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

In re:	)	
Sierra Pacific Industries, Anderson	)	Appeal Nos. PSD 13-01, PSD 13-02, PSD 13-03, and PSD 13-04
PSD Permit No. Sac 12-01	)	

EPA REGION 9'S RESPONSE TO
PETITIONS FOR REVIEW

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Statement of Compliance with Word Count Limitation

I hereby certify that this Response to Petitions for Review submitted by Region 9, exclusive of the Table of Contents, Table of Authorities, Table of Attachments, this Statement of Compliance, and the attached Certificate of Service, contains 13,656 words, as calculated using Microsoft Word software.

INTRODUCTION

The EPA Environmental Appeals Board ("EAB" or "Board") should deny review of challenges brought by Ed Coleman, Heidi Strand, Celeste Draisner, and Rob Simpson ("Petitioners") to the Prevention of Significant Deterioration ("PSD") permit issued pursuant to section 165 of the Clean Air Act ("CAA") by EPA Region 9 ("Region 9") on February 22, 2013 ("Final Permit") to Sierra Pacific Industries, Inc. ("SPI," "Permittee," or "Applicant").[1] The Final Permit authorizes the construction and operation of a new 31 megawatt ("MW") biomass boiler with auxiliary equipment that includes an emergency engine and a cooling tower ("Project").[2] Attachment 1, Excerpt of Record ("ER") #1. The Final Permit is fully supported by the record, including a detailed Fact Sheet / Ambient Air Quality Impact Report ("AAQIR") (ER #2) and response to comments document, ("RTC") (ER #3, *Response to Public Comments on the Proposed PSD Permit Major Modification for Sierra Pacific Industries – Anderson Division,* February 2013). Moreover, Petitioners have failed to demonstrate clear error, an abuse of discretion, or an important policy consideration warranting review of Region 9's decision. In addition, Petitioners have failed in some instances to meet the EAB's pleading requirements, including demonstrating that issues have been preserved for Board review.

[1] Per the Board's letter to Nancy J. Marvel, Regional Counsel, EPA Region 9, dated March 27, 2013, Region 9's Response is submitted in response to petitions filed by Ed W. Coleman (PSD 13-01) on March 25, 2013; Heidi Strand (PSD 13-02) on March 25, 2013; Celeste Draisner (PSD 13-03) on March 22, 2013, and Rob Simpson and Helping Hand Tools (PSD 13-04) on March 25, 2013. Per the Board's Order Granting Region's Motion for Extension of Time, dated April 15, 2013, Region 9's Response is also submitted in response to petitions filed by Ed Coleman and Celeste Draisner on March 26, 2013. The deadline for filing a petition to the Final Permit was March 26, 2013. At this time, Region 9 is not responding to Petitioners' materials submitted on or after March 27, 2013.

[2] The PSD permit number assigned to the Project is PSD Permit No. SAC 12-01.

FACTUAL AND PROCEDURAL BACKGROUND

Currently, SPI operates a wood-fired boiler with associated air pollution control equipment and conveyance systems that produces steam to dry lumber in existing kilns at its location in Anderson, California ("the Facility").[3] In March 2010, SPI updated an application originally submitted to Region 9 in 2007, requesting approval to construct and operate a new cogeneration unit capable of generating 31 MW of electricity from the combustion of biomass and natural gas ("March 2010 Application") (ER #4). SPI's March 2010 Application stated that the new cogeneration unit would consist of a biomass-fired boiler, a steam turbine and a generator, and that the new boiler would burn biomass fuel generated from SPI's existing lumber operations (including SPI operations at other locations), as well as from SPI owned or controlled timber lands and other sources of agricultural or urban wood wastes. SPI stated that the new boiler would produce roughly 250,000 pounds per hour of steam that would be used to dry lumber in existing kilns for the lumber operation, as well as feed a turbine that will drive a generator to produce electricity for use on site or for sale to the electrical grid. March 2010 Application at 3. In May 2012, SPI submitted additional data related to air quality modeling ("May 2012 Modeling Submittal") (ER #5). In July 2012, SPI submitted additional information regarding additional impacts on Class II areas, which was SPI's last substantive submittal to Region 9 regarding the Project.[4]

[3] The Shasta County Air Quality Management District ("SCAQMD") issued a PSD permit for the existing equipment in 1994. On March 3, 2003 U.S. EPA revoked and rescinded SCAQMD's authority to issue and modify federal PSD permits for new and modified major sources of attainment pollutants in Shasta County; therefore, Region 9 is currently the PSD permitting authority for Shasta County.

[4] On October 4, 2010, Region 9 sent a letter to SPI stating that it found the March 2010 Application with additional submittals of July 1, 2010 and September 8, 2010 to be "administratively complete." ER #6

On September 13, 2012, Region 9 proposed to issue a PSD permit for the Project ("Proposed Permit") (ER #7).[5] *See* RTC at 3. Region 9 accepted comments on the Proposed Permit from September 14, 2012 until the end of the comment period, October 17, 2012. Region 9 proposed to issue the proposed permit because we concluded that the permit would require the use of Best Available Control Technology ("BACT") to limit emissions of nitrogen oxides ("NOx"), carbon monoxide ("CO"), total particulate matter ("PM"), particulate matter under 10 micrometers ("ug") in diameter ("PM10") and particulate matter under 2.5 ug in diameter ("PM2.5") to the greatest extent feasible for the new cogeneration unit. ER #8, Public Notice for Proposed Permit. Region 9 also concluded that emission from the Project would not cause or contribute to violations of any National Ambient Air Quality Standards ("NAAQS") or any applicable PSD increments for the pollutants regulated under the PSD permit. *Id.*

Region 9 announced the public comment period through a public notice published in the *Record Searchlight* (in English only) on September 14, 2012 and on Region 9's website (in English) on September 13, 2012. Region 9 also distributed the public notice to the necessary parties in accordance with 40 C.F.R. §124, including notices sent by mail on September 12, 2012 and email on September 13, 2012. Parties notified by Region 9 included agencies, organizations, and public members for whom contact information was obtained through a number of different methods, including requests made directly to EPA through Region 9's website (or through other means) from parties seeking notification regarding permit actions in California, within the SCAQMD, and other parties known to EPA that may have an interest in this action. Region 9 provided notice to numerous government agencies in accordance with 40 C.F.R. §124, including, but not limited to, the California Energy Commission, the SCAQMD, and other local

[5] We note that EPA's permitting regulations at 40 CFR Part 124 refer to proposed permits as "draft permits." *See* 40 C.F.R. §124.6.

neighboring air districts. Documents relating to the administrative record for the Proposed Permit modification were made available at Region 9's office, at SCAQMD's offices in Redding, at the Redding Public Library, and online at regulations.gov. Region 9 also made the Proposed Permit, and the AAQIR and other supporting documents available on Region 9's website. *See generally,* ER #8, Public Notice for Proposed Permit; Public Notice for Final Permit.

After careful consideration of the public comments submitted regarding the Proposed Permit, including comments from Petitioners, the Applicant, and other interested parties, on February 21, 2013, Region 9 issued a final decision, the Final Permit, granting the Applicant a PSD permit modification for the Project.[6] Along with the Final Permit, Region 9 prepared a 53-page response to comments document, which explained in detail Region 9's reasoning in responding to the comments received, including the basis for any permit changes made and additional analyses conducted by the Region as part of its response. *See generally,* RTC.

STANDING AND STANDARD AND SCOPE OF REVIEW

When considering a petition for review of a PSD permit, the Board "first considers whether the petitioner has met key threshold pleading requirements such as timeliness, standing, and issue preservation. . . [I]n order to demonstrate that an issue has been preserved for appeal, a petitioner must show that any issues being appealed were raised with reasonable specificity during the public comment period." *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006) (internal citations and footnotes omitted). The burden of establishing that issues have been

[6] Petitioners Coleman, Strand, and Draisner refer to the issuance of the Final Permit as a "decision by Presiding Officer Omer Shalev." This reference is inaccurate. Mr. Shalev was the primary Region 9 staff person who worked on the permit; however, the decision to issue the Final Permit was made by Deborah Jordan, Director of Region 9's Air Division, as evidenced by her signature on the Final Permit.

preserved for review rests squarely with the petitioner. *In re Encogen Cogeneration Facility* ("*Encogen*"), 8 E.A.D. 244, 250 (EAB 1999). A petitioner must not only specify objections to the permit but also must explain why the permit issuer's previous response to those objections is clearly erroneous or otherwise warrants review. *E.g., In re City of Palmdale* ("*Palmdale*"), PSD Appeal No. 11-07, slip op. at 10 (EAB Sept. 17, 2012). *See also* Order Governing Petitions for Review of CAA NSR Permits (April 19, 2011) at 4 ("[T]he petitioner must also demonstrate with specificity, by citing to the applicable documents and page numbers, where in the response to comments the permit issuer responded to the comments and must explain why the permit issuer's response to comments is inadequate."). Alternatively, a petitioner may demonstrate that an issue or argument was not reasonably ascertainable during the public comment period. 40 C.F.R. § 124.13; *see Encogen,* 8 E.A.D. at 250 n.8.

