-submitted comments without substantively confronting the Air District's multi-faceted responses to those comments. The Air District comprehensively addressed the matter of environmental justice impacts in its permitting documents. In its Statement of Basis, for example, the Air District reported that, because "[t]here [would be] *no* adverse impact on *any* community due to air emissions from the [Project]," there would be no "disparate adverse impact on an Environmental Justice community located near the facility." Exhibit 1, Statement of Basis at 66. In response to numerous comments on the issue, the Air District also addressed the matter of environmental justice at length in its Responses to Public Comments. Exhibit 5, Responses to Public Comments at 192-94.

With specific respect to any potential impacts on air quality or the surrounding community due to the Project's emissions of GHGs, the Air District noted it had received comments that raised the issue of whether GHG emissions might contribute to increased ozone and particulate matter pollution in the vicinity where the CO_2 emissions occur. *Id.* at 20. According to the Air District, "[t]he commenters cited recently-published research findings by Mark Z. Jacobson, a researcher at Stanford University, who has posited that locally-emitted CO_2 will form 'domes' over urban areas where it is emitted, which will cause localized temperature increases under the 'CO_2 domes,' and the localized temperature increases will in turn increase the rate of formation of ozone and particulate matter in such areas." *Id.* The Air District responded to these comments as follows:

> The Air Disagrees that the recent research paper cited by these commenters establishes that the Air District should consider greenhouse gases to be pollutants subject to regulation under the federal PSD program. The Air District notes that the concern expressed in this paper is similar to the general concern that has been expressed about greenhouse gases and the secondary pollution impacts that would arise from warmer temperatures on a global scale. This study is interesting in that it is the first time (that the Air District is aware of) that scientific research has focused on these issues on a local scale. With respect to whether the paper's findings mean that the Air District should treat greenhouse gases as pollutants "subject to regulation" for PSD permitting purposes, the Air District first notes that concerns about temperature increases from the greenhouse effect having secondary impacts on criteria pollutant formation have been known for some time, and yet have not led EPA to treat greenhouse gases as "subject to regulation" at this point as outlined above. The Air District is bound to follow EPA guidance with respect to the Federal PSD program, and so the Air District does not have the discretion to depart from EPA's position in response to a study such as this one. Moreover, since concerns about secondary pollutant effects from warming temperatures globally have not led EPA to consider greenhouse gases "subject to regulation" at this stage, it seems unlikely that consideration of such concerns on a local scale would do so either (at least, at this point in the evolution of EPA's approach to greenhouse gas regulation). This point is especially applicable here, where the first research supporting this hypothesis has only just emerged and there has not yet been time for a scientific consensus to develop around it. But in any event, as with all of these arguments about whether greenhouse gases should be considered "subject to regulation", the issue is moot because the applicant has voluntarily agreed to have the Air District treat greenhouse gases as if they are regulated and to impose greenhouse gas BACT limits, as the Air District has done.

Id. at 20-21.

The Air District also concluded that, even if Dr. Jacobson's hypothesis concerning the relationship between CO_2 domes and criteria pollutant concentrations were better established, application of this hypothesis to the results of the Air District's air quality impacts analysis concerning fine particulate matter (*i.e*., less than 2.5 microns in diameter) ("$PM_{2.5}$") would not "alter the conclusion that the facility will not cause or contribute to a violation of the [National Ambient Air Quality Standard ("NAAQS")]." *Id*. at 163. In response to comments that suggested the Air District should apply Dr. Jacobson's approach to its $PM_{2.5}$ analysis, the Air District noted that "it is required to use applicable EPA-approved air quality models . . . and cannot substitute a different analysis based on Dr. Jacobson's research." *Id*. The Air District also noted that "even if the Air District were free to pick and choose what approach it could take for modeling $PM_{2.5}$ impacts in a Federal PSD permitting analysis, it would be hesitant to include CO_2 as a factor in its modeling based on Dr. Jacobson's paper because of the relatively

preliminary nature of Dr. Jacobson's research." *Id*. Nevertheless, the Air District conservatively took the most significant modeled increase in $PM_{2.5}$ concentrations that Dr. Jacobson attributes to *all* anthropogenic sources of CO_2 emissions and found that, even if it were to add that modeled increase to the results of the Air District's $PM_{2.5}$ analysis, the results would still be far below the NAAQS. *Id*. at 164-65. Later in its Responses to Public Comments, the Air District also evaluated whether Dr. Jacobson's research on the impact of CO_2 emissions on health impacts warranted any changes in "the Air District's conclusion that the air emissions from this facility will not have any significant health impacts." *Id*. at 191. The Air District found that it did not. *Id*. Thus, the Air District went above and beyond the regulatory requirements for issuance of a PSD permit and actually considered whether the project's CO_2 emissions would result in any significant impacts to air quality or health in surrounding communities and found that they would not. CARE/Simpson raise no evidence that would challenge this conclusion or suggest any error in the Air District's analysis.

By their bare statement that "[t]his project has been located so as to disparately place environmental burdens upon low-income, minority residents" (Petition at 11), CARE/Simpson fail to present any issue that would warrant review of the Air District's treatment of GHG emissions in the PSD permit. CARE/Simpson allege no error in any of the Air District's findings of fact and/or conclusions of law with respect to the Air District's determination that the Project will have no adverse impact on any community, let alone a disparate impact. Given the extensive discussion of issues such as the impact of the project's emissions of CO_2 on criteria pollutants and human health, CARE/Simpson's Petition suggests that they did not even read the Air District's responses on these points. Clearly, CARE/Simpson have failed to identify any error or otherwise articulate an issue the Board should review. Thus, the Board should deny review of this issue.

D. The Petition Fails To Specify Any "Specific 'Amended' Permit Issues" Warranting Review

As its fourth argument for remand, CARE/Simpson purport to list "specific 'amended'

PSD permit issues." Petition at 12. It is not always clear, however, what those issues are, and nowhere do CARE/Simpson articulate specific objections to any condition of the final PSD permit so as to establish a basis for review. A number of their "issues" do not even relate to the RCEC Project, but to facilities and permit processes that are not at issue here; nor do they bear in any way on this proceeding, as with CARE/Simpson's discussion of issues surrounding the permitting of the Gateway Generating Station. *Id*. at 15-16. As a result, CARE/Simpson fail in this section to "provide sufficient specificity such that the Board can ascertain what issue is being raised" and to "articulate some supportable reason as to why the permitting authority erred or why review is otherwise warranted." *Knauf I*, 8 E.A.D. at 127. Thus, the Board should deny review on this basis alone.

Nonetheless, RCEC here attempts to discern and respond to each of CARE/Simpson's "specific 'amended' permit issues" on the merits by addressing the following arguments: (a) that the Air District prevented and/or failed to support public participation throughout the permitting process; (b) that the Air District issued flawed fact sheets, notices, and other documents; (c) that the Air District's response to CARE/Simpson's document requests under the California Public Records Act was inadequate; and (d) that the Air District has failed to issue any permit "correctly." Petition at 15.

1. The Air District Did Not Prevent or Fail to Support Informed Public Participation in the Permitting Process

CARE/Simpson begin by noting that "there is great interest in PSD permitting, if potential parties become aware of the proceedings." *Id*. at 13. CARE/Simpson then assert that the Air District undermined this awareness and interest, alleging that the Air District's process "has continued to attempt to prevent informed participation" and that any outreach efforts had to be conducted by outside organizations "without accurate information or support from the District." *Id.*

This broad allegation echoes a number of comments submitted to the Air District related to the quality and scope of the Air District's notice and outreach efforts. The Air District

responded to all of these comments at length in its Responses to Public Comments. As stated therein, the facts clearly show that, not only has the Air District not "attempt[ed] to prevent informed participation," but the Air District has gone above and beyond to enable informed participation. For example, the Air District noted that it duly provided notice of the permit actions as required by law:

> The Air District provided notice to all individuals, governmental bodies, and others who are entitled to it as required by the applicable PSD notice regulations and the Delegation Agreement. Copies of all of the public notice documents for this permitting action, including mailing lists, proofs of newspaper publication, *etc.*, are included in the record documents the Air District is making available in this matter. The Air District notes that the significant public interest expressed in this project highlights the fact that the District's public notice and outreach efforts were very broad and robust.

Exhibit 5, Responses to Public Comments at 201. The Air District also received comments stating that it should provide answers to certain questions the commenters submitted during the initial public comment period, and that until it has done so, it should keep the public comment period open to provide commenters an opportunity to review such responses. *Id.* at 206. The Air District responded:

> The Air District has gone to great lengths to provide the public with relevant information regarding the Russell City project and the District's permitting analysis for it. The Air District has provided all of the information necessary for the public to understand the District's analysis and its basis for issuing the permit. The Air District disagrees that there is further information that it needs to provide at this stage before making a final permit determination. To the extent that the commenters' questions can be construed as containing comments on the District's analysis and the draft permit, the Air District is responding to them in this Responses to Public Comments document.

Id.

Specifically on the topic of public participation, the Air District received comments questioning whether it complied with several regulations dealing with public comment opportunities, including 40 C.F.R. § 51.166(q) (public participation for SIP-Approved PSD programs); 40 C.F.R. § 124.13 (longer comment period to the extent shown to be necessary); 40 C.F.R. § 124.8 (Fact Sheet); and 40 C.F.R. § 124.6 (Draft Permits). *Id.* In response, the Air District clarified that it had gone above and beyond these requirements to insure informed public

participation in the process:

> The Air District has complied with all applicable requirements for providing public comment opportunities for this PSD permit. The public comment requirements are set forth in 40 C.F.R. Section 52.21 and the relevant provisions of 40 C.F.R. Part 124, and the Air District has not only fully satisfied all applicable requirements; it has even gone well beyond the minimum required in many areas. In particular, the Air District provided two public comment periods, each well over the minimum 30 days required by the regulations. The comments have not identified any reason why the time periods provided for public comment were insufficient, or why there may be a need for additional time for public comment pursuant to 40 C.F.R. section 124.13. Moreover, the Air District provided what the regulations call "Fact Sheets" under 40 C.F.R. section 124.8 (what the Air District called the "Statement of Basis" and "Additional Statement of Basis"), which set forth the degree of PSD increment consumption expected, which is less than significant here for the PSD pollutants for which increments have been established; a detailed summary of the basis for the draft permit conditions, with appropriate references to governing authority and to documentation in the Air District's permitting file; a description of how the Air District will make its final decision on the draft permit describing the comment process and the public hearing that was being held; and the name and phone number of a contact person for more information. Furthermore, the Air District circulated for public review its Draft Permit setting forth all of the proposed permit conditions as required by 40 C.F.R. section 124.6 (both as initially proposed in December of 2008 and as revised in the August, 2009, proposal). In this way, the Air District fully complied with all of the requirements for providing the public opportunities for comment on the draft permit.

Id. at 207 (footnotes omitted). As a result of these efforts, the Air District noted that it received a "large volume of public comment," which was "testimony to the robust comment opportunity that was provided." *Id*.

Also in its responses, the Air District specifically addressed comments that it had been "hostile to public comment and ha[d] attempted to prevent public input." *Id*. at 208. Stating that it "strongly disagree[d] with these comments," the Air District noted that it

> went well beyond the minimum legal requirements in providing public outreach and encouraging public interest in this permitting action. The Air District very much appreciates the insightful comments it received from the public, and in fact has incorporated a number of comments to improve the permit. For example, based on public comments (among other information), the Air District has revised the Carbon Monoxide BACT limit downwards from 4.0 ppm to 2.0 ppm. Similarly, the Air District revised the voluntary Greenhouse Gas BACT analysis that the applicant requested to result in a lower BACT emissions level as well as an annual compliance test requirement to ensure that efficiency does not unduly degrade over time. The Air District also reviewed its startup BACT analysis based in part on public comments and is finalizing the permit with more stringent startup limits as a result. These actions speak for themselves, and show that the Air District had not made up its mind regarding the final permit and in fact

> changed its mind based in part on comments received from the public. These actions highlight the fact that Air District does greatly value public input on its permitting actions, and has acted on the public's input in this case to strengthen the final permit.

