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

In re: Russell City Energy Center PSD Permit No. 15487	)	PSD Appeal Nos. 10-02, 10-03, 10-04, and 10-05 [Related to PSD Appeal No. 10-01.]

RESPONDENT BAAQMD'S SUR-REPLY BRIEF

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TABLE OF CONTENTS

INTRODUCTION AND SUMMARY

Pursuant to the May 19, 2010, Order from the Environmental Appeals Board granting leave to file Reply Briefs and Sur-Reply Briefs in the above-captioned matter, Respondent the Bay Area Air Quality Management District hereby submits this Sur-Reply to the Reply Briefs of Chabot-Las Positas Community College District ("CLP") in Petition 10-02; Citizens Against Pollution ("CAP") in Petition 10-03; Robert Sarvey in Petition 10-04; and CARE and Rob Simpson in Petition 10-05. For the reasons explained herein, none of these Reply Briefs presents any further reason why this Board should grant review.

OBJECTION TO IMPROPER ARGUMENTS RAISED IN REPLY BRIEFS

At the outset, the District notes that at various places the Reply Briefs either (i) simply repeat arguments already made in the Petitions for Review, or (ii) raise new issues that were not included in the Petitions for Review that petitioners initially filed. The District objected to and opposed Petitioners' motions for leave to file reply briefs on these grounds, noting that such arguments are improper under *In re Keene Wastewater Treatment Plant*, NPDES Appeal No. 07-10 (EAB Mar. 19, 2008), slip op. at 19-20. *See* District Consolidated Opposition To Motions Requesting Leave To File Reply Briefs (May 18, 2010), at 5-6. The District objected in particular to attempts by Petitioners to raise new issues, or to present "arguments [that] raise substantive nuances that are not set forth in the Petition . . . ." *Keene*, *supra*, slip op. at 20. The Board did not rule on whether the issues that Petitioners wished to address in replies constituted such impermissible matters, but instead granted Petitioners leave to file the replies and invited the District and project applicant to reiterate any objections in their sur-reply briefs. The Board also reminded Petitioners that they may not raise any new issues in their reply briefs, Order Granting Motion to File Reply Briefs *etc.* (May 19, 2010), at 7, and yet a number of new issues have been raised. The District therefore reiterates its objection here, under *Keene* and the arguments the District made in its opposition to the motions to file reply briefs, as well as under the Board's Order granting leave to file the briefs, and submits that the Board should reject and

refuse to consider all such material in the reply briefs. For brevity, the District will simply identify such issues and arguments in the following discussion, and incorporates by reference this objection for each issue and argument so identified.

THE DISTRICT'S SUR-REPLY ARGUMENTS

The District submits the following sur-reply arguments to the replies filed by Petitioners in this matter. As explained herein, nothing in the sur-reply briefs provides any reason to question the demonstration in the District's Responses that its issuance of the PSD permit in this case was proper and fully justified, and that all of the Petitions for Review should be denied.

I. CLP'S REPLY BRIEF PROVIDES NO REASON WHY ITS PETITION SHOULD NOT BE DISMISSED

CLP raises five substantive arguments in its Reply Brief. As explained below, none of these arguments provides any reason why the Petition should not be dismissed on the grounds discussed in the District's Response.

A. The Board Should Reject CLP's Belated Attempt To Argue That The 40 C.F.R. Section 52.24 "Construction Moratorium" Prohibits Construction Of The Russell City Energy Center Because It Is Untimely and Because There Is No Construction Moratorium In Effect Here For PM2.5

CLP attempts to raise a completely new argument that has never been aired in any of the comments or any of the Petitions. CLP's new argument is that the "construction moratorium" set created in Section 110 of the Clean Air Act and 40 C.F.R. Section 52.24 prohibits the construction of the Russell City Energy Center now that the San Francisco Bay Area has been designated as non-attainment for the PM2.5 24-hour NAAQS. *See* CLP Reply Brief at Section B, pp. 10-12. The Board should reject this new argument outright for not having been raised in a timely fashion, as noted above.

But the Board should also reject the argument on the merits, because there is no construction moratorium in effect here resulting from the PM2.5 non-attainment designation. The construction moratorium in 40 C.F.R. Section 52.24 applies where an area has been designated as non-attainment but has not submitted an approvable State Implementation Plan

according to the timeline for doing so under Part D of the Clean Air Act. This is clearly established in the language of Section 52.24 implementing the construction moratorium, which states in subsection (c) that:

> The Emission Offset Interpretative Ruling, 40 C.F.R. part 51, Appendix S ("Offset Ruling"), rather than paragraphs (a) and (b) [the construction moratorium], governs permits to construct and operated applied for before the deadline for having a revised SIP that satisfies Part D.