The Board has further stated:

> The Board's review of a PSD permit is … discretionary. Ordinarily, the Board will not review a PSD permit unless the permit decision either is based on a clearly erroneous finding of fact or conclusion of law, or involves a matter of policy or exercise of discretion that warrants review ... [using] an abuse of discretion standard... [T]he Board examines the administrative record prepared in support of the permit to determine whether the permit issuer exercised his or her considered judgment. The permit issuer must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied upon when reaching its conclusion... On matters that are fundamentally technical or scientific in nature, the Board will typically defer to a permit issuer's technical expertise and experience, as long as the permit issuer adequately explains its rationale and supports its reasoning in the administrative record.

Palmdale, slip op. at 8-9 (citations, quotation marks, parentheticals and brackets omitted).

ARGUMENT

Petitioners raise numerous procedural and substantive issues in their challenges to Region 9's PSD permit decision for the Project. As Region 9 demonstrates below, Board review is not

warranted on any of these grounds. As an initial matter, in certain instances some of the Petitioners' arguments are not properly before the Board because they do not meet the Board's pleading requirements, including the requirement to demonstrate that arguments were raised with reasonable specificity during the public comment period.

Even where Petitioners have met these pleading requirements, review is not warranted. As explained below, Region 9 reasonably applied the relevant PSD regulatory criteria to the specific facts surrounding the Project, reasonably considered and responded to the comments submitted by Petitioners and other commenters, and conducted additional analyses and made appropriate permit changes in response to these comments. Petitioners fail to satisfy their burden of demonstrating that Region 9's permitting decision constituted clear error, or involved an abuse of discretion or an important policy consideration warranting Board review.

I. Petitioners Fail to Demonstrate that Region 9's Decision Not to Provide a Public Hearing Constituted Clear Error, an Abuse of Discretion, or Raises an Important Policy Consideration that the Board Should Review

Petitioners argue that Region 9's denial of their requests for a public hearing violated the Administrative Procedures Act and was arbitrary and capricious because it did not apply a defined threshold for "significant." Similarly, Petitioners argue that Region 9's denial of their requests violated environmental justice policies and guidelines. In fact, however, the record in this matter shows that Region 9's decision was reasonably based on the level of public interest and was consistent with relevant statutory, regulatory and policy criteria. We address Petitioners' arguments below.

A. Petitioners Fail to Demonstrate that Region 9 Improperly Imposed a Standard of "Significant Public Interest" in Deciding Whether to Hold a Public Hearing

Petitioner Coleman alleges that Region 9's denial of the public hearing requests violated the Administrative Procedures Act. Coleman Petition at 4-5. Petitioners also argue that Region

9 was arbitrary and capricious by applying a standard of "significant public interest" without defining "significant." Coleman Petition at 5; Strand Petition at 1; Simpson Petition at 5. As explained below, Petitioners' arguments are without merit.

As an initial matter, public hearings are generally not a forum in which the permitting authority responds to questions regarding the proposed action. Their primary purpose is to obtain public input on the proposed action. The public participation requirement in the Clean Air Act contemplates only "an opportunity for interested persons to submit written or oral presentations" on specific subjects to pertaining to the proposed permit. 42 U.S.C. § 7475(a)(2).

In addition, when considering the public hearing requirements for PSD permits, the applicable standard is set forth in 40 C.F.R. § 124.12. Citing to 40 C.F.R. §§ 124.12(a)(1) and (a)(2), the Board has stated, "EPA is required to hold a public hearing 'whenever [it] *** finds, on the basis of requests, a significant degree of public interest in a draft permit(s).' EPA also has the discretion to hold a hearing whenever 'a hearing might clarify one or more issues involved in the permit decision.'" *In re Russell City*, PSD Appeal No. 08-01, slip op. at 7-8, n.6 (EAB July 29, 2008), 14 E.A.D. ___ (citations omitted). The standards set forth in the Administrative Procedures Act (which pertain primarily to adjudicatory hearings, *see* 5 U.S.C. §§ 554, 556) are not directly applicable here.

In the case of the SPI PSD permit, Region 9 received four requests for a public hearing: (i) on September 16, 2012 from Petitioner Strand on behalf of Citizens for Clean Air ("CCA"); (ii) on October 4, 2012, again from Petitioner Strand / CCA; (iii) on October 17, 2012 from Petitioner Simpson; and (iv) also on October 17, 2012, from Patricia Lawrence.[7] ER #9. These requests did not indicate that persons other than the individual making the request sought the

[7] We would also like to note that Region 9 responded to Ms. Strand's initial request, via email dated October 1, 2012 in which we explained that our decision to hold a public hearing would be based on whether "significant" public interest existed. Attachment 2.

opportunity to make oral presentations. In addition, as the Board is aware, on October 15, 2012, CCA, represented by Petitioner Coleman, filed a petition with the Board challenging Region 9's denial of CCA's request for public hearing. *See* Order Dismissing Petition for Review without Prejudice as Prematurely Filed, PSD Appeal No.12-03 (EAB December 21, 2012). In addition to these requests for a public hearing, Region 9 received fifteen comments from the public, three of which supported issuance of a permit for the Project.

Applying the standard for when a public hearing is required, Region 9 reasonably determined that the level of interest our proposed action for the Project did not meet the threshold of "significant" that would mandate a public hearing. Region 9 disseminated the public notice for our proposed action to over 800 groups and individuals using U.S. mail and to approximately 650 individuals and groups using electronic mail;[8] we also published notices in a local paper, the *Record Searchlight*, and on the Region 9 Web site. RTC at 10. Despite these efforts to bring attention to our action, we received very little indication that the public at large was interested in this permit decision. As noted above, we received only 12 comment letters adverse to our proposed action, and three of these comment letters were from Petitioners Coleman, Strand, and Simpson. Thus, it was reasonable for Region 9 to determine that there was not a "significant" public interest in our proposed permit for the Project. Moreover, although Petitioners assert that Region 9 should have established a threshold for "significant," there is nothing in EPA's regulations that requires making such a determination in each case absent a specific definition of the term in this context. The fact that only a few individuals requested a public hearing, out of the literally hundreds of persons who were directly contacted about the

[8] Region 9 notes that it notified some groups and individuals by both U.S. Mail and electronic mail.

Project by Region 9, supports a finding that there was not a "significant" level of public interest in this case.[9]

Next, applying the standard for when EPA has discretion to hold a public hearing, the Board should conclude that the individuals who requested a hearing did not provide a sufficient basis to determine that a public hearing would provide an opportunity to "clarify issues involved in the permit decision." For example, although Ms. Strand's second request included a list of five subjects that she would raise at a public hearing, these topics were general in nature and for the most part constituted inquiries related to topics already included in the administrative record, such as, "What methods of BACT "Best Available Control Technology) are being utilized by Sierra Pacific in the construction of this new Cogeneration plant?" and "Can you provide us with a discussion of the cumulative impacts of air, water, and waste disposal methods proposed for this new project?"[10] ER #9. In her petition, Ms. Strand states that she would have asked the question regarding whether the permit to be issued by EPA was for a new facility or a permit covering "both facilities." Strand Petition at 1.

Furthermore, the answer to Ms. Strand's question was readily available in the administrative record – for example, the Proposed and Final Permits contain tables of new and existing equipment, Table 1 "New Equipment Regulated by the PSD Permit;" and Table 2, "Existing Equipment List," with the following explanatory statement: "*Table 2* lists the existing equipment that is not included in this PSD permit. The equipment listed below is permitted by the District and the Permittee must comply with all applicable requirements. *Table 2* is provided for reference purposes only." ER #7, Proposed Permit at 2; ER #1, Final Permit at 2.

In addition, Region 9's AAQIR includes the following "Project Description:"

[9] Certainly, no such threshold is to be found in EPA's current regulations at 40 C.F.R. §124.12.
[10] We note that in the past the Board has found that generalized questions submitted as public comments do not "transform such questions into an objection to the permit." *See Palmdale* at 47 (citation omitted).

> The original PSD permit for this lumber manufacturing facility was issued in 1994 by the Shasta County Air Quality Management District (SCAQMD). The site currently contains a wood-fired boiler with associated air pollution control equipment and conveyance systems that produces steam to dry lumber in existing kilns. On March 3, 2003 USEPA revoked and rescinded SCAQMD's authority to issue and modify federal PSD permits for new and modified major stationary sources of attainment pollutants in Shasta County. Therefore EPA is modifying the PSD permit issued by SCAQMD to incorporate the proposed modifications.

AAQIR at 3-4. Region 9's AAQIR further delineated between the new equipment covered by the proposed PSD permit and existing equipment in Tables 4-1, "Proposed New Equipment List," and 4-2, "Existing Equipment List," with the following explanatory notes: "Table 4-1 lists the proposed new equipment that will be regulated by this PSD permit" and "Table 4-2 lists the existing equipment that is not included in this PSD Permit. The equipment listed below [referring to the list in Table 4-2] is permitted by SCAQMD, and Table 4-2 is provided for reference purposes only." AAQIR at 6-7.

Petitioner Simpson's request for a public hearing also failed to establish that a public hearing would provide clarity to the issues. Mr. Simpson included his request for a public hearing at the introduction to his written comments and did not differentiate his request for a public hearing from the issues he raised through written comments, or otherwise provide any independent basis for how a public hearing would clarify the issues apart from a written response to comments. Because Region 9 was able to provide a detailed and thorough response to all public comments, including Mr. Simpson's, we reasonably determined that a public hearing was not necessary to clarify the issues.