Id. Thus, not only was the Air District not hostile to public input on its draft permitting decision; it substantively changed the permit conditions in response to such public input. These actions speak for themselves.

Once again, CARE/Simpson fails to identify any deficiency in the Air District's responses to comments. On that basis alone, review should be denied. *See Indeck-Elwood*, slip op. at 88; *Zion Energy,* 9 E.A.D. at 705.

CARE/Simpson's argument fails on the merits as well. Not only do they fail to substantiate their allegation that the Air District "attempt[ed] to prevent informed participation;" they neither explain how the Air District's efforts were legally deficient, nor do they demonstrate any error in these efforts. CARE/Simpson have not carried their burden under 40 C.F.R. section 124.19(a) of demonstrating that a permit condition is based on a finding of fact or conclusion of law that is erroneous.

2. CARE/Simpson Demonstrate No Clear Error or Other Basis for Review in the Air District's Publication of Public Notices and Related Documents

CARE/Simpson here allege that the Air District "has issued no less than 4 different fact sheets;" that "[t]he [a]ddress and identified location of the facility changes from Notice to Notice;" and that "none of the Notices includes identification of the emission impacts or the PSD increment consumed." Petition at 14. None of these issues has merit.

a. The Air District Did Not Mislead the Public Concerning the Location of the Project

In the Project Fact Sheet and Statement of Basis, the Air District identified the Project's location as "3862 Depot Road, near the corner of Depot Road and Cabot Boulevard, in Hayward, CA." *See* Exhibit 1, Statement of Basis at 9; Exhibit 29, Project Fact Sheet. The December 12, 2008 notice of public hearing on the draft permit also noted the address of the Project ("3862 Depot Road, near the corner of Depot Road and Cabot Boulevard, in Hayward, CA"), and that

this was 1,500 feet north of the Project's original location. Exhibit 30, Notice of Public Hearing and Notice Inviting Written Public Comment on Proposed Air Quality Permit for the Russell City Energy Center, Hayward, CA (Dec. 12, 2008). While it is true that the Air District had sent out a notice on December 9, 2008, that had incorrectly indicated the Project's address as "3806 Depot Road, at the corner of Depot Road and Cabot Boulevard, in Hayward, CA" (Exhibit 31, Notice of Public Hearing and Notice Inviting Written Public Comment on Proposed Air Quality Permit for the Russell City Energy Center, Hayward, CA), the Air District promptly corrected this error and distributed the second public notice, which included the words "(NOTE REVISE ADDRESS)" in bold, all-capital letters at the top. *See* Exhibit 30. Thus, any member of the public who, upon receiving the initial public notice, was led to believe that the address of the Project was 3806 Depot Road subsequently received an updated notice, more than 30 days in advance of the public hearing and deadline for submission of public comments, which clearly indicated that the correct address was, in fact, 3862 – not 3806 – Depot Road. CARE/Simpson raise no facts that would suggest that any member of the public was, in fact, misled by this error. Nor do they allege that it would have been material in any respect to the Air District's decision on the permit or to public participation in the permitting process. As the Board has explained, it typically declines to review errors that are immaterial. *See, e.g.*, *In re Dominion Energy Brayton Point, L.L.C.*, NPDES Appeal No. 07-01, slip op. at 49-50 (EAB, Sept. 27, 2007). CARE/Simpson fail to provide any evidence that would indicate that the Air District's timely and appropriate correction of the Project's address resulted in any error warranting review by the Board. Indeed, the fact that the initial notice had incorrectly identified the Project location at an adjacent assessor's parcel number (which, although it will ultimately be part of the Project's property, is not its legal address) is wholly immaterial to any condition of the PSD Permit.

In sum, all of the Air District's notices and decision documents noted that the Project's address had been relocated 1,500 feet to the north of its originally proposed location. *See* Exhibits 29-31. Once the error in the initial public notice published in December 2008 was correct, all subsequent documents correctly reflected the Project's address. For example, upon

publishing the Additional Statement of Basis, the Air District again published RCEC's location as "3862 Depot Road, near the corner of Depot Road and Cabot Boulevard, in Hayward, CA" in its final notice to the public. Exhibit 32, Notice of Public Hearing and Notice Inviting Written Public Comment on Proposed Revised PSD Permit for the Russell City Energy Center, Hayward, CA (Aug. 3, 2009). Together, these notices and documents provided "full notice" to the public of the exact location of the Project, as explained by the Air District:

> The public notices that the Air District issued cited the specific project location giving the street address and nearest cross-streets, which afforded members of the public full notice of exactly where this project will be located. Identifying the specific location in this respect gave members of the public full information sufficient to locate the project site in relation to any other geographic features that may have been of interest to them. Indeed, with the specific project location, members of the public were able to visit the project location and see for themselves exactly where it will be located and what the surrounding areas are like. This information gave the public full notice of the project's location as well as surrounding areas, including features such as the industrial nature of the area and its proximity to the Hayward shoreline. And the Air District received a large volume of comment regarding the project's location and setting from members of the public who were fully able to understand and identify where it would be located, where it would be in relation to nearby areas of concern, and what the surrounding setting is like. These comments, which are based on a clear understanding of where the project will be located, belie the comments suggesting that the public was not adequately informed of the project location.

Exhibit 5, Responses to Public Comments at 203 (footnotes omitted).

CARE/Simpson state that the address and identified location of the Project changed "from Notice to Notice," but they provide no evidence to support that the public was in any way uninformed about the location of the Project or otherwise misled. Nor do they provide any evidence that would suggest that correction of the address between two notices sent in December 2008 was in any way material to the Air District's decision or any condition of the PSD Permit. Accordingly, CARE/Simpson have failed to demonstrate any clear error or other basis warranting the Board's review. The Board should therefore dismiss their claims.

b. The Air District's Notices Were Not Otherwise Deficient

By way of other "flaws" in the Air District's notice documents, CARE/Simpson allege that "none of the Notices includes identification of the emission impacts or the PSD increment consumed." Petition at 14.

This statement echoes comments asserting that the Air District's public notices and Statement of Basis documents should have included additional detailed information regarding the project and its emissions. The Air District addressed these comments as follows:

> The Air District disagrees that the level of detail it provided in its public notices and in its Statement of Basis documentation was insufficient to provide the public with adequate notice of this project and information on which to review the Air District's permitting decision. The Air District has provided a large amount of information to the public in order that interested parties can understand what this facility will involve and can review the Air District's permitting analyses with respect to the facility and the applicable Federal PSD requirements. The Air District is not aware of any information relevant to any part of the Federal PSD Permit process that the Air District has not made publicly available, and the comments have not identified any. The comments have pointed to some information that is not relevant to the permitting analysis and suggested that it needed to be made available and/or included in the public notices for this facility, but the Air District disagrees that such information must be identified or made available if it is not part of the Federal PSD analysis.

Exhibit 5, Responses to Public Comments at 205. As a preliminary matter, CARE/Simpson fail to address the Air District's comments; instead, they merely "reiterate comments made during the public comment period" without "substantively confront[ing] the permit issuer's subsequent explanations" (*Indeck-Elwood*, slip op. at 88), and on that basis alone, review can and should be denied. *Zion Energy*, 9 E.A.D. at 705.

CARE/Simpson's argument also fails on the merits. Again, nothing in the applicable regulations requires the Air District to provide in its public notices of permit actions the level of detail here requested by CARE/Simpson, namely "identification of the emission impacts or the PSD increment consumed." Specifically, the federal regulations require only that notices provide the following information: (i) name and address of the permit-issuing authority; (ii) name and address of the applicant; (iii) a brief description of the business conducted at the facility; (iv) name, address and telephone number of a person from whom interested persons may obtain further information, including copies of the draft permit or draft general permit, as the case may be, statement of basis or fact sheet, and the application; and (v) a brief description of the required comment procedures. *See* 40 C.F.R. § 124.10(d). The Air District's notices provided all of this information. Neither this regulation nor any other rule or regulation requires

the Air District's notices to provide more. To the extent CARE/Simpson argue that the Air District's fact sheets failed to include specific information, this argument also fails. *See supra* section V.A.3.a. CARE/Simpson thus fail to substantiate their allegations that the Air District's notices were legally deficient and to establish a basis for review under 40 C.F.R. section 124.19(a).

3. This Board Lacks Jurisdiction To Review the Air District's Response to Public Records Act Requests; Regardless, the Air District's Response Was Adequate.

CARE/Simpson go to great lengths to criticize the process and substance of the Air District's response to Mr. Simpson's requests for documents pursuant to the Public Records Act. Petition at 13-14. They note, for example, that "[p]ublic records requests to the District have often been ignored, misguided or delayed up to a year in response. We can not expect that others would have had a more informative experience. Others may have merely given up prior to receipt of requested records." *Id*. at 14. CARE/Simpson allege that the Air District "chide[d] Mr. Simpson for non specificity in requesting documents," and "ignored, misguided [*sic*] or delayed" its response to his Public Records Act request up to a year. *Id*. CARE/Simpson claim that the Air District allegedly attempts to "weave a story of an innocent agency besieged by public records requests of insurmountable volume as to render it incapable of timely response," and go on to state that "[t]he District would have you believe that a roughly 100 day period from September 11, 2008 to December 18, 2008 was required to provide documents created between July 29, 2008 to September 11, 2008[,] a 44 day time period." *Id*. Even then, CARE/Simpson fault the Air District's responses to these requests. *Id*. at 14-15.

These issues echo matters raised earlier in the Petition, and they have already been addressed in full by RCEC in this response. *See supra* section V.A.1 (refuting the merits of Petitioners' argument that the Air District has circumvented public participation by hindering access to public documents). To reiterate here, any issue related to the Air District's response to Mr. Simpson's California Public Records Act request is not governed by PSD regulations, and thus is beyond the jurisdiction of the Board. *See, e.g., HELCO*, 10 E.A.D. at 238.

As to allegations that the Air District failed to provide documents for public inspection as required by PSD regulations, RCEC emphasizes that the Air District went above and beyond what was legally required of it. These efforts are well documented in the Air District's Responses to Public Comments. *See* Exhibit 5, Responses to Public Comments at 210-13. Of particular note, in contrast to CARE/Simpson's assertion that it took the Air District 100 days to produce documents responsive to Mr. Simpson's Public Records Act request, the Air District began providing him copies of responsive documents on September 18, 2008, just *one week* after the request was received. *Id*. at 211. Overall, the Air District conducted a comprehensive search of its records for responsive documents:

> The relevant history of the public records act requests regarding this facility is as follows. Mr. Rob Simpson submitted a Public Records Act request on September 11, 2008, in which he requested all Air District documents regarding the facility "subsequent to EPA Remand," which the EAB issued on July 29, 2008. The Air District began working on responding to that request, and provided the documents from the permit engineer's working file – which were the most relevant and readily available documents – one week later, on September 18, 2008. To provide a complete response, the Air District then conducted a comprehensive records search of all records created since the EAB Remand Order on July 29, 2008, that could be located anywhere within the Air District's possession. This included searching paper records as well as electronic records such as email correspondence and other electronic files such as word processing documents and PDF documents stored on the Air District's central computer servers as well as on staff's individual computers. This search included paper and electronic files from the large number of Air District staff who have worked on or had contact with this project from multiple Air District divisions. Once all of the public records since the EAB Remand Order had been collected, they were reviewed by legal counsel to remove any documents not subject to public disclosure such as privileged attorney-client communications. When all of these tasks were completed, the full set of responsive records – which constituted several boxloads of records – were made available for the requestor to review, on December 18, 2008. During this time period, the requestor also engaged in a large volume of email correspondence with various Air District staff, and in some of those emails suggested that he wanted to review additional documents beyond the documents "subsequent to EPA Remand" that he had originally requested. After some further communications to ascertain exactly what universe of records he was requesting, on January 15, 2009, the commenter clarified that he was requesting all documents anywhere within the Air District's possession related to the Russell City facility "from 2008 and this year [2009]". The Air District therefore began the process of compiling and reviewing all documents related to the facility back to January 1, 2008, as it had done with the requestor's first request of September 11, 2009. The Air District completed these tasks and made the requested documents available for the requestor's review on June 15, 2009. The Air District has therefore responded to all Public Records Requests regarding this facility.