Similarly, subsection (k) states that:

> For an area designated as nonattainment after July 1, 1979, the restrictions in paragraphs (a) and (b) of this section [the construction moratorium] shall not apply prior to 18 months after the date the area is designated as nonattainment. The Offset Ruling shall govern permits to construct and operate applied for during the period between the date of designation as nonattainment and either the date the Part D plan is approved or the date the restrictions in paragraphs (a) and (b) of this section apply, whichever is earlier.

These provisions make clear that once an area is designated as non-attainment for a pollutant, Appendix S (the "Offset Ruling") governs the permitting of new major sources of that pollutant until such time as the state submits a Part D non-attainment SIP for that pollutant. The Bay Area was designated as non-attainment for the PM2.5 24-hour standard effective December 14, 2009, *see* Air Quality Designations for the 2006 24-Hour Fine Particle (PM2.5) National Ambient Air Quality Standards, Final Rule, 74 Fed. Reg. 58688, 58709-11 (Nov. 13, 2009) (to be codified at 40 C.F.R. § 81.305), and the deadline for it to submit an approvable Part D SIP has not yet arrived. The construction moratorium in Section 52.24 is therefore inapplicable under its own terms. Appendix S governs permitting issues related to the PM2.5 24-hour NAAQS instead, which is exactly how the District analyzed this issue here. There is nothing in the provisions of the Clean Air Act or in the cases that CLP cites that suggests otherwise. To the contrary, those authorities are all consistent with this description of the law. Far from supporting CLP's argument on this issue, they require it to be rejected.

B. CLP Provides Nothing To Rebut The Fact That The District Used The Maximum Worst-Case Permitted Emissions Limit of 7.5 Pounds Per Hour In Its PM2.5 Analysis, Which Is What Is Required Under EPA Regulations And Guidance

CLP next argues that "assuming that BAAQMD has a duty to examine the 24-hour PM2.5 concentrations levels for NAAQS purposes" – which is a false assumption because the San Francisco Bay Area is a non-attainment area for the 24-hour standard and PSD requirements do not apply – the District erred in using the maximum worst-case permitted PM2.5 emissions rate in its 24-hour PM2.5 impact analysis. But CLP does not provide any further support for its argument. CLP cites two EAB cases in which the Board approved of the agency's use of the maximum worst-case emissions rate as the District did here, *Prairie State* and *Northern Michigan University*, both of which the District discussed in its Response to CLP's Petition. *See* Response to Petition 10-02 at 22. CLP provides nothing further to explain why these cases do not support the District's analysis here. CLP observes that in *Prairie State*, the EAB noted that where an agency imposes a BACT limit that is subject to an allowance for a subsequent upward adjustment, the PSD analysis must be based on the maximum upward adjustment. CLP Reply Brief at 15. But the District's PM limit here does not incorporate an upward adjustment, and the 7.5 lb/hr emission rate is the maximum limit that applies under the permit. CLP also notes that in *Northern Michigan University* the Board observed that the operating condition that causes the maximum ground-level concentrations should be used as a basis for the modeling. But here that is the 7.5 lb/hr maximum permitted emissions rate that the District used in its analysis. These cases support the District's position, not CLP's, and require that CLP's petition be dismissed on this issue.[1]

[1] CLP also rehashes its argument that the District should not have established a BACT limit at 7.5 lb/hr and used that as the basis for its analysis, claiming (based on assertions by power plant operators) that 7.5 lb/hr may not be achievable. The District responded to this point in its Response to Petition 10-02, at pp. 19-21. CLP raises nothing new in its Reply, and so the Board should decline to consider this material as mere repetition of what has been argued before. On the merits of this issue, the District simply refers the Board to its earlier Response.

C. CLP Can Cite No Evidence That Highway 880 and Hesperian Blvd. Would Cause Significant 24-Hour PM2.5 Concentration Gradients At Any Location Where The Project's Emissions Would Cause Impacts Above The SIL

CLP next challenges the District's determination not to include Highway 880 and Hesperian Boulevard as "nearby sources" in the multi-source modeling analysis it conducted for the 24-hour PM2.5 full impact analysis. The District excluded these highways because it found that they would not cause any significant concentration gradient at any location where the facility's impacts would exceed the 24-hour PM2.4 Significant Impact Level ("SIL"), which the District explained in its Response is fully consistent with EPA guidance. *See* District Response to Petition 10-02 at 29. CLP replies by pointing out that the District acknowledged that as a general matter, highways can cause significant concentration gradients close to the highway itself. CLP attempts to turn this unremarkable observation into a finding by the District that these particular roadways are expected to cause a significant concentration gradient at points where the facility's impacts would be above the SIL. CLP Reply Brief at 17-18. But CLP cites no evidence for this assertion, and in fact it is exactly the opposite of what the District explained in its Response. In the Response, the District explained how it had evaluated these additional roadways, which are farther away from the facility than Highway 92, and found that PM2.5 concentrations would fall off substantially by the time they reached locations near the facility where the facility's impacts could be above the SIL. District Response to Petition 10-02 at 29. CLP's Petition should therefore be rejected on this issue.