Petitioner Draisner describes Region 9's denial of public hearing requests as the denial "of the opportunity to discuss BACT." Draisner Petition at 1, 2, and 3. In response, Region 9 again points out that the public participation requirement in the Clean Air Act contemplates only "an opportunity for interested persons to submit written or oral presentations" on specific

subjects to pertaining to the proposed permit. 42 U.S.C. § 7475(a)(2). Thus, the primary purpose of a public hearing is to obtain public input on the proposed action, not to engage in a "discussion" of the issues. Furthermore, it is difficult to discern in any of the Petitions that Region 9's denial of the hearing requests actually prevented or precluded them from submitting or presenting specific information to EPA regarding the permit.

For the reasons stated above, the Board should find that Region 9's decision to deny requests for a public hearing was consistent with applicable law.

B. Petitioners Fail to Demonstrate that Region 9's Denial of Requests for a Public Hearing was Contrary to Environmental Justice Considerations

Petitioners allege that Region 9's denial of requests for a public hearing violated Executive Orders 12898 and 13563 and environmental justice guidelines. Petitioner Coleman alleges in particular that Region 9's failure to follow environmental justice guidelines resulted in an erroneous assessment of public interest. As explained below, the record supports that Region 9's decisions regarding public participation were based upon an adequate and reasonable inquiry into relevant demographic information and consideration of environmental justice issues.

Executive Order 12898, entitled, "Federal Actions to Address Environmental Justice in Minority and Low-Income Populations," is a directive to each federal agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." Exec. Order 12898, Sec. 1-101, 59 Fed. Reg. 7629 (Feb. 16, 1994).

Consistent with the directives of the Executive Order, Region 9 reviewed demographic data for the community surrounding the immediate project area, including factors such as education, socioeconomic data and linguistic isolation to help inform our public outreach

activities. RTC at 10. For example, Region 9 conducted a review of U.S. Census data to determine whether outreach materials should be provided in a language other than English. *Id.* Region 9's review found that the cities of Anderson and Redding, and Shasta County had less than 2.5%, 1.5% and 1.5%, respectively, of households listed as linguistically isolated. *Id.* Moreover, Region 9 contacted SCAQMD to learn whether the local air agency had received complaints, concerns, or requests regarding the publication of public notices in a language other than English for any prior permitting actions. SCAQAMD personnel stated that they had not received any such complaints, concerns or requests. *Id.* Based on these inquiries, Region 9 determined that outreach materials would not be translated into another language.

As noted above, EPA's public outreach efforts in conjunction with the issuance of this Permit included the mailing of the public notice of announcing our proposed permit and the commencement of a public comment period, and opportunity to request a public hearing to approximately 800 addressees. In addition, Region 9 sent the same notice to approximately 650 recipients via electronic mail. Region 9 also published a notification of the Project in a local newspaper, the *Record Spotlight* on September 14, 2012. The *Record Spotlight* also published a news article about the Project on September 22, 2012. *Id*.

Petitioner Coleman claims that Shasta County has already been identified as an Environmental Justice community, citing the Board's decision in *In re Knauf Fiberglass, GMBH*, PSD Appeal Nos. 98-8 through 98-20, 8 E.A.D. 121 (EAB 1999). Coleman Petition at 6. We do not agree with Petitioner's reading of this decision. We understand the Board's decision as a remand of the permit to SCAQMD and Region 9 to supplement the administrative record with documentation regarding an analysis of environmental justice. *Id.* at 175.

For the reasons set forth above, Petitioners' allegations that Region 9's denial of their requests for a public hearing was the result of the Region's failure to consider environmental justice policies and directives is without basis and should be rejected by the Board.

II. Petitioners Fail to Demonstrate that Region 9's Handling of Public Comments Constituted Clear Error, an Abuse of Discretion, or Raises an Important Policy Consideration that the Board Should Review

Petitioners Strand, Draisner, and Simpson allege that Region 9's actions with respect to public comments were inadequate or inappropriate. We address these arguments below.

A. Petitioners Fail to Demonstrate that Region 9 Inappropriately Handled Public Comments

Petitioners make the following claims with regard to Region 9's handling of public comments: (i) Region 9 inappropriately omitted the comments of Celeste Draisner, Ed Coleman and Heidi Strand from the public record; (ii) Region 9 inappropriately paraphrased comments; and (iii) Petitioner Strand's ability to comment was impaired by the lack of a response to a Freedom of Information Act ("FOIA") request. For the reasons set forth below, the Board should reject each of these claims as without merit.

1. Region 9 Did Not Inappropriately Omit Comments from the Administrative or Public Records

Petitioners allege that Region 9 inappropriately omitted comments submitted by Heidi Strand, Ed Coleman, and Celeste Draisner from the public record. Strand Petition at 1-2; Draisner Petition at 2.

Regarding comments submitted by Petitioners Strand and Coleman, the administrative record for this action includes their comments. *See* ER #10, Nos. IV.10 and IV.11. Therefore, the Board should deny review on this ground.

Regarding comments submitted by Petitioner Draisner, which Region 9 did not include in the administrative record, Petitioner Draisner incorrectly claims that Region 9 did not provide a reasonable explanation for excluding her comments from the administrative record. In fact, Region 9 explained the reason why Ms. Draisner's comments were not included in the administrative record in an email and a letter dated March 6, 2013. Region 9 explained that we were unaware of Ms. Draisner's comments prior to making our final decision because she did not submit them to either of the locations clearly set out in Region 9's public notice for its proposed action and the AAQIR. Attachment 2. As explained in our communication to Ms. Draisner, Region 9 was unaware of Ms. Draisner's comments until she contacted Region 9 on February 22, 2013. After expending some effort, Region 9 was able to locate Ms. Draisner's comments, which had been directed to the individual EPA email account of Omer Shalev. Because Region 9 had already made the decision to issue the Final Permit on February 19, 2013,[11] Region 9 was unaware of Ms. Draisner's comments at the time of our final action, and we therefore did not include them in the administrative record. We did, however, want to acknowledge Ms. Draisner's interest in our action, and so we provided a full and complete response to her comments. Attachment 2. Furthermore, although we did not include Ms. Draisner's comments in the *administrative* record, we did include her comments in the *public* record (contrary to her

[11] The public notice for the Proposed Permit and the AAQIR contained the following instructions for submittal of public comments:

> Comments or requests must be sent or delivered in writing to Omer Shalev at one of the following addresses:
>
> Email: R9airpermits@epa.gov
>
> U.S. Mail: Omer Shalev (AIR-3)
> U.S. EPA Region 9
> 75 Hawthorne Street
> San Francisco, CA 94105-3901
> Phone: (415) 972-3538

See ER #8 and AAQIR at 46-47.

allegation), by posting them and our response to them on regulations.gov under the heading, "Post Decision Material Not Included in the Administrative Record" and notifying all commenters via mail or electronic mail. *See* Attachment 3. Region 9's purpose in doing so was to provide the public the ability to access them, while at the same time being clear as to their status.

Although Petitioners do not argue that Ms. Draisner's submittal should have been treated as an official comment because it was sent to Omer Shalev, the Region 9 contact person for the permit, we wish to proactively state that any such argument based upon the rationale that Ms. Draisner's submittal was "close enough" to the instructions for submittal of public comments would be mistaken and should be rejected. In fact, Region 9's long-standing practice for PSD permitting actions has been to use a separate email account for the submittal of public comments for official actions precisely to avoid the situation that arose here – comments that should be part of the agency's decision-making are overlooked amidst the dozens of unrelated email that an individual EPA employee might receive on any given day. Therefore, Ms. Draisner's submittal was not "close enough," and to conclude otherwise would be the start of a slippery slope of continual judgment calls as to which EPA staff person is close enough to the permit action or at a sufficient level of decision-making authority that a misdirected public comment should nevertheless be part of the administrative record. Adherence to the instructions for submitting public comments is necessary to ensure the smooth and timely processing of permit applications and to avoid bureaucratic confusion.

2. Petitioner Strand Fails to Establish that Region 9's Paraphrasing of Comments was Inappropriate or Otherwise Warrants Review

Petitioner Strand argues that Region 9 paraphrased comments submitted by herself and Petitioner Coleman and "proceeded to use them as a platform to justify [the] action." Strand

Petition at 1. The Board should reject this allegation because the Petitioner's assertion is unfounded, incorrect and unsupported by any specific allegations of inaccuracy. As noted above, Region 9 included all of the comments submitted by Petitioners Strand and Coleman into the administrative record for this action. 40 C.F.R. §124.17(a)(2) provides that the permit issuer's response to comments must "briefly describe" and respond to all significant comments raised during the public comment period. Accordingly, consistent with this provision, Region 9's RTC paraphrased and summarized Petitioner Strand's comments. (The RTC includes Petitoner Coleman's comments verbatim.) The introduction to Region 9's RTC contains the following statement that clearly explains that the RTC summarized comments and explained how to locate the original comments as submitted:

> This section summarizes all significant public comments received by EPA and provides our responses to the comments. The full text of all public comments and many other documents relevant to the permit can be accessed online through EPA's website at http://www.epa.gov/region09/air/permit/r9-permits-issued.html.

RTC at 6.

Moreover, Petitioner Strand fails to point to any specific inaccuracy with our characterization of her comments. Because these allegations are inaccurate and unsupported, the Board should deny review.