Exhibit 5, Responses to Public Comments at 211-12.

CARE/Simpson allege that the Air District "misstates the facts" (Petition at 15), but CARE/Simpson proffer nothing to specifically controvert the above-stated facts, which are supported by the email communications referenced by CARE/Simpson. *See* Petition at Exhibit 2. Nor do CARE/Simpson cite to the language they claim amounts to the "chiding" by the Air District. The Petition merely cites to pages 211-215 of the Responses to Public Comments, wherein the matter of the Air District's response to the public records requests is broadly addressed. Thus, CARE/Simpson merely continue to disagree with the Air District's response instead of demonstrating how the District's responses were erroneous or otherwise inadequate.

The process for producing administrative records described above is inherently laborious and time-consuming. The fact that CARE/Simpson were not ultimately satisfied with the process – or that the Air District's response was, in CARE/Simpson's estimation, somehow "limited" (Petition at 4) – does not constitute a basis for review of the permit. Again, the Air District provided at least as much information, if not more, than was required. In fact – in contrast to CARE/Simpson's conjecture that "[o]thers may have merely given up prior to receipt of requested records" (Petition at 14) – some commenters praised the Air District for making its documentation available for the public to review and for otherwise providing information. *See* Exhibit 5, Responses to Public Comments at 210. In sum, CARE/Simpson fall far short of establishing any clear error by the Air District.

4. A Number of CARE/Simpson's Issues Are Beyond the Scope of Review of this Permit

In what appears to be a critique of the Air District generally, CARE/Simpson allege that the Air District has "apparently never issued any PSD permit correctly." Petition at 15. Petitioners appear to take issue with the Air District's handling of other facilities' permits, but nothing therein constitutes an "issue" that relates to a finding of fact or conclusion of law underlying the terms and/or conditions of *this* PSD permit. Petitioners' inclusion of lengthy exhibits regarding matters that have no bearing on this permit, ***e.g.***, the "DISTRICT PGE

COMMUNICATION" and "comments to DOJ and BAAQMD" (Petition at 15), does nothing to support their position that review is warranted.

For the reasons described above, the Board should deny review of all of the issues described by CARE/Simpson as "Specific 'Amended' PSD Permit Issues for Remand."

E. CARE/Simpson's Assertion that the Air District Did Not Respond Adequately to Any of Their Comments Has No Merit

CARE/Simpson claim that "[b]ecause the District restated the comments and did not identify which comments they were restating or responding to they did not adequately respond to any of our comments." Petition at 16. CARE/Simpson follow this general claim by noting approximately 18 issues to "identify some of the responses that may appear to be to our comments but it can in no way be a complete list without some correlation between the comment and the response." *Id.* Neither CARE/Simpson's general claim nor any of the listed issues provides grounds for review of any condition of RCEC's PSD permit.

1. The Air District's Responses to Public Comments Clearly Satisfied Its Obligations Under the Federal PSD Rules

At the time it issued its final permit decision, the Air District was required to issue a response to comments that "[b]riefly describe[s] and respond[s] to all significant comments on the draft permit . . . raised during the public comment period, or during any hearing." 40 C.F.R. § 124.17(a)(2). On February 3, 2010, upon issuing RCEC's Final PSD Permit, the Air District issued a 235-page Responses to Public Comments that responds to comments received during the first and second public comment periods. *See* Exhibit 5, Responses to Public Comments. The Responses to Public Comments has a comprehensive seven-page table of contents and is organized by topic and, within topics, by comments. *See id.* Under each comment heading, the Air District described the comments on that issue and then provided its response (prefaced by "Response:"). *See id.*

Because the Air District received so many comments on the Draft PSD Permit (56 comment letters and public hearing comments) and revised Draft PSD Permit (147 comment letters and public hearing comments), and many of the comments addressed similar issues, the

Air District did not identify in its Responses to Public Comments who raised each comment.[7] Not only would it have been impracticable to do so, the Air District was not required to do so. *See, e.g., Indeck-Elwood,* slip op. at 57 n.80 ("This regulation [40 C.F.R. § 124.17(a)(2)] does not require the permit issuer to respond to each comment in an individualized manner."); *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 582-83 (EAB 2006) (the "Region's decision to group related comments together and provide one unified response for each issue raised was an efficient technique, not an indication of unresponsiveness"); *In re Kendall New Century Development*, 11 E.A.D. 40, 50 n.13 (EAB 2003) ("a permit issuer is not required to individually respond to every comment, but may provide a unified response to related comments") (citations omitted).

Moreover, "the applicable rules do not require the permit issuer to respond in detail to all comments irrespective of their merit." *Indeck-Elwood*, slip op. at 57 n.80. To the contrary, the permit issuer "need only 'describe and respond to all significant comments on the draft permit,' 40 C.F.R. §124.17(a)(2), and *its response can be in proportion to the substantive merit of the comments*." *Id.* (emphasis added). As discussed below, many of the comments raised by CARE/Simpson during the public comment periods lacked merit or raised issues far beyond the federal PSD requirements, but the Air District still provided thorough responses.

Thus, CARE/Simpson's claim that the Air District "did not adequately respond to any of [its] comments" (Petition at 16) falls flat. The Air District's extensive Responses to Public Comments fully satisfies the requirement to "[b]riefly describe and respond to all significant comments on the draft permit."

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[7] *See* http://www.baaqmd.gov/Home/Divisions/Engineering/Public%20Notices%20on%20Permits/2009/080309%2015487/Russell%20City%20Energy%20Center.aspx.

2. CARE/Simpson Fail To Show that Any of the Air District's Responses to Public Comments Was Clearly Erroneous or Otherwise Warrants Review

As to the numerous specific issues raised by CARE/Simpson, none provides a basis for this Board's review of RCEC's PSD permit. The merits of each will be discussed in turn, below.

a. The Air District Did Not Fail to Identify the Location of the Facility

CARE/Simpson allege that the Air District selectively identified the true location of the facility "[w]hen convenient for their argument." *Id*. at 16.

As noted in section V.D.2.a, the Air District's informational and notice documents accurately identified the Project's location as "3862 Depot Road, near the corner of Depot Road and Cabot Boulevard, in Hayward, CA." *See*, *e.g.*, Exhibit 1, Statement of Basis at 9; Exhibit 29, Project Fact Sheet. These and other documents also noted that this address reflected the Project's relocation 1,500 feet to the north of its originally proposed and noticed location. *Id*. Thus, as an initial matter, CARE/Simpson fail to "substantively confront" the Air District's statement of the facts, opting instead to merely reiterate stale comments. On that basis alone, review should be denied. *See Indeck-Elwood*, slip op. at 88; *Zion Energy,* 9 E.A.D. at 705.

Nor is there merit to CARE/Simpson's argument. While it is true that the Air District's initial public notice had incorrectly indicated the Project's address as "3806 Depot Road, at the corner of Depot Road and Cabot Boulevard, in Hayward, CA" (*see* Exhibit 31), the Air District promptly corrected this error and distributed the second public notice, which included the words "(NOTE REVISE ADDRESS)" in bold, all-capital letters at the top. *See* Exhibit 30. CARE/Simpson provide no evidence to suggest that any member of the public was misled by this error. Nor do they allege that it would have been material in any respect to the Air District's decision on the permit or to public participation in the permitting process. Thus, their allegation that the Air District was inconsistent in identifying the Project's location or that it "selectively" identified the location "[w]hen convenient for their argument," provides no basis for review. *See* 40 C.F.R. § 124.19(a) (requiring petitioner to show that a condition of the PSD permit is based on a clearly erroneous finding of fact or conclusion of law, or an exercise of discretion, which

the Board in its discretion should review).

b. The Board Does Not Have Jurisdiction To Review the CEC's Decision to License a Combined-Cycle Facility

CARE/Simpson allege that the Air District did not adequately respond to comments stating that "[t]he function for which the facility is proposed and designed for does not meet the Commission's goal." Petition at 16. According to CARE/Simpson, "[t]he function conflicts with the current demand as stated b [*sic*] the Commission," which, they imply, is evidenced by the following excerpt from a CEC Letter:

> [A]n essential piece of the state's renewable strategy is to construct new, very efficient, gas-fired power plants that will be essential to support a more renewable-based system. These gas-fired power plants will typically have fast-start capability, are highly efficient, and can quickly 'ramp' up and down to support fluctuating generation from wind and solar facilities.

Id. (citing Letter from Melissa Jones, Executive Director to U.S. Environmental Protection Agency (Dec. 24, 2009) at 3 ("CEC Comment Letter")) (Petition, Exhibit 4).

The purpose of the CEC Comment Letter was to argue for "tailoring" the major source applicability thresholds for GHG emissions for PSD and Title V permitting, because the CEC believes that subjecting emerging renewable energy sources and "new, more flexible and efficient, gas-fired electric generation" to PSD permitting would cause "regulatory gridlock . . . resulting in major delays for the very infrastructure investments that are necessary to reduce GHG emissions." Petition, Exhibit 4 (CEC Comment Letter) at 1-2.

As a preliminary matter, this issue is not within the Board's jurisdiction, as it implicates a matter beyond the scope of the PSD permit itself. As the Air District explained:

> Determining the most appropriate mix of electrical generation sources under these circumstances is a highly complex engineering and policy exercise that is most appropriately undertaken by the California Energy Commission, the state's expert agency on energy policy matters. The Air District obviously has a supporting role to play in helping the Energy Commission to understand the air quality impacts of its siting decisions and to include appropriate air quality conditions in its licenses. But as an agency, the Air District does not have the expertise nor the authority to determine what type of generation sources are needed, of what capacity, and where. The Air District must therefore necessarily defer to the Energy Commission's decision that the proposed natural-gas fired, combined-cycle facility is the most appropriate alternative for this project. If it would be more appropriate to use wind or solar power to serve the function intended for the

> proposed Russell City project, the Energy Commission is the agency best suited – and specifically tasked by the California legislature – to make that determination.

Exhibit 5, Responses to Public Comments at 25.

As the Air District emphasized, "[t]he Federal PSD BACT requirement is not designed to intrude upon this analysis by the expert state agency on power generation and supply policy. To the contrary, Federal PSD permitting explicitly contemplates that PSD permitting authorities will defer to other state agencies on siting decisions." *Id*. at 27. In support of this proposition, the Air District cited clear Board and EPA precedent as follows: "*See In re Prairie State Generating Co.*, PSD Appeal 05-05, *supra* note 6, slip op. at 44; *In re SEI Birchwood, Inc*., 5 E.A.D. 25, 27 n.1 (EAB 1994); *In re EcoEléctrica, LP*, 7 E.A.D. 56, 74 (EAB 1997); *In re Kentucky Utils. Co*., PSD Appeal No. 82-5, at 2 (Adm'r 1982)." *Id*. at 27 n.65. Thus, the CEC's decision to license a combined-cycle plant is separate from the PSD permit process, and not within the scope of the Board's review of that permit. *See, e.g., HELCO*, 10 E.A.D. at 238.