B. Petitioner Strand Fails to Establish that the Lack of a Response to a FOIA Request Substantially Impaired Her Ability to Present Her Case

Petitioner Strand argues that her ability to present her case was impacted by the lack of a response to a request for documents that she made pursuant to the Freedom of Information Act on February 28, 2013. Strand Petition at 2. Specifically, Petitioner Strand states that she requested "complete comments submitted on the project, including ones excluded that were submitted to the agency. I also requested the complete contact information for each one." *Id.*

Petitioner Strand further states that she requested this information so that she could show that Region 9 "had not met the threshold of EJ." *Id.* Petitioner's claims are without merit. On February 20, 2013, Region 9 sent to all persons who submitted comments during the public comment period a public notice announcing our final action either by U.S. mail or electronic mail. *See* ER #8, Public Notice for Final Permit. The notice included the following statement:

> Key portions of the Administrative Record for this decision (including the final permit, all public comments, EPA's responses to the public comments, and additional supporting information) are available through a link at our website, www.epa.gov/region09/air/permit-r9-permits-issued.html#psd, or at www.regulations.gov (Docket ID# EPA-R09-OAR-2012-0634.

Id. The notice also provided information for in person viewing of the administrative record, including the final permit and Region 9's responses to public comments. Therefore, Petitioner Strand had access to all the information she requested pursuant to the Freedom of Information Act. Moreover, Petitioner Strand fails to explain why she waited until February 28, 2013 to submit her FOIA request. If for whatever reason she preferred to pursue her inquiry via FOIA, she could have and should have made her request much earlier since her request appears to have been limited to the public comments and the public comment period ended on October 17, 2012.

Because the Petitioner has failed to establish that she was adversely impacted by an inability to obtain access to relevant documents, the Board should deny review of this claim.

C. Petitioner Simpson Fails to Demonstrate that Region 9 Inappropriately Denied His Request to Extend the Public Comment Period

Petitioner Simpson alleges that Region 9's denial of his request that we extend the time to submit public comments was clear error. Simpson Petition at 3-4. Petitioner states that the denial was inconsistent with congressional intent and the practice of the U.S. Court of Appeals for the 9th Circuit and that if his request had been granted, his comments would have been better

informed, more compelling and "would have resulted in less pollution." *Id.* The Board should reject these arguments for the reasons stated below.

On September 26, 2012, Petitioner Simpson requested an extension to submit his comments on the grounds that he was unfamiliar with this type of facility and the 30-day public comment period was insufficient to review the information in the docket. ER #9. On September 28, 2012, Region 9 responded to Mr. Simpson, explaining:

> In order for EPA to extend the public comment period beyond the currently scheduled end date of October 17, 2012, a commenter must adequately justify why additional time is required in order to comment on the proposed action. While your request states that there are many documents to review, the number of documents for this project is no different than any other project, and you have not demonstrated why there would be a significant greater burden to review the documents for this project. Thus, we do not plan to extend the public comment period at this time.

Attachment 2; RTC at 11. Petitioner Simpson did not provide further substantiation of his need for an extension during the public comment period.

The Board's recent decision in *Palmdale* addresses a nearly identical issue, upholding Region 9's denial of a request for an extension to the public comment period, also from Petitioner Simpson. In *Palmdale,* the Board denied review of Petitioner Simpson's request for an extension to comment on Region 9's proposed PSD permit for the Palmdale Hybrid Power Project in Palmdale, California, applying standards set forth in 40 C.F.R. §§124.10 and 124.13.[12] The Board stated, "Because the Region provided at least the regulatory minimum of thirty days for public notice and comment, the Board concludes Mr. Simpson has failed to demonstrate that the Region clearly erred." *Palmdale* at 16. The Board continued, "Thus, the Board must

[12] As stated by the Board: "Permitting regulations governing the timing of the public comment period for a PSD permit provide that '[p]ublic notice of the preparation of a draft permit *** shall allow at least 30 days for public comment." *See* 40 C.F.R. § 124.10(b). Section 124.13 provides that '[a] comment period longer than 30 days *may* be necessary to give commenters a reasonable opportunity to comply with the requirements of this section. Additional time *shall* be granted *** *to the extent that a commenter* who requests additional time *demonstrates the need* for such time.' *Id.* § 124.13 (emphasis added.)" *Palmdale* at 16.

examine whether the Region abused its discretion when it did not extend the public comment period." *Id.* (citations omitted). The Board further explained that the factors to be considered in evaluating the reasonable exercise of discretion include: "whether the public has received a meaningful opportunity to review and comment on a draft permit" and "the permit issuer's need to balance the public's desire for an extended review period against other factors, such as the permit issuer's obligation to timely issue or deny a permit application." *Id.* at 16-17 (citations omitted). The Board also noted that the permit issuer's obligation for timeliness "is especially true in time-sensitive PSD permit proceedings." *Id.* at 17 (footnote omitted).

In this case, Region 9 took the following steps to provide a meaningful opportunity to review and comment on our draft permit for the Project:

- September 12, 2012: sent via U.S. mail the public notice describing the project, the procedures for the public to request a hearing or submit comments, including the deadline of October 17, 2012, to approximately 800 groups and individuals;
- September 13, 2012: sent via email notices announcing public comment period to approximately 650 groups and individuals (note: some groups and individuals may have received notification via U.S. mail and email);
- September 13, 2012: posted public notice and materials related to the draft permit (including the draft permit and Region 9's AAQIR) on Region 9's website;
- September 14, 2012: published public notice in the *Record Searchlight*.

RTC at 3.

As noted above, Region 9's public comment period ran, at a minimum, from September 14, 2012 through October 17, 2012, a total of 33 days. Since this period exceeds the 30-day

minimum applied in *Palmdale*, the Board should find that Petitioner Simpson has again failed to show clear error.

In addition, for reasons similar to those in *Palmdale*, we believe that the Board should further find that Region 9's denial of Petitioner Simpson's request for an extended comment period for the SPI permit was a reasonable exercise of discretion. Essentially, Petitioner Simpson's reasons for an extension are: (i) his unfamiliarity with the type of facility; and (ii) his view that the record was "extensive." Simpson Petition at 3-4. As in *Palmdale*, both of Petitioner's reasons are generic and do not identify why the comment period was inadequate. *See Palmdale* at 19. The Region would be hard-pressed to calibrate the length of public comment periods according to an individual's level of expertise in the subject area. Moreover, as is evident in administrative record for this action, Petitioner submitted, within the 30 day public comment period, reasonably sophisticated comments regarding topics related to BACT such as solar energy, fuel mixing, modeling and ambient monitoring data. RTC at 10-19. Furthermore, as stated in our September 26, 2012 response to Mr. Simpson, the number of documents for the SPI PSD permit was not especially large. Attachment 2. For example, we note that administrative record for the SPI Permit is less extensive than the administrative record for the Palmdale permit. Attachment 4, Certified Index for *In re City of Palmdale,* PSD Appeal No. 11-07.

In sum, Region 9's denial of Mr. Simpson's request to extend the public comment period was reasonable. Petitioner failed to demonstrate clear error or abuse of discretion and therefore the Board should deny review on this basis.

III. Petitioner Simpson Fails to Demonstrate that Region 9's Determinations Regarding PM2.5 Modeling Constituted Clear Error, an Abuse of Discretion, or Raises an Important Policy Consideration that the Board Should Review

Region 9's RTC document contained a discussion of a January 2013 decision by the U. S. Court of Appeals for the D.C. Circuit regarding a national rulemaking relating to "significant impact levels," or "SILs," and significant monitoring concentration, or "SMC," for fine particulate matter ("PM2.5"), *Sierra Club v. EPA*, 705 F.3d 458 (D.C. Cir. 2013). RTC at 3-4. The court in *Sierra Club* granted a request from EPA to vacate and remand to EPA portions of PSD rules related to the PM2.5 SILs at 40 C.F.R. §§ 51.166(k)(2) and 52.21(k)(2) and also vacated PSD rules relating to PM2.5 SMC at 40 C.F.R. §§ 51.166(i)(5)(i)(*c*) and 52.21(i)(5)(i)(*c*) .[13] Region 9 included the discussion of *Sierra Club* in the RTC to supplement the administrative record in order to clarify certain issues. We felt that such a clarification was prudent because the D.C. Circuit's opinion related to the appropriate modeling and analysis required for PSD permits involving PM2.5 emissions, and because the decision was issued in the period subsequent to the public comment period for the Proposed Permit but before our final decision with respect to the Final Permit. Notably, Region 9's discussion distinguished the basis for the D.C. Circuit's *Sierra Club* decision from our conclusions regarding the Project's projected impacts: "The AAQIR and further analysis included here show that the Project does not present the type of situation in which existing air quality in the affected area is already close to the NAAQS or PSD increment . . ." RTC at 4. Thus, the RTC points out that the recent *Sierra Club* decision did not change our proposed decision to issue the Permit.

Petitioner Simpson claims: (i) Region 9 inappropriately relied on SILs, especially the annual SILs, to exempt the Project from cumulative impact analyses for PM2.5 (annual) and

[13] Petition Simpson argues that D.C. Circuit's decision "made it clear that Region did not have authority to rely on the Significant Impact Level (SIL) to exempt the proposed modification from undertaking a cumulative air quality analysis. The court also made it clear that the Region did not have authority to waive the on-site monitoring requirement, as the Region did in this action." Simpson Petition at 2. In fact, the D.C. Circuit's opinion pertained to a national rulemaking for implementing the 2006 PM2.5 National Ambient Air Quality Standard ("NAAQS"), not to Region 9's Proposed or Final Permits for the Project. *See Sierra Club,* 705 F.3d. 458 (D.C. Cir. 2013).

PM2.5 (24-hour); (ii) Region 9 inappropriately exempted the Project from on-site monitoring requirements; and, (iii) Region 9 relied on an inappropriate version of AERMOD and should not have relied on CALPUFF. With respect to each of Petitioner's allegations, the Board should deny review as explained below.

A. Region 9 Appropriately Evaluated Requirements for Cumulative Impact Analyses

Petitioner Simpson alleges that Region 9 relied on SILs "to exempt the proposed modification from undertaking a cumulative air quality analysis" and that Region 9 failed to require a cumulative impact analysis. Simpson Petition at 2. As is apparent from his Petition, Mr. Simpson has concerns regarding Region 9's handling of cumulative impact analyses for both the PM2.5 (annual) and PM2.5 (24-hour) standards. Petitioner Simpson also alleges that Region 9 inappropriately exempted the Project from on-site monitoring requirements. *Id.* Each of his arguments should be rejected by the Board, as explained below.

1. Petitioner Simpson Failed to Raise These Reasonably Ascertainable Issues During the Public Comment Period

Petitioner Simpson's allegation regarding the adequacy of PM2.5 modeling is an issue that he neglected to raise during the public comment period.[14] Although Petitioner claims that these issues were not reasonably ascertainable during the comment period, that assertion is in fact not accurate. The only new facts here are the D.C. Circuit's *Sierra Club* decision, which was issued in January 2013, several weeks after the close of the public comment period in October 2012, and Region 9's discussion in the RTC to supplement the record and explain our rationale for why *Sierra Club* did not change our PSD permit decision in this case. If Petitioner's arguments were limited to *Sierra Club* and our rationale, we would not challenge his

[14] We note that Petitioner Simpson did include a comment regarding air quality monitoring: "The EPA should require one year of local monitoring prior to consideration of a permit request." ER #10.

ability to raise such claims after the public comment period. Such, however, is not the case. Petitioner Simpson complains for the first time in his petition that Region 9 "exempted the proposed modification from undertaking a cumulative air quality analysis." Simpson Petition at 2. In fact, Region 9's conclusion that no cumulative impact analysis for PM2.5(annual) was necessary is a fact that was reasonably ascertainable during the comment period since the AAQIR contains several statements to that effect. *See e.g.,* AAQIR at 32 ("Based on Table 8.4-2, SPI-Anderson's impacts are significant only for annual and 1-hour NOx , and 24-hour PM2.5, and we have determined that in this case cumulative impacts analyses are required only for these pollutants and averaging periods."); AAQIR at 35 ("For the annual averaging time no cumulative impact analysis was required because the project's annual impacts were less than the SIL.").

Furthermore, Petitioner Simpson's reliance on *Sierra Club* to excuse the fact that he did not raise these issues during the public comment period is flawed. Petitioner Simpson claims that, "the court makes it clear that the Region's (*sic*) did not have the authority to rely on the Significant Impact Level (SIL) to exempt the proposed modification from undertaking a cumulative air quality analysis." Simpson Petition at 2. In fact, the court explicitly declined to address EPA's authority to promulgate SILs and thus did not hold that the Clean Air Act precludes the use of SILs as part of a demonstration that a source does not cause or contribute to a violation of the NAAQS or PSD increment**.** *Sierra Club,* 705 F.3d at 464. Therefore, the recent decision did not lead to a new ground to excuse Petitioner's failure to raise this issue during the public comment period.

Thus, the Board should reject Petitioner Simpson's arguments with respect to Region 9's conclusion that no cumulative impact analysis was required for PM2.5(annual), on the ground

that Petitioner failed to raise this reasonably ascertainable issue during the public comment period.

2. Region 9 Provided a Reasoned Basis for Why No Cumulative Impact Analysis for PM2.5 (Annual) Was Necessary

As explained in the AAQIR and the RTC, our decision not to require a cumulative impact analysis for PM2.5 (annual) was based on several factors. AAQIR at 32, 35; RTC at 3-4. Our decision was based in part on the fact that the background concentration of PM2.5 (annual) in the area is quite low relative to the NAAQS. *See* RTC at 4; AAQIR at 28, Table 8.2-1. Specifically, the background concentration of PM2.5 (annual) is 5.3 ug/m3 and the PM2.5 (annual) NAAQS is 15 ug/m3. *Id.* When the Project's predicted impact of 0.27 ug/m3 is added to the background concentration of 5.3 ug/m3, the post-project concentration is predicted to be 5.57 ug/m3, which is far below the NAAQS level of 15 ug/m3. *See* AAQIR at 35; RTC at 4.

Our discussion in the RTC also explained why the *Sierra Club* decision did not affect our determination that a cumulative impact analysis for PM2.5 (annual) was not necessary. Specifically, we distinguished the data before us regarding SPI from concerns articulated by EPA and the court in *Sierra Club* -- the new rule's lack of discretion, where a proposed source did not have an impact greater than the SIL, for permitting authorities to require a cumulative impact analysis, even in circumstances where such an analysis might be necessary to demonstrate that a project will not cause or contribute to a violation of an increment or NAAQS. *See Sierra Club,* 705 F.3d. at 463-64. Region 9's RTC discussion explained that the specific concern addressed in *Sierra Club* was not at issue because, "[t]he difference between the PM2.5 (annual) background concentration in the area and the NAAQS is 9.7 ug/m3, which is significantly greater than the PM2.5 annual SIL of 0.30 ug/m3." RTC at 4. In other words, the concern that existing pollutant concentrations might be so close to the NAAQS that an impact below the SIL could nonetheless

cause or contribute to an exceedance of the NAAQS is not present here. Region 9's RTC discussion also explained that the predicted impact of the Project was well below the increment in the area. *Id.* at 4. We also explained that our conclusions regarding increment and the NAAQS allowed for a margin of safety because the analysis conservatively assumed that 100% of the boiler's PM emissions would be PM2.5 although according to EPA emission factors only 65% of emissions from wood fired boilers equipped with electrostatic precipitators are PM2.5. RTC at 4-5.

Again, in response to Petitioner Simpson's claim that the *Sierra Club* decision held that Region 9 cannot rely on SILs to exempt the Project from undertaking a cumulative impact analysis, Simpson Petition at 2, we note that in fact, the court explicitly declined to address EPA's authority to promulgate SILs and thus did not hold that the Clean Air Act precludes the use of SILs as part of a demonstration that a source does not cause or contribute to a violation of the NAAQS or PSD increment**.** *Sierra Club,* 705 F.3d at 464.

For the reasons stated above, the Board should deny review of Petitioner Simpson's claims that: (i) the Region inappropriately failed to conduct a cumulative impact analysis for PM2.5 (24-hour) because the record does in fact include such an analysis; and (ii) Region 9 inappropriately failed to conduct a cumulative impact analysis for PM2.5 (annual) because the AAQIR and RTC provide Region 9's well-reasoned basis for why the latter analysis was not necessary to show that the Project would not cause or contribute to a violation of the PM2.5 (annual) NAAQS, and further, why the D.C. Circuit's recent decision in *Sierra Club* did not reasoning or conclusions.

B. Region 9 Reasonably Addressed Relevant Monitoring Requirements

Petitioner Simpson also alleges that Region 9 inappropriately exempted the Project from on-site monitoring requirements. Simpson Petition at 2. Petitioner's arguments must fail because they are factually incorrect. In fact, the Applicant submitted existing PM2.5 monitoring data, which was used in the cumulative impact analysis conducted for PM2.5 (24-hour) and as the basis of our decision not to require a cumulative impact analysis for PM2.5 (annual). AAQIR Table 8.2.1 at 28. These data were collected in 2011, the most recent year prior to SPI's May 2012 Modeling Submittal, which is consistent with EPA regulations. *See* 40 C.F.R. §§51.166(m) and 52.21 (m). Although the data were measured at a monitor located 6.5 miles from the Project location, and not from an on-site monitor, it has been EPA's long-standing practice in implementing the PSD program to allow representative data where circumstances warrant. *See In re Northern Michigan University,* PSD Appeal No. 08-02, slip op. at 58 (EAB Feb. 18, 2009); *see also,* 52 Fed. Reg. 24672, 24686 (July 1, 1987) ("the prospective PSD source must use existing … representative air quality data or collect … monitoring data."). Moreover, the Petitioner has not challenged the sufficiency of this monitoring data. Because Region 9 did not exempt the Project from monitoring requirements, the recent D.C. Circuit decision in *Sierra Club* vacating the PM2.5 SMC is not applicable.

C. Region 9's Evaluation was Based on Appropriate Modeling Protocols

Petitioner Simpson alleges that Region 9's decisions with respect to PM2.5 were based on an outdated version of AERMOD. Simpson Petition at 2. Petitioner Simpson also alleges that the Region's decision inappropriately relied on CALPUFF. *Id.* at 2-3.

1. Petitioner Simpson Failed to Raise These Reasonably Ascertainable Issues During the Public Comment Period

The Board should reject Petitioner Simpson's arguments with respect to AERMOD and CALPUFF because Petitioner failed to raise these reasonably ascertainable issues during the

public comment period. Petitioner clearly cites to the March 2010 Application and the May 2012 Modeling Submittal, which were available to him during the public comment period. In addition, the AAQIR clearly discussed both models. *See* AAQIR at 27 ("AERMOD with its default settings is the standard model choice, with CALPUFF available for complex wind situations.") Moreover, the portion of the D.C. Circuit's *Sierra Club* decision cited by Petitioner stands for a general proposition regarding informed decision making, hardly a new concept.[15] Petitioner fails to explain how the *Sierra Club* decision relates to his arguments regarding AERMOD and CALPUFF. For these reasons, the Board should reject Petitioner's arguments regarding AERMOD and CALPUFF. 40 C.F.R. §§124.13, 124.19(a).