Even if this issue were within the Board's jurisdiction, CARE/Simpson's argument would fail on the merits. CARE/Simpson portray the CEC as having expressed in this letter a determination to construct only "more flexible and efficient, gas-fired electric generation" like peaking plants, which the RCEC is not. This takes the CEC's comment out of context. The letter was not issued with the intent of developing California's energy policy, but rather with the intent of addressing implementation of federal PSD requirements. The letter does not mean that the CEC no longer believes that intermediate-to-baseload, combined-cycle plants no longer have a role in California's energy mix. Moreover, the Air District fully addressed comments suggesting that if the facility were intended for load-following or other duty that would involve frequent startup and shutdown events, RCEC should be required to construct a fast-start-capable, peaking-to-intermediate duty plant instead:

> The Air District notes that the Federal PSD Permit process is designed to ensure that a proposed facility will be as low-emitting as possible (among other requirements). It is not designed to require an applicant to propose a different type of project of a different fundamental scope and design, for example to substitute a simple-cycle peaking plant instead of a combined-cycle intermediate-to-baseload project as the commenters suggest here. [Footnote: This principle has been well established by the Environmental Appeals Board in reviewing PSD

> permits. *See, e.g., In re Prairie State Generating Co.*, *supra* note 6, slip op. at 32; *In re Kendall New Century Development*, *supra* note 6, at 51-52.] *Moreover, it would not make any sense from an emissions standpoint to require a simple-cycle facility for the purpose that this facility is intended to be used for, which is to serve intermediate-to-baseload capacity. Simple-cycle facilities are less efficient than combined-cycle facilities*, which recover the heat from the turbine exhaust (which would simply be emitted and wasted in a simple-cycle facility) and use it to generate additional electricity. *Simple-cycle facilities are therefore generally inferior to combined-cycle facilities, except for applications where the generating capacity must come online in a very short time frame, which is not the case with the uses for which this facility has been proposed and designed*. The Air District therefore disagrees that it should require the applicant to redesign the facility as a simple-cycle peaking facility.

Exhibit 5, Responses to Public Comments at 13 (emphases added). Thus, CARE/Simpson's allegation lacks merit and provides no basis for Board review.

c. The Air District Did Not Err in Finding that GHGs Are Not Subject to PSD.

CARE/Simpson here reiterate that the Air District erred in finding that GHGs "are not subject to PSD at this time." Petition at 17. As discussed above, this allegation is factually wrong and entirely lacks merit. *See supra* section V.C.

d. Petitioner Fails To Show that the Air District's Conclusion that Carbon Sequestration Is Not a Feasible Technology Is Clearly Erroneous

CARE/Simpson assert that the Air District "misstate[d]" Mr. Simpson's comment regarding the feasibility of bio- and subterranean carbon sequestration, and they take issue with the Air District's decision not to adopt carbon sequestration technology as BACT for the Project. Petition at 17-18. Specifically, CARE/Simpson dispute the Air District's assessment that the technology Mr. Simpson described in his comments is "in its infancy." *Id*. at 18. They note that the Air District appears to have studied a "different technology" than what Mr. Simpson was referring to, and that the technology referenced by the Air District may well be in its infancy, but "photosynthesis is not." *Id.*

In its Statement of Basis, the Air District considered carbon capture and sequestration but eliminated it as an available control technology for purposes of its BACT analysis because it cannot feasibly be implemented on a large-scale power plant at this point in time. Exhibit 1, Statement of Basis at 60-61. The Air District provided two main reasons for this conclusion:

First, it noted that emerging carbon capture and sequestration technologies are in their infancy and are not currently feasible for projects such as the Russell City Energy Center. *Id.* In particular, "[t]here are currently no carbon capture and sequestration systems commercially available for full-scale power plants in the United States." *Id*. Second, the Air District noted that even if carbon capture and sequestration were sufficiently developed, the feasibility of a system for a particular power plant would depend on the availability of appropriate sequestration sites in the vicinity of the plant, and that, although basins within Alameda County are under investigation for the potential for carbon sequestration, there are no such sites that have been demonstrated as appropriate for sequestration at this time. *Id*. at 61. Finally, the Air District explained that "carbon capture and sequestration may also have ancillary environmental and societal impacts that need further evaluation before the technology can be considered feasible." *Id.*

In response to this, Mr. Simpson provided the following comment:

> Carbon Sequestration is a feasible control technology that has not been adequately studied for this project. Subterranean sequestration may be a viable alternative as well as bio-sequestration of pollutants in algae producing ponds. There are extensive ponds adjacent to the site that could accommodate this. After sequestration the water/ algae could be utilized for reforestation or irrigation to create a buffer between the the [*sic*] developed and natural areas of the shoreline or in other locations further sequestering Carbon. Please study this plan.

Exhibit 25, Letter from Rob Simpson to Weyman Lee, P.E. (Sept. 16, 2009) at 8 ("CARE/Simpson Comments 9/16/2009").

In response to Mr. Simpson's comment, the Air District conducted further investigation into a range of carbon capture and storage technologies, including subterranean and bio-sequestration. The Air District reported that efforts were being made at the federal and state level to develop these technologies, but noted that the results of its investigations only supported the Air District's earlier assessment that such technologies were in their infancy and not suitable for consideration as BACT for the Project. *See* Exhibit 5, Responses to Public Comments at 21-24. With respect to Mr. Simpson's suggestion of bio-sequestration in algae-producing ponds, the Air District noted:

> The Air District also considered the comments' reference to bio-sequestration of carbon in algae-producing ponds. Research has begun on an emerging technology that would use "algae bioreactors" to sequester carbon dioxide emissions. An algae bioreactor would house huge quantities of algae that would use CO_2 captured from a power plant for photosynthesis. Although the technology is potentially promising, it is also in its infancy and is not feasible at this time as an add-on control technology. Moreover, the comment on this point did not provide any information on how the facility could feasibly implement bio-sequestration, it simply referenced the technology and suggested that the Air District study it. The Air District has done so in response to this comment, but disagrees that bio-sequestration is currently feasible control technology that could be required here as part of a greenhouse gas BACT technology review.

Exhibit 5, Responses to Public Comments at 24 (footnote omitted). CARE/Simpson fail to identify any error in the Air District's conclusions concerning the feasibility of algae bioreactors or of bio-sequestration more generally.

The Air District's conclusion that carbon capture and sequestration technologies, including bio-sequestration, are in their infancy and are not currently feasible for the Project is well supported by the stated facts. In its Petition, CARE/Simpson express disagreement with the Air District's conclusion, but they fail to substantively confront or to otherwise point to clear error in the Air District's findings and analysis. Indeed, given the lack of specificity in both Mr. Simpson's original comment on this subject (and the Petition as well), it is not surprising that CARE/Simpson would allege the Air District studied a "different technology" than proposed by Mr. Simpson. The only statement CARE/Simpson make here by way of rejoinder is to say that the Project's proximity to extensive ponds creates a "unique opportunity" to initiate bio-sequestration (Petition at 18) and to state that photosynthesis and wet scrubbers "that can help facilitate this action" are not technologies that are in their infancy. *Id*.

As a threshold matter, these allegations merely repeat Mr. Simpson's comment concerning the availability of nearby ponds for bio-sequestration. They do not point to any actual examples of bio-sequestration in algae-producing ponds that might possibly demonstrate that this is a feasible technology. The Air District in its research identified no such examples. By its unsupported allegations, CARE/Simpson do not meet the "heavy burden" that the Board assigns to petitioners seeking review of technical issues. *See Three Mountain Power*, 10 E.A.D. at 50 ("We generally accord deference to permitting agencies when technical issues are in play.

As such, we assign a heavy burden to persons seeking review of issues that are quintessentially technical.") (citations omitted). Accordingly, CARE/Simpson have failed to identify any error in the Air District's determination that carbon sequestration, either generally or specifically in nearby ponds, did not represent a feasible control technology for the Project.

Moreover, given the lack of specificity in Mr. Simpson's comment concerning the availability of bio-sequestration, the Air District tried to interpret his comment more broadly, but nevertheless found other reasons why it would not represent a feasible control technology for the Project:

> To the extent that the commenter intended "bio-sequestration" to mean simply using vegetation to remove CO_2 from the atmosphere generally, the Air District disagrees that this approach to addressing greenhouse gas emissions could be considered a BACT control technology. BACT control technologies reduce or remove air pollutants before they are released into the atmosphere. Reducing greenhouse gas emissions from the atmosphere once they have been emitted, for example by planting trees or putting algae in ponds to draw CO_2 out of the atmosphere, is more in the nature of offsets than it is a BACT control technology. The Air District therefore disagrees that requiring a facility to plant vegetation to remove CO_2 as a means of addressing its greenhouse gas emissions could be required in a BACT analysis.

Exhibit 5, Responses to Public Comments at 24 n.57. Thus, to the extent that Mr. Simpson had simply meant the Air District should pursue technologies that would not directly control the Project's emissions, but would instead pull CO_2 out of the atmosphere, the Air District disagreed that this would constitute a BACT emissions control. CARE/Simpson fail to acknowledge the Air District's discussion on this point, let alone to point to any clear error in the Air District's reasoning, and thus fail to establish a basis for review of any permit condition.

e. The Data Underlying the Determination that There Were No Feasible Alternatives to the Project Was Not Out of Date

CARE/Simpson assert that the CEC relied on out-of-date decisions in determining that alternative generating technologies are not currently capable of meeting the state's electrical power demand at all times: "The problem with relying on data from 2002 or 2007 in making decisions for future energy needs is that they fail to consider the rapidly changing technology available and the fact that other sources have been developed to satisfy any need." Petition at 18.

As with CARE/Simpson's assertion that the RCEC facility somehow does not meet the CEC's goals (*see supra* section V.E.2.b. above), this issue is not within the Board's jurisdiction because it does not relate to a permit condition that implements the federal PSD program. *See, e.g., HELCO*, 10 E.A.D. at 238. As the Air District explained,

> Determining the most appropriate mix of electrical generation sources under these circumstances is a highly complex engineering and policy exercise that is most appropriately undertaken by the California Energy Commission, the state's expert agency on energy policy matters. The Air District obviously has a supporting role to play in helping the Energy Commission to understand the air quality impacts of its siting decisions and to include appropriate air quality conditions in its licenses. But as an agency, the Air District does not have the expertise nor the authority to determine what type of generation sources are needed, of what capacity, and where. The Air District must therefore necessarily defer to the Energy Commission's decision that the proposed natural-gas fired, combined-cycle facility is the most appropriate alternative for this project. If it would be more appropriate to use wind or solar power to serve the function intended for the proposed Russell City project, the Energy Commission is the agency best suited – and specifically tasked by the California legislature – to make that determination.

Exhibit 5, Responses to Public Comments at 25.

In sum, the Air District deferred to the CEC's jurisdiction over determining how to meet the State's energy needs. CARE/Simpson identify no error in the Air District's deference to the CEC's jurisdiction in this respect. Board precedent makes clear that Federal PSD permitting explicitly contemplates that PSD permitting authorities will defer to other state agencies on siting decisions. *See Prairie State*, slip op. at 44 (reiterating that "it is appropriate for a permit issuer to refrain from analyzing whether a proposed facility is needed where the state has specifically tasked another state agency with authority to consider that issue"); *SEI Birchwood*, 5 E.A.D. at 27 n.1 (holding that petitioner's contention that the proposed facility is not needed "is outside the scope of the Board's jurisdiction" because the "need for a power plant is 'more appropriately addressed by the state agency charged with making that determination'") (quoting *In re Kentucky Utils. Co*., PSD Appeal No. 82-5, at 2 (Adm'r, Dec. 21, 1982)); *EcoEléctrica,* 7 E.A.D. at 74 (explaining that "the Region acted reasonably and appropriately by deferring questions concerning the need for the facility to the [government]"); *Kentucky Utils.*, PSD Appeal No. 82-5, at 2 (stating that the need for a power plant is "more appropriately addressed by the state

agency charged with making that determination"). Thus, CARE/Simpson's allegation that the CEC's need determination was defective in any respect is wholly outside of the Board's jurisdiction to review the PSD Permit.

Second, to the extent CARE/Simpson raise a concern regarding technology selection that might possibly fall within the Board's jurisdiction to review PSD permits, their contentions are without any merit because the Air District clearly evaluated the entire Pproject as a wholly new application:

> In evaluating the project for compliance with Federal PSD requirements, the Air District did not rely in any way on the analysis prepared for initial permit. To the contrary, the Air District made clear in the Statement of Basis that it was evaluating the entire project for compliance with the Federal PSD requirements, not just elements that were changing since the initial permitting. As the Air District explained in the Statement of Basis, it analyzed both the amendments to the proposed project as well as the elements that were not being changed, and concluded "[t]he analysis of the elements that are not being amended shows that the conditions from the initial permit that are not being changed meet current applicable legal standard for Federal PSD Permit, and that they would *comply with current PSD requirements even if they were being proposed anew at this time*." (Statement of Basis at p. 7 (emphasis added).) The detailed analyses provided in the Statement of Basis clearly support this conclusion. The Air District evaluated all of the equipment at the project from scratch to ensure that it meets current BACT standards as is required for a new permit application. The District similarly conducted an Air Quality Impacts Analysis (and related analyses) from scratch for the entire project, using the most current information and modeling techniques, as is required for a new project. The Air District's review of this project was therefore effectively a new permit evaluation, even if it was erroneously referred to in the initial Statement of Basis as a revision to an existing permit.

Id. at 214.

Thus, although CARE/Simpson allege that the CEC's determination of "need" was defective because it was based on an outdated evaluation of available alternatives to the Project, the Air District's evaluation of the Project was clearly based on current PSD requirements and current technology. Moreover, CARE/Simpson's allegations in this respect fall outside of the Board's jurisdiction, in light of the Air District's deference to the CEC's expertise and authority to decide how best to meet the State's energy needs. Because CARE/Simpson fail to identify any condition of the permit that is based on any factual or legal error or any other issue that might otherwise warrant review, the Board should dismiss their contentions.

f. The Air District Adequately Studied All Potential Impacts of the Project's Zero Liquid Discharge System

CARE/Simpson assert that the Air District failed to adequately study the impacts of the Project's Zero Liquid Discharge system. Petition at 19 ("The Zero liquid Discharge or All Vapor Emission system was not a part of the original plan and the impacts have not been adequately studied."). CARE/Simpson specifically take issue with the Air District's conclusion that diverting wastewater to the Project's Zero Liquid Discharge system will minimize harm to Bay water quality. Citing the Air District's statement that "[t]he facility's 'Zero Liquid Discharge' plant will minimize potential harm to water quality in the vicinity of the Water Pollution Control Facility's outfall, where wastewater that has undergone secondary treatment would otherwise be discharged into the bay," CARE/Simpson assert that this statement "ignores the fact that advanced fresh water marshes have been developed next to the Wastewater plant utilizing wastewater, which has created nesting sites for Least Terns and other endangered species," and that "[u]se of wastewater for other effects could threaten this ecosystem." *Id.* at 19.

The Air District addressed this issue and disagreed with comments that there may be adverse environmental effects by ceasing to discharge the water into the Bay:

> The Air District received some comments during the second comment period that were skeptical that using recycled cooling water from the City's wastewater treatment plant would actually provide environmental benefits. The comments stated that there may be adverse environmental effects by ceasing to discharge the water into the Bay . . . . The Air District disagrees that there would be a net environmental harm from using recycled water. The elimination of the wastewater discharge into the Bay will not have any detectible impact on overall water levels in the Bay. The amount of wastewater at issue is on the order of 4 million gallons per day, which will not even amount to a 'drop in the bucket' compared to the total volume of water in the San Francisco Bay.

Exhibit 5, Responses to Public Comments at 88 n.182.

Moreover, comprehensive evaluations were performed to determine the environmental impact of the Project on surrounding shoreline habitats and ecosystems, including nearby vernal pools, salt marshes and freshwater habitats. These impacts are addressed primarily through other regulatory mechanisms such as the Endangered Species Act and the California Environmental Quality Act ("CEQA"), not through the federal PSD regulations. Thus, they are not within the

scope of this Board's review of the permit. *Cf. Knauf I*, 8 E.A.D. at 171 ("Both of these issues are related to the CEQA process rather than PSD review, and we have no authority over them. Therefore, we must deny review of them.").

Jurisdictional issues aside, EPA Region 9 and the U.S. Fish and Wildlife Service evaluated the potential for wildlife impacts in detail and concluded that the facility is not likely to adversely affect any endangered species. *See* Exhibit 5, Responses to Public Comments at 175 (citing Letter from G. Rios, EPA Region 9, to B. Young, BAAQMD, re "Section 7 Endangered Species Act Consultation for the Proposed Russell City Energy Center – Hayward, CA" (Jan. 28, 2010); Letter from C. Goude, USFWS, to G. Rios, EPA Region 9, re "Endangered Species Informal Consultation on the Proposed Russell City Energy Center Project by Calpine/GE Capital; City of Hayward, Alameda County, CA (Jan. 25, 2010)).

As to other potential impacts of the Project's Zero Liquid Discharge system and All Vapor Emission system, CARE/Simpson's broad allegation that they were not "adequately studied"[8] is unfounded and incorrect. The Air District explained at length the basis for its

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[8] Elsewhere in its Petition, CARE/Simpson refer to a petition for review drafted by Ernest Pacheco. Petition at 24 (citing "Ernie Exhibit 5"). Attached thereto (as Exhibit 6) is a petition for review – which was never submitted – wherein Mr. Pacheco asserts that the Project's water vapor emissions will "have an obvious effect on . . . foundational variables" of various modeling programs that "require accurate relative humidity data to produce coherent results." Petition Exhibit 6 at 5-6. Because the exhibit containing Mr. Pacheco's allegations was not filed with the Board, but was merely included as an exhibit to CARE/Simpson's Petition, neither the Air District nor RCEC needs to respond to the issues raised therein. Indeed, while the Board has been quite generous in interpreting letters of opposition to the Project as "petitions" and requesting the Air District's response to such petitions, the Board has not separately docketed Mr. Pacheco's comments as a Petition; nor has it requested any response to it from the Air District.

Moreover, although CARE/Simpson correctly note that the Zero Liquid Discharge system was not a part of the original design, the system was incorporated into the revised Draft PSD Permit and discussed fully in the Additional Statement of Basis, so the public had ample opportunity at that time to submit comments regarding the potential effects of water vapor emissions on modeling programs. CARE/Simpson cite to no relevant comment that was raised during the public comment period. Again it is not the Board's obligation "to scour the record to determine whether an issue was properly raised." *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 n.10 (EAB 1999). That burden rests with petitioners, regardless of whether they are represented by counsel. *Id*. at 249-50. Thus, for multiple reasons, Mr. Pacheco's allegations on this point provide no basis for Board review.

decision to approve the Zero Liquid Discharge system as part of the Project's design:

> The Air District agrees that dry cooling systems are preferable in general from a criteria air pollution perspective because they do not have the particulate emissions that can result from wet cooling. In reviewing these comments about requiring a dry cooling system here, however, the Air District has been mindful that it cannot require an applicant to redesign its facility in a manner that alters inherent design elements or changes a fundamental purpose of the facility. Here, this facility was specifically designed from the very beginning to make use of recycled water from the City of Hayward wastewater treatment plant. A central element of the project design is a tertiary treatment plant that will utilize the City's wastewater effluent and clean it further to enable it to be used for cooling purposes. The benefit of being able to recycle the City's wastewater was also one of the reasons the City cited in agreeing to a property exchange that allowed the applicant to go forward with the project at its current location. And the Energy Commission explicitly found that the ability to use recycled wastewater was an objective of the project when it initially approved the facility. The use of a wet cooling system taking advantage of the City's wastewater is thus clearly an integral design element of the project. Moreover, it has clear environmental benefits and does not appear to be a design choice the applicant has made for reasons independent of air permitting. Under these circumstances, the Air District would be hesitant to conclude that it could require the applicant to redesign this source to use dry cooling in this case, as it would disrupt one of the basic objectives of the proposed facility which is recycling the wastewater from the City's treatment plant.

Exhibit 5, Responses to Public Comments at 87-88. The Air District further noted that even if it were to undertake a BACT analysis and compare wet and dry cooling as alternative feasible control technologies, it would select wet cooling for this facility in "Step 4" of the top-down BACT analysis because of the benefits of using recycled wastewater, which would otherwise be discharged into the Bay:

> The facility's "Zero Liquid Discharge" plant will minimize potential harm to water quality in the vicinity of the Water Pollution Control Facility's outfall, where wastewater that has undergone secondary treatment would otherwise be discharged into the bay. Although the City's wastewater is treated before discharge, it still contains minor amounts of water pollutants that contribute to the overall pollution levels in the Bay. Elimination of such water pollution, even in relatively small amounts, contributes to the health of the Bay and is therefore a beneficial environmental effect. This conclusion is supported by the State Water Resources Control Board, which encourages power plants wherever possible to draw cooling water from wastewater that is already being discharged into surface water bodies. The Air District has concluded that this net environmental benefit would support the choice of wet cooling over dry cooling for this particular facility, to the extent that the BACT analysis can even consider a redesign of the facility to change the cooling system.

Id. at 88.

Moreover, the Air District did consider the emissions impacts of the wet-cooling system, conducting a review of the BACT limits for particulate matter emissions from the cooling tower. The Air District acknowledged the necessity of this, because the cooling tower can contribute to particulate matter ("PM") emissions through solids dissolved in the water used in the cooling system, which can be emitted in the water vapor exhausted through the cooling tower. *See* Exhibit 1, Statement of Basis at 50-51. Thus, the Air District conducted a top-down BACT analysis to select a control technology for these PM emissions. *Id.* The Air District selected the top control technology – high-efficiency drift eliminators – as the BACT control technology and proposed 0.0005% cooling tower drift as the BACT limitation for PM from this source. *Id.* at 51. In addition to imposing this BACT emissions limit, the Air District proposed a condition limiting the amount of TDS in the facility's cooling water to 8,000 parts per million by weight ("ppmw") (milligrams per liter ("mg/l")). *Id.* at 78 (proposed Condition No. 44).

Not a single comment was received during the first public comment period on the District's BACT analysis for PM from the cooling towers. Exhibit 5, Responses to Public Comments at 86. The Air District, however, conducted its own further analysis of TDS data from the source of the Project's cooling water, the City of Hayward's Waste Water Treatment Plant, and concluded that RCEC "should be able to keep the TDS of the cooling water at 6200 ppm or below." Exhibit 3, Additional Statement of Basis at 52. Thus, the Air District revised the proposed BACT limit for TDS from 8,000 ppm to 6,200 ppm. *Id.* During the second comment period, not a single comment was received on the revised TDS limit. Exhibit 5, Responses to Public Comments at 87.

Thus, the Air District addressed not only the impacts of using wastewater on Bay water quality, but also the impacts associated with emissions from the cooling tower. The Air District ultimately selected the Zero Liquid Discharge system because, in the aggregate, the environmental impacts of that mechanism were minimized. CARE/Simpson fail to acknowledge any of the Air District's explanations or responses to comments. Review should be denied on this basis alone. *See Indeck-Elwood*, slip op. at 88; *Zion Energy,* 9 E.A.D. at 705. Moreover, as

established by the Air District in its extensive analyses, CARE/Simpson's argument fails on the merits.

g. The Name "Russell City Energy Center" Is Not Misleading

CARE/Simpson allege that the Air District misled the public by naming the Project the "Russell City" Energy Center when the Project is in fact located in Hayward. *Id*. at 19.

To begin, nothing in the PSD scheme purports to govern the naming of a facility; this matter is wholly outside the ambit of PSD regulations, and thus beyond the scope of this Board's review of the permit. *See, e.g.*, *HELCO*, 10 E.A.D. at 238.