2. Petitioner Simpson Fails to Demonstrate Clear Error or an Abuse of Discretion with Respect to Region 9's Use of AERMOD and CALPUFF.

Petitioner Simpson alleges that Region 9 relied on an outdated version of AERMOD and should not have relied on CALPUFF. Simpson Petition at 3-4. Preliminarily, we note that EPA's regulations provide useful explanations of both models:

- AERMOD is "a traditional model" for stationary sources, and "[f]or a wide range of regulatory applications in all types of terrain, the recommended model is AERMOD." 40 C.F.R. Part 51, Appendix W, §4.2.2.b.
- CALPUFF is suited for assessing impacts at distances greater than 50 kilometers, but less than 300 kilometers: "It was concluded from . . . case studies that the CALPUFF dispersion model had performed in a reasonable manner, and had no apparent bias toward

[15] Specifically, the Simpson Petition makes the following reference to the *Sierra Club* decision: "The court stated, 'Indeed, one of Congress's stated purposes in enacting the PSD provisions was 'to assure that any decision to permit increased air pollution in any area to which' the PSD provisions apply be made only after careful evaluation by the permitting authority and 'after adequate procedural opportunities for *informed* public participation in the decisionmaking process.'" 42 U.S.C.§7470(5) (emphasis added [by Petitioner Simpson])." Simpson Petition at 3.

over or under prediction, so long as the transport distance was limited to less than 300 km." 40 C.F.R. Part 51, Appendix W, §6.1.

While Petitioner Simpson's objections to the use of AERMOD are not entirely clear, to the extent Petitioner is arguing that the version of AERMOD relied upon in SPI's March 2010 application (version 09292) under-predicts impacts as compared to more recent versions of AERMOD (versions 11059 and 12345) because it "could demonstrate a lower downwash effect for PM2.5," Petitioner is incorrect. Although there was a change to the downwash subroutine in AERMOD versions 11059 and later, this change affected only stacks at good engineering practice ("GEP") stack height or higher. [16] Attachment 5, "Model Change Bulletin #4, AERMOD 11059," at 4. According to the March 2010 Application, the stacks for the Project will be below GEP stack height. March 2010 Application at 14. As documented in the AAQIR, Region 9 considered issues related to stack height and downwash and found that, "for all emitting units, the applicant used the planned actual stack heights for inputs in AERMOD modeling, and included wind direction-specific Equivalent Building Dimensions to properly account for downwash." AAQIR at 31. Later versions of AERMOD would not have changed Region 9's analysis of the Project's impacts and Region 9's Final Permit was reasonably based on appropriate modeling of potential downwash impacts.

Petitioner Simpson also alleges that the Region's decision inappropriately relied on CALPUFF. Petitioner is incorrect. Region 9 and the Applicant used CALPUFF to evaluate impacts on Class I areas within 200 kilometers from the Facility. AAQIR 38-40. EPA's regulations support Region 9's use of CALPUFF for this purpose. *See* 40 C.F.R. Part 51, App.

[16] "Subroutine WAKFLG was modified to no longer ignore potential downwash effect for stack heights that equal or exceed the EPA formula height." Attachment 4, *Model Change Bulletin #4, AERMOD 11059*, February 28, 2011, at 4.

W §6.2.3: "the CALPUFF modeling system . . . has been designed to accommodate . . . the Class I LRT [long range transport] situation . . ." 40 C.F.R. Part 51, Appendix W, §6.2.3. Petitioner Simpson refers to a statement contained in an email from an EPA Region 4 employee, Stanley Krivo, regarding the "regulatory application" of the CALPUFF model. Simpson Petition at 3-4. This email, however, also states that permit applicants should consult with EPA regional offices regarding the acceptable modeling procedures. ER #5, May 2012 Modeling Submittal at 37. In fact, the AAQIR supports a finding that the Applicant and Region 9 engaged in such a consultation. *See* AAQIR at 27-28 (describing the Applicant's numerous submittals, including those in response to incompleteness determinations and requests for additional information). Moreover, Region 9 gave thorough consideration to SPI's CALPUFF modeling analyses, as set forth in the AAQIR. *See* AAQIR at 38-40. Region 9's technical expertise in this area is entitled to particular deference. *See In re Peabody W. Coal Co.,* 12 E.A.D. 22, 33 (EAB 2005) (citing *In re Carlota Copper Co*., 11 E.A.D. 692, 708 (EAB 2004) ("a petitioner seeking review of issues that are technical in nature bears a heavy burden because the Board generally defers to the Region on questions of technical judgment.")).

IV. Petitioner Simpson Fails to Demonstrate that Region 9's Determinations for BACT and Solar Power Constituted Clear Error, an Abuse of Discretion, or Raise an Important Policy Consideration that the Board Should Review

Petitioner Simpson argues that Region 9's response to his comment that the BACT analysis should consider a solar component was clear error. Simpson Petition at 3-4. Region 9's response, while brief, was not clearly erroneous; moreover, Region 9's decision not to include a solar component in the BACT analysis was reasonable. Therefore, the Board should reject Petitioner Simpson's arguments for the reasons stated below.

First, we note that Petitioner's comment regarding solar power was vague and devoid of citation or support. ER #9. For example, Mr. Simpson commented that a solar component would reduce emissions by "preheating the system" and "augmenting the electrical output," but failed to provide any specific information, such as the emission reductions that a solar component would bring or its potential for supplemental power. Mr. Simpson also commented that solar energy is "an inherently lower emitting, add on control technology" without any authority to support that solar power is an accepted "add on technology" for a biomass cogeneration facility. Though Petitioner now complains that Region 9's response to his comments was inadequate and unsupported by the record, the general nature of Petitioner's comments did not provide a basis for Region 9 to develop a substantive analysis. Rather than a specific proposal for the use of solar power as part of the project, Mr. Simpson's comment was vague and indeterminate. As the Board has recently noted in a separate proceeding when addressing a similar comment also raised by Mr. Simpson, "[t]he permit process cannot work efficiently or as designed by Congress if the permit issuer is obliged to anticipate and analyze multiple permutations or variations of conceivable options that an overbroad and vague question can invoke." *Palmdale* at 47-48. *See also*, *Encogen*, 8 E.A.D. at 251 n.12 (where issue raised only generally during public comment period, permit issuer not required to provide more than general justification in response).

Moreover, Region 9's response clearly invoked factors relevant to the Agency's policy concerning redefining an applicant's proposed project. Specifically, Region 9 stated that a solar component "presents a significant departure from the existing facility's operations and the Project's purpose. In this instance, the existing lumber facility will add equipment within its existing physical footprint and utilize the excess biomass at this and other SPI sawmill or lumber

operations." RTC at 13. Region 9's rationale is consistent with previous Agency decisions concerning this issue. *See e.g., Palmdale,* at 42-43 ("As the Board has thoroughly explained in prior cases, determining whether a potential control option would redefine the source requires the permit issuer to examine first how the applicant initially 'defines the proposed facility's end, object, aim, or purpose – that is the facility's basic design."' (citation omitted).

Region 9 agrees with the Petitioner that the critical question in considering whether a solar component would constitute "redefining the source" "is whether any alterative configuration would disrupt the basic business purpose of the proposed facility." *Palmdale,* at 44. As the Board has stated, the permitting authority "is given broad discretion in making this determination" and should be upheld unless there is an abuse of such discretion. *Id.* at 44-45. The Board should uphold Region 9's determination that a solar component would be "a significant departure from the existing facility's operations and the Project's purpose" because our determination was reasonable and amply supported by the administrative record. For example, SPI's March 2010 Application contained a Project Description explaining that the project's "basic business purpose" is to provide power for SPI's existing lumber manufacturing plant (which includes an existing biomass boiler), as well as to provide power to the electrical grid through the burning of biomass:

> SPI currently operates an existing lumber manufacturing facility in Anderson, California. SPI intends to construct a new cogeneration unit at the Anderson facility that would burn biomass fuels in a boiler to produce steam that would be used to generate electricity and to heat existing lumber dry kilns at the facility . . . The proposed cogeneration unit will be located near the existing biomass-fired boiler at SPI's Anderson lumber manufacturing facility.

March 2010 Application at 3.

Petitioner states that the Applicant's business purpose is "renewable energy" that can be used to produce steam. The administrative record, however, shows that the Project's "basic

business purpose" is to burn *biomass fuel*, particularly from biomass waste generated by SPI's lumber mill operations at Anderson and other locations, from SPI-owned timber lands, and from agricultural residues and urban wood debris:

> Fuel for the cogeneration unit will come from the existing SPI facilities in California at Arcata, Anderson, Shasta Lake, and Red Bluff, as well as in-forest materials from SPI-owned or controlled timberlands, and various sources of agricultural and urban wood wastes. The available supply from SPI-owned or controlled facilities and timberlands totals 400,000 bone dry tons (BDT) per year. In addition, there are 50,000 BDT of agricultural and urban wood wastes available to SPI annually. . . The Anderson facility currently produces approximately 160,000 BDT of wood wastes per year of which 60,000 BDT are consumed by the existing cogeneration facility, 20,000 BDT are trucked to other biomass power plants, and the balance is trucked to other markets (e.g., wood chips to pulp mills). The new facility will consume a maximum of 219,000 BDT per year, 80,000 BDT of which will be generated by SPI's Anderson facility at a minimum, while the balance (a maximum of 139,000 BDT) will [be] transported by truck from other SPI sources.