The argument also fails on the merits. The Air District addressed this issue in its Responses to Public Comments, stating:

> The District also received several comments regarding the use of the "Russell City" name for the facility. Some commenters objected to the use of this name because the city in which the facility is officially located is the City of Hayward, CA. Other comments praised the use of the "Russell City" name in recognition of the unincorporated community that historically existed in the area that was known by that name. The facility's name is not relevant to any PSD permitting issues, and the Air District disagrees that there is any way that any members of the public could be misled by the use of this name given all of the information the Air District provided regarding the location of the facility.

Exhibit 5, Responses to Public Comments at 203 n.377. CARE/Simpson continue to assert that the name was misleading. Petition at 19 ("The name is certainly relevant if it [*sic*] misleading, as it is here."). They entirely fail to refute any of the Air District's facts or conclusions of law. Specifically, they fail to demonstrate that the public actually *was* misled by the name, and they fail to show that the Project's name is somehow relevant to a condition of the PSD permit. It is not. CARE/Simpson thus fail to establish that review is warranted.

h. The Air District Did Not Misrepresent the Character of the EAB Remand Order; Public Participation in the Permitting Process Was Not Chilled

CARE/Simpson allege that the Air District misrepresented the significance of the EAB's 2008 Remand Order, to the detriment of informed public participation in the permitting process. Petition at 20-21. Specifically, CARE/Simpson allege that the Air District's "misstating the status of the permitting appeal actions and opportunities" had a "cooling potential on public

participation," and that the Air District failed to address Mr. Simpson's comments to that effect in its Responses to Public Comments. *Id*. at 20. CARE/Simpson also allege that in the Air District's notice of the permit, "[t]he District misstate[d] the scope of the EAB considerations on this Matter and appeal venues which could serve to mislead the public and hamper participation" (*id.* at 21), and that the Air District "misstated and belittled the gravity of the EAB decision" in its Statement of Basis, "limiting informed participation possibly resulting in decreased or misguided public participation." *Id*.

As a preliminary matter, this issue was not preserved for review. CARE/Simpson's own prior comments on the subject were limited to a direct quote of an Air District response and two questions regarding that response:

> The Environmental Appeals Board ruled that the Air District had not mailed notice of the proposed amended Federal PSD Permit to several parties that were entitled to it, and so it remanded the permit to the District to re-notice the proposed permit and provide the public with a further opportunity to comment. *SOB at 7*
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> 19. Is this what the EAB remand stated?
>
> 20. Could further disclosure of details of the Remand affect public interest or informed participation?

Exhibit 23, CARE/Simpson Comments 2/5/2009 at 23 (repeated verbatim in the Petition at 21). By these questions, CARE/Simpson failed to preserve for review the far-reaching issues raised now in the present Petition, namely whether the Air District misstated and/or misrepresented the character of the Remand Order, and if so, whether this cooled public participation. CARE/Simpson point to no other comments and/or responses addressing these allegations, and it is not the Board's obligation "to scour the record to determine whether an issue was properly raised." *Encogen*, 8 E.A.D. at 250 n.10. To the extent CARE/Simpson have thus failed to carry their burden with respect to this threshold procedural requirement, this issue is not subject to review. *Knauf II*, 9 E.A.D. at 5.

Moreover, to the extent CARE/Simpson raise concerns about state-law permitting

procedures, these issues are outside the Board's jurisdiction. *See, e.g., HELCO*, 10 E.A.D. at 238.

To support their contention, CARE/Simpson provide an excerpt from the Air District's 2008 Statement of Basis, in which the Air District explains the Board's ruling on appeal of the PSD permit. Nothing stated by the Air District therein is inaccurate, and CARE/Simpson fail to identify the specific language that they claim was misleading. *See* EAB Practice Manual at 33 ("petitions for review must meet a minimum standard of specificity"). Thus, their arguments lack specificity. Further, CARE/Simpson fail to demonstrate how any deficiency noted by the Board in its Remand Order (specifically with respect to notice requirements) was not fully rectified by the Air District thereafter. Indeed, CARE/Simpson's assertion that public participation was in *any* way "hampered" is fully undermined by the remarkable volume of public comments submitted throughout this process. (All told, the Air District responded to more than 200 comment letters.) Without more, CARE/Simpson's allegations here – which amount to little more than unfounded speculation – fail to meet threshold procedural requirements and provide no basis for review of the permit. *See* 40 C.F.R. § 124.19(a)(1)-(2).

i. The Air District's Response to CARE/Simpson's Request for Information Regarding the Project's Equipment Was Proper

CARE/Simpson assert that whether the turbines are used or remanufactured bears on their pollution characteristics and claims that the Air District "misstated the comment" in concluding that specific details such as serial numbers and dates of manufacture were not relevant to determining BACT. Petition at 22-23. Specifically, CARE/Simpson refer the Air District to its own statement that "[a]n enforceable BACT limitation must be set at a level that the facility can achieve for the life of the facility, including as its equipment ages and incurs anticipated degradation." *Id.* at 23 (citing "ASOB 28"). As CARE/Simpson note, the Air District acknowledged that equipment degradation rates potentially increase after the first major overhaul and/or as the equipment approaches the end of its useful life. *Id.* (citing "ASOB at 31"). Finally, at the end of their argument, CARE/Simpson state that "[a] Calpine representative informed me

that they would be utilizing equipment that had been removed from another facility." *Id.*

In its Responses to Public Comments, the Air District explained that it based its BACT permit conditions on the emissions performance of current, state-of-the-art technology, and not on some lesser performance level based on older equipment:

> At the outset, the Air District notes generally that it agrees with the premise underlying these comments [about the currentness of combustion turbine technology] that the BACT permit requirements established for a facility need to be based on the emissions performance of the best equipment currently available, and may not be based on a lower level of performance of older equipment simply because an applicant may have already purchased existing equipment. The commenters are incorrect, however, in implying that the Air District bases its BACT determinations on the performance of older equipment in situations where an applicant may have already purchased equipment that it would like to use at a facility. To the contrary, the Air District bases its BACT limits on emissions performance of the most current technology . . . .
>
> For these reasons, in response to these comments the Air District explored whether there was more efficient generating equipment that the facility could use. The Air District has identified "FD3" turbine technology as the current state-of-the-art electrical generating equipment for a facility of this type . . . . After further discussions with the project applicant, the applicant has agreed to upgrade its equipment to incorporate the more modern FD3 technology. . . .
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> * * *
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> The Air District is therefore basing its BACT permit conditions on the emissions performance of this current state-of-the-art FD3-level technology, and not on some lesser performance level based on older equipment. The Air District notes, however, that is not proposing permit requirements specifying exactly what equipment must be used to satisfy the applicable BACT permit limits. BACT requires emission limits to be imposed based on the best emissions performance achievable by current state-of-the art technology, but once the BACT limits are established based on this technology as the Air District is proposing, the specific equipment the facility uses to achieve that limitation is irrelevant. As long as the facility keeps emissions within the BACT emission standards, it does not matter what particular choice of equipment the facility uses to do so. Certainly, from an environmental standpoint the choice is irrelevant because it is the emissions that impact air quality not the make or model of the equipment that generates them. If the applicant can meet current emission standards by upgrading existing equipment, there may be significant benefits to be gained, such as avoiding the costs of purchasing new equipment that would ultimately be borne by ratepayers and avoiding the waste inherent in junking serviceable equipment. But how the applicant meets current emission standards is up to the applicant. What matters from an air quality perspective – and what matters for purposes of the Federal PSD Permit requirements – is whether the limits established in the permit reflect the maximum emission reductions achievable for the source using current technology. As demonstrated in the Air District's BACT analyses (as set forth in more detail in the rest of this document), the limits the District is imposing on this facility are all based on current technology. Since the limits that the facility will

> be subject to are based on current technology, issues such as the date of manufacture or purchase of the specific equipment the applicant may choose to install are not relevant for purposes of the Federal PSD Permit.

Exhibit 5, Responses to Public Comments at 4-7. The Air District specifically addressed comments that asked for detailed information about the turbines, such as serial numbers, dates of manufacture, and cost:

> Specific details such as these are not relevant to determining the Best Available Control Technology and applicable permit limits for this equipment or for analyzing the potential air quality impacts of the facility, and so the Air District has not sought such information from the applicant. For example, if the Air District determines that a certain type of turbine is BACT and imposes a BACT permit limit based on the achievable emissions performance for such a turbine, it makes no difference which particular turbine is used (e.g., which particular serial number) as long as the facility complies with the applicable permit conditions. The Air District disagrees that such specific information is relevant to the Federal PSD Permitting analysis. To the extent that information about particular types of turbines is relevant (e.g., costs, ancillary environmental or energy impacts, relative efficiency, achievable emissions performance standards, *etc*.) the Air District has sought that information and provided it in the relevant areas of its permitting analysis.
>
> The Air District included this further discussion of the issue in the Additional Basis, and received comments during the second comment period that specific equipment details such as turbine serial numbers, dates of manufacture, cost, *etc.*, are important because the commenters believe that the turbines may be used or remanufactured turbines. The comments asserted that if they are overhauled turbines, their pollution characteristics may differ from the original manufacturer's specifications. The Air District has no information on which to evaluate these claims that the turbines that Calpine intends to use at the facility may be used or remanufactured, and the comments have not provided any information to support this contention beyond mere speculation. But regardless, it does not matter whether the turbines are new or used as long as they can meet the BACT emissions limits, which are based on the best performance of current, state-of-the-art equipment. The Air District disagrees that there is anything about this specific detailed turbine information that is relevant to the PSD permit analysis, or that the Air District needs to obtain and publish such information as part of the permit process.

Exhibit 5, Responses to Public Comments at 15-16. *See* Exhibit 23, CARE/Simpson Comments 2/5/2009, at 26 ("Turbine Questions").

Moreover, CARE/Simpson fail to show the substantive relevance of the information that they seek. At issue is not whether the turbines are new or not, but whether they meet BACT. On that point, CARE/Simpson fail to confront any of the Air District's conclusions that the age of the equipment is not relevant where the conditions of the permit clearly require the facility to

meet BACT. As the Air District explained, BACT is based on "the best performance of current, state-of-the-art equipment" (*id.* at 16) and the Project will need to meet that level of emissions performance, *regardless* of whether the equipment it uses is new or used. Thus, even if it were true that older turbines have different "pollution characteristics," that would in no way relieve the Project of its obligation under the PSD Permit to achieve levels of emissions performance equivalent to what can be achieved through current, state-of-the-art equipment. Accordingly, Petitioners' contentions that the Air District somehow erred in not providing specific information on the equipment that will be used, such as serial numbers and its manufacture date, are irrelevant. As a consequence, CARE/Simpson have failed to identify any condition of the PSD Permit that is in error or otherwise warrants review by the Board.

j. The Air District Properly Excluded Some Roadways from its Impact Analysis

CARE/Simpson allege "[t]he modeling for the air quality impacts do [*sic*] not include impacts of nearby roadways." Petition at 23. They further explain: "The Monitoring station is not from the same impact area as demonstrated by the Air District's own report (Exhibit xx). The District itself, in its Community Air Risk Evaluation (CARE) Program, identified 'Western Alameda County,' showing the area also on the map, as one of 6 geographic areas 'where higher levels of exposure to air pollution has elevated residents' health risks." *Id*. at 23-24.

The argument echoes comments received by the Air District, which asserted that in addition to Highway 92, the Air District should have included other highways as "nearby sources" in its full impact analysis, including Interstate 880, additional portions of Highway 92, Interstate 580, Highway 238, Highway 185, and additional arterial roads. Exhibit 5, Responses to Public Comments at 158. The Air District fully explained why it disagreed:

> The Air District disagrees that other roadway sections should be included in the full impacts analysis. The Air District properly included all roadway emissions that could cause a significant concentration gradient in the areas where the facility's impacts would be above the [Significant Impact Level ("SIL")]. The Air District determined that these other roadway sections, even though they may lie within the 6-mile radius the District used to identify potential nearby sources, would not cause a significant concentration gradient at locations where the project's impacts would be above the SIL. EPA's guidance is clear that the full

> impact analysis does not need to consider a source as a "nearby" source unless it could result in a significant concentration gradient in the same vicinity as the proposed source's impacts. That is, even if a particular highway segment might generate a significant concentration gradient *somewhere* within the impact area, but not within the same location where the source's impacts also exceed the SIL, then its exclusion from the multi-source full impact analysis is appropriate; so long as the facility's predicted impacts which exceed the SIL do not coincide in both time and location with any potential violation of the NAAQS resulting from the highway segments, then the facility cannot be found to cause or contribute to such a violation. [Footnote: *See In re Prairie State Generating Company*, *supra* note 6, pp. 137-144 (affirming decision to issue permit where modeled violations of the NAAQS were not coincident in both time and location with the source's modeled impacts above the SIL).] Identifying the location of the proposed facility's impacts, relative to the location of such other sources, no additional sources were identified as "nearby sources" for inclusion in the full impact analysis because none of such sources could reasonably be expected to cause a significant concentration gradient in or around the same location where the proposed facility's impacts were modeled above the SIL. Accordingly, since most of the modeled locations that were above the SIL were in the immediate vicinity of the proposed project, it was appropriate not to model additional sources as part of the multi-source modeling analysis.

Id. at 158-59.

As a preliminary matter, CARE/Simpson's contention fails entirely to acknowledge and/or substantively confront the Air District's exhaustive treatment of this issue. On this basis alone, review can and should be denied. *See Indeck-Elwood*, slip op. at 88; *Zion Energy,* 9 E.A.D. at 705.

CARE/Simpson's contention also fails on the merits. As explained by the Air District, the modeled impacts from the proposed Project that exceeded the respective SIL were, for the annual $PM_{2.5}$ standard, limited entirely to the 450-meters immediately adjacent to the Project location and, for the 24-hour standard, located almost entirely within the 1260-meters adjacent to the Project location, with six isolated locations above the SIL in elevated terrain up to 8.1 kilometers away. *See id*. at 155, 156 n.314. Both EPA guidance and Board precedent clearly provide that, where a source's contribution to a predicted violation of a NAAQS is less than the respective SIL at all times and locations where violations are predicted, the source will not be found to "cause or contribute to" a violation of the NAAQS. *See* Draft NSR Workshop Manual at C.52 ("The source will not be considered to cause or contribute to the violation if its own impact is not significant at any violating receptor at the time of each predicted violation.");

Prairie State slip op. at 137-44 (affirming decision to issue permit where modeled violations of the NAAQS were not coincident in both time and location with the source's modeled impacts above the SIL). Further, EPA's Guideline on Air Quality Models makes clear that "[t]he impact of the nearby sources should be examined at locations where interactions between the plume of the point source under consideration and those of nearby sources (plus natural background) can occur." 40 C.F.R. Part 51, App. W § 8.2.3.e. Accordingly, the Air District properly concluded that it need not model the contribution from roadways that could not result in a significant concentration gradient in the same location as the Project's modeled significant impacts. This is particularly true with respect to the annual standard, given that the 450-meter "impact area" encompasses no roadway segments (not even any of the sections of Highway 92 that were modeled).

The Air District specifically defended the conservatism of its use of a larger impact area based on the 24-hour $PM_{2.5}$ standard as the basis for identifying nearby sources for purposes of the NAAQS compliance demonstration. The Air District explained that, now that the PSD is no longer applicable for the 24-hour standard, the air quality impacts analysis would only need to look at the farthest exceedance of the annual SIL:

> The most distant impact above the annual SIL was at only 450 meters. The impact area for the annual SIL is therefore only 63.6 hectares in size, whereas the Air District considered the larger impact area of 20,612 hectares based on the 24-hour standard. Rather than redo the analysis with this smaller area, the Air District continued to rely on the larger impact area since even using that larger area the analysis shows no significant contribution to any NAAQS exceedance. The Air District considers the use of this larger area – over 300 times larger in size than the impact area that would result from using the annual SIL – to add a high degree of conservatism to its analysis.

Exhibit 5, Responses to Public Comments at 143 n.281.

As to CARE/Simpson's unsupported allegation about the Air District's CARE program, the proposed Project and all of its modeled impacts above the respective SIL for both the annual and 24-hour $PM_{2.5}$ standards are located outside of the area identified as a "priority community" for the CARE program. *See* RCEC's Response to Petition for Review Filed by Chabot-Las

Positas Community College District, PSD Appeal No. 10-02 (Apr. 23, 2010), at 50-52.

Thus, CARE/Simpson's sparse allegation that "[t]he modeling for the air quality impacts do [*sic*] not include impacts of nearby roadways" (Petition at 23) entirely lacks merit. To the contrary, the Air District provided a complete and thorough response to Petitioner's contention that the Air District should consider emissions from additional roadways as part of its cumulative impacts analysis.

CARE/Simpson's sparse allegation falls far short of establishing any clear error by the Air District.

k. The Air District Adequately Responded to Comments

CARE/Simpson reiterate their contention that "[t]he District did not adequately respond to any comments." Petition at 24. They go on to explain, "[w]e do not have the capability to scan all interested parties [*sic*] comments to compare them to the Districts [*sic*] responses but we do note that Ermest [*sic*] Pacheco and Laura Baker, M.A, Ecology and Systematic Biology Conservation Committee Chair East Bay Chapter of the California Native Plant Society find the responses inadequate.(ERNIE EXHIBIT 5)." *Id.* Exhibit 6 to the Petition is Ernest A. Pacheco's petition for review, which was not submitted to the Board.

RCEC has already shown that the Air District more than satisfied the requirements of 40 C.F.R. § 124.17(a)(2). *See supra* section V.E.1. By way of presenting "evidence" to undermine the Air District's conclusions that it adequately responded to comments, CARE/Simpson here identify two individuals, claim that their comments were not adequately addressed, and attach the comments of one of those individuals, Mr. Pacheco. As a threshold matter, RCEC notes that it is unclear how or in what capacity CARE/Simpson intend to reference Mr. Pacheco's comments. While these comments were submitted as an exhibit to the CARE/Simpson Petition, the comments appear to be drafted as though they amounted to an independent petition. Indeed, Mr. Pacheco is identified in this exhibit as "Petitioner" and "a founding member of Citizens Against Pollution," which is another petitioner in this matter. *See* Petition, Exhibit 6 at 2, 3. Although the Board has been quite generous in interpreting a party's letter in opposition to the

Project as a "petition" and requesting a response from the Air District to such petitions, Mr. Pacheco never filed his comments with the Board and they have not been docketed as a petition. Nor has the Board requested any response of the Air District to the specific contentions made by Mr. Pacheco in this exhibit to CARE/Simpson's Petitioner. Accordingly, RCEC is not providing a response to the specific issues raised by Mr. Pacheco.

Moreover, the mere allegation that Mr. Pacheco and Ms. Baker were dissatisfied with the Air District's response to their earlier comments clearly does not establish a basis for review, where those individuals failed to raise any specific issues in accordance with the Board's procedures. *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 . . . is clearly erroneous or otherwise warrants review"); *LCP Chemicals*, 4 E.A.D. at 665 n.9 ("a petition for review must specifically identify disputed permit conditions and demonstrate why review is warranted"); EAB Practice Manual at 33 (petitions for review "must meet a minimum standard of specificity"). Thus, CARE/Simpson's allegation raises no issue for Board review and should be dismissed.

l. The Air District Provided Proper Notice of all Permitting Proceedings

CARE/Simpson again allege that the Air District failed to follow notice requirements, claiming that "Barbara George Executive Director Women's Energy Matters participated in this proceeding since 2001-2002 and apparently never received Notice of this action. (Exhibit 6 Declaration of Barbara George)." Petition at 24. In an attempt to support this allegation, CARE/Simpson attach a declaration from Ms. George. *See* Petition, Exhibit 7.

In her declaration, Ms. George declares that she petitioned to intervene in the CEC's licensing proceeding on June 19, 2002, that intervention was denied the next day, that she appealed the denial, and that the CEC denied her appeal. *Id.* She then declares:

> I have no record that the Bay Area Air Quality Management District provided Public Notice to me of permitting actions for this facility. If I had received Notice I *may have participated* in the public comment opportunity. Both the Energy Commission and the BAAQMD were aware of how to reach me, because

> *although I moved*, I continued to be involved in Energy Commission matters, including other power plant applications. Furthermore, my email addresses have been the same since that time.

Id. (emphases added). The insinuation that the Air District had an obligation to keep track of Ms. George, although she moved, is patently false. RCEC understands that the Air District will provide a description of its process for maintaining its extensive mailing list for the Project. Because the Air District is in a better position to describe its process, RCEC would refer the Board to the Air District's response in this respect.

m. CARE/Simpson Fail to Establish that the Air District Circumvented Any Applicable Regulation or Rule in Permitting this Facility

CARE/Simpson next identify what they perceive to be an "important policy consideration which the Environmental Appeals Board should, in its discretion, review." Petition at 24 (citing 40 C.F.R. § 124.192 [*sic*]). CARE/Simpson then set forth a critique of California's power plant licensing and permitting scheme generally and ask "[d]oes California Power Plant Licensing pursuant the [*sic*] Warren Alquist Act serve to circumvent the Clean Air Act and the PSD program?" *Id.* As basis for these assertions, CARE/Simpson state that the Board "offered guidance in the remand" that could have benefitted the CEC and the Air District, yet those agencies "continue to act as if they are without the Boards [*sic*] enlightenment." *Id.* "In fact," they say, "the Commission complains about the Boards [*sic*] Authority in a letter from its Executive Director Melissa Jones to the EPA Administrator." *Id.* In response, CARE/Simpson argue that the CEC's contentions of delay are "baseless" and assert that the CEC should reduce appeals by complying with the Clean Air Act. *Id*. at 25. CARE/Simpson further allege a "disconnect between public participation and permitting . . . at each planned power plant reviewed." *Id.* CARE/Simpson also describe alleged problems raised in other Board appeals, including the Humboldt Bay Repower project, the Gateway Generating Station, and the previous Russell City Energy Center matters. *Id.* at 25-26.

These broad allegations fail to establish a basis for review of *this* PSD permit, which is the only permit at issue in this proceeding. While listing numerous perceived problems with the

CEC's and Air District's procedures, CARE/Simpson fail to identify a particular condition of *this* permit that they take issue with. Moreover, although CARE/Simpson have framed this issue as a "policy consideration" that the Board "should, in its discretion, review," the scope of their request goes well beyond the jurisdiction of the Board in this proceeding in that it relates not to a specific condition of the RCEC PSD permit, but to the permitting scheme generally. Thus, CARE/Simpson provide no issue for Board review. *Cf. HELCO*, 10 E.A.D. at 238 (denying review because petitions challenge the adequacy of the PM10 NAAQS that address the health risks of sulfate aerosols); *In re Tondu Energy Co.*, 9 E.A.D. 710, 715 (EAB 2001) ("permit appeals are not appropriate fora for challenging Agency regulations.").

n. Unresolved Issues from Prior Appeals Cannot Be Incorporated by Reference

CARE/Simpson state, "[i]n this appeal we incorporate the unresolved issues from both prior appeals regarding this facility." Petition at 26. The Board already ruled that several of these issues (specifically, contemporaneous emission reduction credits, endangered species concurrence, various non-PSD statutes, and toxic air contaminant health screening) are non-PSD issues and not subject to the Board's jurisdiction. *See Russell City*, slip op. at 40-41 (EAB, July 29, 2008). To the extent CARE/Simpson attempt to raise any remaining issues, a mere reference to prior appeals is insufficient to raise a specific issue. *See, e.g., LCP Chemicals*, 4 E.A.D. at 665 n.9 (petitioner must "specifically identify disputed permit conditions and demonstrate why review is warranted").

o. The Allegations Raised Concerning the Adequacy of the U.S. Fish & Wildlife Report Fall Outside of the Board's Jurisdiction and Are Without Merit

CARE/Simpson allege that "[t]he U.S. Fish and wildlife report is incorrect and inadequate." Petition at 26. As basis for this conclusion, they allege that the Air District "did not provide accurate information the [*sic*] the USFWS to make its determination" and "did not disclose the redirection of water resources, the true location of the facility or the affect [*sic*] of rerouting aircraft to the Wildlife preserve." *Id.* As a threshold matter, the allegations raised by

CARE/Simpson concerning the adequacy of the U.S. Fish & Wildlife Service's ("FWS" or "Service") or EPS Region 9's Endangered Species Act ("ESA") consultation fall outside of the Board's jurisdiction. Regardless, CARE/Simpson fail to identify any error in the analyses completed by FWS and EPA Region 9 that would warrant review by the Board. Nor do they identify any evidence that would call into question the determination that the Project is not likely to adversely affect any federally listed species.