March 2010 Application at 3-4.

The record also describes the location of the SPI Anderson facility and the placement of existing and proposed new equipment, from which one can reasonably conclude that the physical location of the facility is inadequate for any type of commercial solar application. Specifically, SPI's March 2010 Application states:

> The proposed cogeneration unit will be located near the existing biomass-fired boiler at SPI's Anderson lumber manufacturing facility. The existing facility is bordered on the northeast by the Sacramento River, on the northwest by a private parcel, on the southwest by Union Pacific Railroad tracks and State Route (SR) 273, and on the southeast by private parcels.

March 2010 Application at 3. In addition, maps of the facility and proposed Project show the existing and proposed equipment. ER #11. Based on this information, Region 9's response to Mr. Simpson's comment ("the existing lumber facility will add equipment within its existing physical footprint and utilize the excess biomass at this and other SPI sawmill or lumber operations" RTC at 13) was reasonable and supported in the record.

Finally, the Board should reject Petitioner's arguments comparing "emissions per megawatt" (Simpson Petition at 7) as Petitioner did not raise this comment during the public comment period. 40 C.F.R. §§124.13(a), 124.19(a).

V. Petitioner Simpson Fails to Demonstrate that Region 9's Determinations for BACT and Fuel Mix Constituted Clear Error, an Abuse of Discretion, or Raises an Important Policy Consideration that the Board Should Review

Petitioner Simpson alleges that Region 9's BACT determination was erroneous because it failed to consider fuel mixing, and specifically mentions increased gas use because it can "raise the temperature and reduce emissions through more complete [combustion]." Simpson Petition at 7-10. We note that both the Proposed and Final Permits specify that the new boiler will be a biomass-fired stoker boiler with natural gas burners for start-up. *See* ER #7, Proposed Permit, and ER #1, Final Permit, Table 1, at 2. In addition, both the Proposed and Final Permits limit heat input from natural gas to 10 percent on an annual basis. See ER #7, Proposed Permit, Condition X.F. 3 at 10; ER #1 Final Permit, Condition X.G.2. at 10.

As explained below, Petitioner fails to demonstrate that Region 9's consideration of fuel mix or that the Final Permit's restriction on natural gas to no more than 10 percent of heat input are clearly erroneous, an abuse of discretion or otherwise warrant review; therefore, the Board should deny review of this issue.

A. Petitioner's Reliance on EPA's Guidance for Determining CO2 BACT from Bioenergy Production is Misplaced

Petitioner Simpson attempts to apply an EPA guidance document, "*Guidance for Determining Best Available Control Technology for Reducing Carbon Dioxide Emissions from Bioenergy Production*," March 2011 ("*Bioenergy Guidance*") to argue that Region 9's BACT determination was deficient. Simpson Petition at 7-11. EPA issued the Bioenergy Guidance concurrently with a proposed rulemaking to defer for three years PSD (and Title V operating

permit) requirements to carbon dioxide ("CO2") emissions from bioenergy and other biogenic stationary sources ("biogenic CO2"). EPA intended the Bioenergy Guidance to support permitting decisions to which the deferral rule would not apply at the time of permitting. Guidance at 5. EPA finalized its rulemaking to defer PSD (and Title V) requirements for biogenic CO2 emissions in July 2011. 76 *Fed. Reg*. 43490 (July 20, 2011) ("CO2 Deferral"). On the effective date of this rule, the CO2 Deferral became applicable under 40 C.F.R. § 52.21. As a result, Region 9 relied on the CO2 Deferral rule and did not make a CO2 BACT determination for the Project or apply the Bioenergy Guidance. AAQIR at 9, n.3.

Without citation or support, Petitioner Simpson claims that although the Bioenergy Guidance "largely refers to GHG [greenhouse gas] it is applicable to all pollutants." Simpson Petition at 8. In fact, the Guidance is clearly limited to CO2 emissions. To the extent the Bioenergy Guidance addresses other pollutants at all, it does so only to describe the unique character of biogenic CO2 emissions, which supports the conclusion that the Bioenergy Guidance is not applicable to other pollutants:

> Biogenic CO2 emissions are distinct from other regulated pollutants at bioenergy facilities because, unlike other pollutants and other GHGs, CO2 emissions can participate directly in the global carbon cycle through photosynthesis, which is critical for the maintenance of life on Earth. Further, emissions of CO2 can dwarf emissions of other GHGs from biomass combustion. For example, CO2 makes up 97.9% of the global warming potential (GWP) of the GHG emissions from wood and wood residuals. Finally, because sequestration of CO2 emissions in living plant material outside the boundaries of the facility may counteract the emissions from such facilities on a continuous basis, this unique dynamic merits consideration in the BACT analysis. This argument is underlined by the fact that GHGs such as CO2 are well-mixed in the atmosphere at large spatial scales; therefore, the need to reduce them directly at the facility is of lesser importance so long as their net atmospheric impact is accounted for and is negative or zero.

Bioenergy Guidance at 7-8 (footnote omitted).

Although the Bioenergy Guidance is not applicable to pollutants other than biogenic CO2, and although Region 9 did not make a BACT determination for CO2 as a result of the CO2 Deferral, the Bioenergy Guidance contains reasoning that could be used to support a conclusion that combustion of biofuels can itself be BACT for CO2 emissions: "This guidance provides an illustration of reasoning that a Prevention of Significant Deterioration (PSD) permitting authority may use to support the conclusion that *the best available control technology (BACT) for carbon dioxide (CO2) emissions at a bioenergy facility is the combustion of biogenic fuels by itself*." Bioenergy Guidance at 1 (emphasis added).

Moreover, the Bioenergy Guidance allows that once a project applicant has demonstrated that use of biogenic fuel is "fundamental" to its primary business purpose, permitting authorities may determine that requiring another fuel would redefine the source: "where a proposed bioenergy facility can demonstrate that utilizing a particular type of biogenic fuel is fundamental to the primary purpose of the project, then at the first step of the top-down process, permitting authorities can rely on that to determine that use of another fuel would redefine the proposed source." Bioenergy Guidance at 15. As explained above in response to Petitioner Simpson's arguments regarding a solar component for the Project, the administrative record shows that the Project's "basic business purpose" is to burn biomass fuel, particularly biomass generated by SPI's lumber mill operations at Anderson and other locations, from SPI-owned timber lands, and from agricultural and urban wood waste. *See* Section IV. s*upra* (citing March 2010 Application at 3-4).

Furthermore, the Bioenergy Guidance references BACT analyses that consider the allocation of fuel mixes only when the applicant is proposing primary fuels other than biomass ("In cases where a permit applicant proposes to co-fire or combine biomass fuels with another

primary fuel type, the list of BACT options should include the option of utilizing both types of primary fuels in different combinations") and provides, as an example of a situation in which the BACT analysis should consider various combinations, a scenario in which an applicant proposes a specific proportional allocation or fuel mix (i.e.,<5 percent biomass, >95 percent fossil fuel). Bioenergy Guidance at 15. In contrast, the Applicant in this case is not proposing to co-fire the new boiler with biomass and natural gas during steady-state operations; rather, the Applicant is proposing to use natural gas to stabilize and facilitate startup and shutdown of the biomass combustion. Region 9 included permit conditions to limit natural gas use to 10 percent of overall heat input in part to ensure that the source is using gas for the purpose described above and not co-firing with natural gas on a continuous basis. ER #1, Final Permit at 7 and 10, Conditions X.D.1 and X.G.2.

The Board should reject Petitioner's arguments to the extent they rely on the Bioenergy Guidance, which is clearly intended to apply to CO2 emissions only. As a result of the CO2 Deferral deferring PSD requirements for biogenic CO2 emissions, Region 9 did not analyze BACT for CO2.

B. Petitioner's Arguments that Region 9 Did Not Adequately Consider Fuel Mix are Without Merit

Petitioner Simpson argues that Region 9's response to his comment regarding fuel mixing and our BACT analysis fail to give adequate consideration to the "environmental benefits of increased gas use" on the basis that "any increase in gas heat over biomass would reduce emissions." Simpson Petition at 8-9.

As stated above with respect to Petitioner's arguments regarding a solar component for the Project, Mr. Simpson's comment regarding fuel mix was not a specific proposal for differing fuel mixes, but vague, indeterminate and devoid of support or documentation. Again, it is clear

that the general nature of Petitioner's comment did not provide a basis for Region 9 to develop a substantive analysis. Again, we cite to the Board's recent pronouncement in response to a comment raised by Mr. Simpson regarding another matter, "[t]he permit process cannot work efficiently or as designed by Congress if the permit issuer is obliged to anticipate and analyze multiple permutations or variations of conceivable options that an overbroad and vague question can invoke." *Palmdale* at 47-48.