As the Board decided when it issued its remand order concerning the Project, any alleged deficiencies identified by Mr. Simpson with respect to EPA Region 9's consultation with FWS were outside of the Board's jurisdiction:

> (2) Endangered Species Act Concurrence
>
> The Board does not have jurisdiction over Mr. Simpson's arguments challenging the adequacy of FWS's concurrence with Region 9, following informal consultations between the two entities, that the proposed RCEC would not adversely effect any federal listed species under the administration of the FWS. *See* Pet'r Opposition at 16-20, (Ex. 20); *supra* Part II.B. The Board has previously declined to entertain substantive challenges to FWS actions pursuant to the ESA in keeping with the Board's longstanding principle of declining to hear substantive challenges to earlier, predicate determinations that are separately appealable under other statutes. *See Indeck-Elwood, LLC*, PSD Appeal No. 03-04, slip op. at 118-19 & nn.162-63 (EAB Sept. 27, 2006), 13 E.A.D. ___ (holding that the Board did not have jurisdiction over the petitioner's challenge to FWS's concurrence decision given the availability of judicial review through the Administrative Procedure Act).

Russell City, slip op. at 40-41. CARE/Simpson's allegations concerning any alleged deficiencies in FWS's concurrence in EPA Region 9's determination of the Project's impacts on listed species are therefore outside of the Board's jurisdiction and should be dismissed.

In addition, even if the Board did have jurisdiction to entertain CARE/Simpson's challenge to FWS's concurrence, CARE/Simpson's allegations would fail on the merits as well. As part of an informal consultation undertaken by EPA Region 9 in accordance with the ESA, FWS evaluated the potential for nitrogen deposition-related impacts and reported its findings in a Technical Assessment. *See* Exhibit 5, Responses to Public Comments at 171-72, 174 (citing T. Maurer, USFWS, Technical Assessment: Listed Species and Nitrogen Deposition from the Russell City Energy Center (Jan. 11, 2010) ("FWS Technical Assessment"). FWS reported that

the increase in nitrogen deposition from the facility "appears to be insignificant and in some places of concern (Hayward shoreline), discountable." Exhibit 5, Responses to Public Comments at 174 (citing FWS Technical Assessment at 4). This analysis supported the conclusion that the Project "is not likely to adversely affect federally listed species." *Id*. (citing Letter from C. Goude, USFWS, to G. Rios, EPA Region 9, re "Endangered Species Informal Consultation on the Proposed Russell City Energy Center Project by Calpine/GE Capital; City of Hayward, Alameda County, CA 1 (Jan. 25, 2010)); *see also* Exhibit 5, Responses to Public Comments at 175 ("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."). Although CARE/Simpson contend that the FWS "report is incorrect and inadequate," they provide not one shred of evidence that would call into question either the methods or conclusions of this analysis.

Further, CARE/Simpson's contention that the Air District did not provide accurate information to FWS is without any merit. (In fact, the Air District did not provide information to FWS in support of its analysis; rather, EPA Region 9 consulted directly with FWS to satisfy its consultation obligation under Section 7 of the ESA.) In conducting its evaluation of the Project's wildlife impacts, the FWS reported that it reviewed a number of materials, including all application documents, the final CEC Report dated October 2007, RCEC's 2006 and 2009 petitions for amendment to the original permit application, a biological site assessment prepared by CH2M Hill in 2009, "miscellaneous correspondence and electronic mail concerning the proposed action between representatives of the Service, EPA, and project proponent; and other relevant published and unpublished studies, and communications on the distribution and abundance of federally listed species under the administration of the Service." *See* Exhibit 34, FWS Technical Assessment at 2, attached to letter to Gerardo C. Rios from Cay C, Goude, Subject; Endangered Species Act Informal Consultation on the Proposed Russell City Energy Center Project by Calpine/GE Capital; City of Hayward, Alameda County, California; attached to letter to Barry Young, BAAQMD, from Gerardo C. Rios, U.S. EPA, Subject: Section 7

Endangered Species Act Consultation for the Proposed Russell City Energy Center - Hayward, California. Individually and collectively, these materials provided the FWS with all the information it needed to perform a comprehensive and accurate assessment of the Project's impacts on listed species. Accordingly, Petitioners' suggestion that the Service made its determination based upon inaccurate or incomplete information is unfounded.

Undermining any credibility in Petitioners' claim that the Air District "did not disclose the redirection of water resources," FWS's Technical Assessment actually notes that the "proposed plant . . . would include a Zero Liquid Discharge facility which would substantially limit wastewater discharges from the power plant facility." *Id*. Thus, it is clear that FWS was aware that the Project would eliminate wastewater discharges to the San Francisco Bay. Further, "the true location of the facility" was disclosed in public documents, including the Air District's notices, well in advance of the FWS's evaluation.[9] Its location was also depicted in various maps, photographs and other illustrations that had accompanied the many technical reports and analyses submitted to FWS by EPA for its consideration as part of the information consultation. Accordingly, there simply is no merit whatsoever to Petitioners' contention that the Air District failed to disclose the Project's "true location" and/or that any such failure in any way influenced FWS' determination that the Project was not likely to adversely affect any species protected under the ESA.

p. The Air District Fully and Adequately Considered the Project's Potential Health Impacts

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[9] According to the Technical Assessment, the EPA initially requested informal consultation concerning the proposed action on June 11, 2007. The FWS reviewed the materials provided, and on July 31, 2007, reported that it "concurred with the EPA's determination that the proposed action was not likely to adversely affect any federally listed species under the administration of the Service." Exhibit 34, FWS Technical Assessment at 1. Subsequent to that determination, the EPA decided to prepare additional information, especially concerning nitrogen emissions that would be generated by the proposed action. *Id.* It submitted this information to the FWS on March 2, 2009, requesting that the FWS review it. In the Technical Assessment, the FWS noted, "The Service has reviewed this and other additional information provided by the EPA and project proponent to determine if the Service's original determination that the proposed action is not likely to adversely affect federally listed species is still valid." *Id*.

CARE/Simpson contend that "The Alameda County Health Department is on record documenting the health effects in the area east of the RCEC." Petition at 26. CARE/Simpson provide nothing more than this bare assertion.

To the extent that CARE/Simpson attempt to raise an issue regarding potential impacts of the Project on human health, the Air District fully and adequately addressed this issue. 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 132-69 (Air Quality Impacts Analysis), 184-91 (Health Risk Assessment).

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." *Indeck-Elwood,* slip op. at 87-88. CARE/Simpson neither state an objection to the permit nor explain why the Air District's response on these issues is clearly erroneous. Thus, their bare assertion about the Alameda County Health Department falls far short of establishing any basis for Board review.

q. The Air District Adequately Considered the Project's Impacts on Low Income and Minority Households

CARE/Simpson's final issue, in its entirety, is that "[t]here are also important

environmental justice issues of impacts on low income and minority households as demonstrated in the Chabot College Brief filed with the Commission for another nearby planned facility." Petition at 26 (footnote omitted). Again, this issue lacks merit procedurally and substantively.

The Air District concluded in its environmental justice analysis that "[t]here is no adverse impact on any community due to air emissions from the [Project] and therefore there is no disparate adverse impact on an Environmental Justice community located near the facility." Exhibit 1, Statement of Basis at 66. In response to numerous comments on the issue, the Air District also addressed the matter of environmental justice at length in its Responses to Public Comments. First, the Air District explained that its conclusion that there will be no disproportionate adverse impacts on any environmental justice community "was not based on an assumption that there are no environmental justice communities near the project site. To the contrary, it was based on the District's assessment that "there will be no significant adverse impacts to *any* community, regardless of demographic makeup." Exhibit 5, Responses to Public Comments at 192 (emphasis added). Second, the Air District explained that its Health Risk Assessment methodology "is designed to take sensitive populations, such as those who may be particularly sensitive to air pollution concerns, into account." *Id.* at 193. Third, the Air District described its efforts to address cumulative risk concerns:

> [T]he District certainly does share the commenters' concerns about air pollution sources in locations with existing elevated background level of toxic air contaminants. The Air District is implementing several initiatives to address these concerns. The Air District's Community Air Risk Evaluation ("CARE") program, for example, is designed to implement mitigation measures – such as grants, guidelines, or regulations – to achieve cleaner air for the public and the environment, with specific focus on heavily-impacted communities. Similarly, the Air District is in the process of adopting "Thresholds of Significance" under the California Environmental Quality Act that will add a heightened level of environmental review and mitigation for new projects located in areas with significant existing sources of toxic risk. These policies, along with the Air District's requirement that no new source of toxic air contaminants may contribute more than a *de minimis* additional amount of toxic risk, will help to address the problems associated with air toxics in impacted communities.

Id. at 194. Finally, the Air District described the "very robust level of public outreach regarding all aspects of this project, including environmental justice issues." *Id*. This conclusion was

supported by the following facts:

> The Air District widely publicized its proposal to issue the Federal PSD permit in the community, and held two public hearings at Hayward City Hall to allow residents to express their views on the proposal. Notably, the Air District went well beyond what is required by the Federal PSD regulations in providing notice to Spanish-speaking populations and in providing a translation service at the public hearing to ensure the broadest possible opportunity for public participation. This level of outreach more than satisfies the requirements for PSD permitting and for consideration of environmental justice issues.

Id.

CARE/Simpson's "issue" here is nothing more than an unfounded allegation that does not substantively confront the Air District's responses to comments on this issue. Review should be denied on that basis alone. *See Indeck-Elwood*, slip op. at 88; *Zion Energy,* 9 E.A.D. at 705.

Even if that were not the case, CARE/Simpson's argument would fail on the merits. Their unsupported statement that "[t]his project has been located so as to disparately place environmental burdens upon low-income, minority residents" does not refute the Air District's finding that there would be *no* impact to *any* community, let alone a disparate impact to low-income or minority communities. In short, CARE/Simpson identify no clear error in any of the Air District's decisions in this respect.

VI. CONCLUSION

CARE/Simpson fail to meet threshold pleading requirements on many issues and fail to demonstrate that the Air District's public participation efforts, PSD permit notices, treatment of GHGs, actions related to other "specific 'amended' permit issues," or extensive responses to public comments were clearly erroneous or otherwise warrants Board review. Thus, RCEC respectfully requests that the Board deny review of all issues raised in the Petition.

Respectfully submitted,

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Dated: April 29, 2010

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of April, 2010, copies of the foregoing Russell City Energy Company, LLC's Response to the Petition for Review Filed by CAlifornians for Renewable Energy, Inc., Bob Sarvey, and Rob Simpson were served via first-class U.S. mail, postage prepaid, to:

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