Nevertheless, Region 9's response to Mr. Simpson's comment provided a reasoned basis for why further analysis of fuel mix was not necessary or appropriate. Region 9's response showed our determination that "an inherent aspect of the project is that fuel use be primarily biomass" based on the following facts: (i) the Project would be located at an existing lumber manufacturing facility; (ii) involved the installation of a biomass-fired boiler (as well as a steam turbine and a generator); and (iii) that the applicant, SPI, intended to "use biomass from existing SPI facilities, as well as in-forest materials and various sources of agricultural and urban wood waste." RTC at 13. Region 9's response also explained that the boiler would burn natural gas because "combustion within the boiler may need to be stabilized while burning biomass and to assist with the startup and shutdown of the boiler." *Id.* As Region 9's response makes clear, the fundamental purpose of the Project is the installation and operation of a biomass boiler that will burn fuel readily available to the applicant. Although, as Petitioner points out, natural gas is also readily available to the Applicant, the Project is designed to use natural gas for the limited purpose of stabilizing combustion during startup and shutdown of the boiler. Where the applicant is engaged in the manufacture of lumber and has access to timber on its own land as well as to other biomass sources (*see* March 2010 Application at 3-4), the Region's

determination to limit the use of natural gas to 10 percent of overall heat input was reasonable and well supported by the record.

Petitioner Simpson points to the 10 percent heat input limit for natural gas as a basis for claiming that the facility design was "derived for reasons of air quality permitting," and therefore not inherent for the applicant's purpose. Simpson Petition at 9-10. To support his contention, he points to a statement in SPI's March 2010 Application that "[t]he NOx limits in Subpart Db do not apply to boilers that have an annual fossil fuel capacity factor of less than ten percent." Simpson Petition at 10. Petitioner's allegation is without merit, however. The use of a federally enforceable permit condition to avoid a potentially applicable requirement does not invalidate the facility design or related determinations regarding basic business purpose. In this instance, the record abundantly supports a conclusion that the inherent design and basic business purpose of this Project is to construct and operate a biomass boiler and that the 10 percent limitation on natural gas was a reasonable approach to avoid applicability of a requirement that would otherwise apply to the facility.

VI. Petitioner Simpson Fails to Demonstrate that Region 9's Determinations Regarding Comments Raised by Center for Biological Diversity Constituted Clear Error, an Abuse of Discretion, or Raises an Important Policy Consideration that the Board Should Review

Petitioner Simpson argues that Region 9's response to comments submitted by the Center for Biological Diversity ("CBD") were inadequate. Simpson Petition at 10. Specifically, Petitioner Simpson argues that Region 9 erroneously relied on an unlawful BACT exemption for biogenic CO2 and on an unlawful grandfathering exemption in our proposed rule revising the PM NAAQS. The Board should reject these arguments as explained below.

First, Petitioner Simpson's arguments fail to comply with the pleading requirements set forth in the Board's standing order. *See* Order Governing Petitions for Review of CAA NSR

Permits (April 19, 2011) at 4 ("[T]he petitioner must also demonstrate with specificity, by citing to the applicable documents and page numbers, where in the response to comments the permit issuer responded to the comments and must explain why the permit issuer's response to comments is inadequate."). In addition, Petitioner Simpson's arguments fail because he makes only the barest reference to "unlawful exemptions," but fails to provide any analysis or support for his allegations.

Petitioner Simpson's arguments also fail because Region 9's response to CBD's comments was adequate. With respect to the deferral from PSD requirements for CO2 emissions for bioenergy sources, we stated: "there is pending litigation in the D.C. Circuit Court of Appeals regarding our rule, *Deferral for CO_2 Emissions from Bioenergy and Other Biogenic Sources under the Prevention of Significant Deterioration and Title V Programs*, 76 Fed. Reg. 43490 (July 20, 2011). EPA's position is that the CO2 Deferral is a proper exercise of our authority under the Clean Air Act in light of the need for further scientific review of CO_2 emissions from biogenic sources. Consistent with our rule and the Agency's position, our PSD analysis for the Project does not include an evaluation for CO_2 emissions."[17] RTC at 34-35.

With respect to the provisions in EPA's proposed rule for the PM NAAQS, we stated, "EPA has requested public comment on its proposed action relating to the Project. The commenter states that the Center for Biological Diversity has submitted comments to EPA with regard to the specific issue of grandfathering PSD actions in the context of our recently proposed PM NAAQS. EPA will address those comments as part of our rulemaking action on the PM NAAQS." RTC at 35. In fact, EPA's final notice for the PM NAAQS rulemaking was published in January 2013. 78 Fed. Reg. 3086 (Jan. 15, 2013). EPA's final notice explains that

[17] Litigation over the CO2 Deferral, *Center for Biological Diversity v. U.S EPA*, D.C. Cir. Case No. 11-1101, is still pending; oral argument was recently held before a three judge panel on April 8, 2013.

it is revising the PM2.5 (annual) standard from 15 ug/m3 to 12 ug/m3. EPA's final notice also contains a detailed rationale for its decision to grandfather from the new revised PM NAAQS certain PSD permit applications: (i) those that have been determined complete prior to December 14, 2012 and (ii) those for which a public notice of a draft permit has been published as of March 18, 2013.[18] SPI's application qualifies on both counts: it was determined complete prior to December 14, 2012 and the public notice for the draft permit was published on September 14, 2012. Therefore, Region 9 believes that it properly evaluated the Project according to the previous PM NAAQS of 15 ug/m3.

Thus, Region 9 plainly responded to these comments and provided sufficient reasoning to support Region 9's action. Region 9 reasonably applied controlling regulations that were promulgated through a notice and comment process. This proceeding before the Board is not the appropriate place to contest the merits of those regulations.

VII. Petitioner Draisner Fails to Demonstrate that Region 9's Action Constituted Clear Error, an Abuse of Discretion, or Raises an Important Policy Consideration that the Board Should Review

Petitioner Draisner alleges three deficiencies with Region 9's issuance of the Permit: (i) Region 9 inappropriately excluded her comments from the public record; (ii) Region 9 inappropriately denied an opportunity to discuss BACT and did not address BACT "seriously;"

[18] Specifically, EPA stated:

> This final rule incorporates revisions to the PSD regulations that provide for grandfathering of PSD permit applications that have been determined to be complete on or before December 14, 2012 or for which public notice of a draft permit or preliminary determination has published as of the effective date of today's revised PM NAAQS [March 18, 2013]. Accordingly, for projects eligible under the grandfathering provision, sources must meet the requirements associated with the prior primary annual PM2.5 NAAAQS rather than the revised primary annual PM2.5 NAAQS."

78 Fed. Reg. 3249.

and (iii) Region 9 must conduct an independent environmental review. For the following reasons, the Board should deny review.

Regarding Petitioner Draisner's allegation that Region 9 inappropriately excluded her comments from the public record, Region 9 has provided a thorough response in section II.A.1. *supra*; in short, Region 9 believes it has adequately explained why we excluded Ms. Draisner's comments from the administrative record, and that we made her comments and our response to them available to the public by posting them at regulations.gov and notifying all commenters via mail and electronic mail of this post on regulations.gov.

Next, Petitioner Draisner alleges that Region 9 erred by denying the public the opportunity to "discuss BACT" and did not address BACT "seriously." Region 9 provided a thorough response to allegations regarding the "discussion of BACT" and our denial of public hearing requests in section I.A. *supra.* Regarding our consideration of BACT, Petitioner Draisner excerpts several of Region 9's responses to various public comments, but does not explain why she feels Region 9's responses are erroneous or warrant review. Contrary to Petitioner's claim that these excerpts "clearly demonstrate" Region 9's inadequate consideration of BACT, the excerpts themselves are not sufficient to demonstrate clear error. If anything, the excerpts indicate that we received several comments regarding BACT and provided responses to each. As the Board has stated, "a petitioner must demonstrate with specificity in the petition why the Region's prior response to those objections is clearly erroneous or otherwise merits review." *In re Westborough*, 10 E.A.D. 297, 305 (EAB 2002). Because Petitioner Draisner has failed to establish clear error or another ground for review, the Board should deny review of this claim.

Finally, Petitioner Draisner claims that Region 9 must conduct an environmental review prior to issuing the permit. The Board may reject this claim on the ground that it was not raised during the public comment period. *See* 40 C.F.R. §124.13. In addition, Region 9 has conducted an environmental review of impacts related to emissions to the air, as evidenced by the AAQIR for this action. To the extent that Petitioner Draisner is claiming that Region 9 must review other impacts, Petitioner provides no legal authority for her assertion. Moreover, Region 9 notes that Shasta County was required by the California Environmental Quality Act ("CEQA") to thoroughly review and analyze all environmental impacts, and did in fact prepare and certify an Environmental Impact Report ("EIR"). *See* ER #12.

Because Petitioner has failed to demonstrate that the Final Permit was clearly erroneous or otherwise warrants review, the Board should deny review of Petitioner Draisner's claims.

CONCLUSION

For all of the reasons stated above, Region 9 respectfully requests that the Board deny review of Region 9's Final Permit for the Project.

Date:

Respectfully Submitted,

/S/ Kara Christenson

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of EPA REGION 9's REPONSE TO PETITIONS FOR REVIEW and ATTACHMENTS 1-5, including EPA REGION 9's EXCERPTS OF RECORD in the matter of Sierra Pacific Industries, Inc. EAB Appeal Nos. PSD 13-01, PSD 13-02, PSD 13-03, and PSD 13-04 to be served upon the persons listed below by the means so indicated.

Dated: April 23, 2013 */S/ Kara Christenson*

Kara Christenson

By U.S. Mail: (Region 9 Response only –Attachments available at docket at EAB website)

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