CLP also claims that there is no ambient air monitoring data that support the District's analysis. This is a new argument that CLP did not raise in its Petition, and should be rejected on that ground. Moreover, this assertion is completely false. The District did rely on ambient air monitoring data to establish background conditions. *See* Responses to Public Comments at 134-36 (discussing monitoring data and how it satisfies EPA requirements for PSD analyses). The District carefully considered the representativeness of such monitoring data and responded to all comments it received on the issue. *See id.* CLP has not provided any reason why the Board should grant review on the District's use of ambient air monitoring data here.

D. CLP Provides No Further Argument To Suggest That The District Erred In Concluding That An Auxiliary Boiler Would Not Be Sufficiently Cost-Effective To Require As BACT.

CLP also raises a few arguments concerning its claim that the District erred in determining that an auxiliary boiler would not be sufficiently cost-effective to justify as BACT for startup emissions, but none provides any reason why the Board should not dismiss this claim as well.

1. The District Considered The Only Two Data Sheets From Caithness That CLP Submitted With Its September, 2009, Comment Letter

CLP rehashes its argument that the District erred in considering only the two data sheets that CLP submitted with its September 16, 2009, comment letter. But CLP does not respond to the District's explanation of why it considered only those two data sheets: Because those were the only two data sheets that CLP actually submitted with its comment letter. *See* District Response to Petition 10-02 at 37. Instead, CLP submits all four data sheets that it presumably intended to include with the letter (Exhibit 4 to Petition 10-02), without addressing the fact that the letter the District actually received enclosed only the two data sheets the District reviewed, as explained in Paragraph 10 of the Declaration of Alexander Crockett, which states:

> Note that this letter included two single-page attachments containing data sheets from Siemens Westinghouse Power Corporation, and nothing else. I have specifically double-checked the original document that [was received by] the District, which bears the District's date-received stamp in blue ink, and have confirmed that the original contained only these two single-side attachments and nothing else. I am aware based on arguments made in Petition for Review No. 10-02 that Ms. Hargleroad may have intended to include additional information with this letter as well, but the document that the District received from her dated September 16, 2009, had only these two single-sided attachments. Note also that Ms. Hargleroad submitted an electronic version of this letter by email to the District dated September 16, 2009, but that electronic version did not include the two attachments that were included with the hard copy version, and did not include any other Siemens data.

4/23/10 Crockett Decl., ¶ 10. To the extent that there is still any confusion over this issue, the District is submitting the further declaration of Weyman Lee, P.E., the permit engineer responsible for this permit and the custodian of the comment letter at issue. As Mr. Lee states:

> On September 18, 2009, I received the signed original September 16, 2009 letter that Jewell Harglaroad previously submitted by email . . . . The letter received contained the 14 pages in the PDF version sent earlier by email. It also contained three additional single sided pages of attachments. The first page of the attachments is entitled "Appendix H: Air Permitting Application and Ammonia Impact Assessment" with no other content on the page, the second page is a Siemens Company data sheet for startup and shutdown emissions for "W501FD ….on Natural Gas- No Aux. Boiler", and the third page is another Siemens Company data sheet for startup and shutdown emissions for "W501FD …. on No.2 Fuel Oil -With Aux. Boiler". . . . I have double-checked the original document and found no other Siemens Company data sheets for startup and shutdown emissions.

Declaration of Weyman Lee, P.E., In Support Of Respondent BAAQMD's Sur-Reply Brief, which is being filed concurrently herewith, at ¶ 3. This further testimony should put to rest the issue of what the District did and did not receive.[2] For whatever reason, the comment letter that counsel for CLP submitted attached only two data sheets instead of four. This is why the District relied on these data sheets, and CLP cannot claim error when it was its own submission that caused the problem in the first place.[3]

But as the District explained in its opposition, it ultimately does not matter whether the District considered the two documents that CLP actually submitted, all four documents in CLP's Exhibit 4 that CLP now claims it intended to submit, or even the total emissions reductions that

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[2] Note that CLP explains that it submitted its September 16, 2009, comment letter in both electronic form by email and in hard copy, but it did not include the Siemens vendor information with the email submission. CLP Reply Brief at 19 n.5. The only Siemens information that CLP submitted was thus the two data sheets included with the hard copy. *See also* Crockett 4/23/10 Decl. ¶ 10; Lee Decl. ¶ 2. Note also that the hard copy letter was not submitted during the comment period, which expired on September 16, 2009, as the District did not receive the letter until September 18th. Lee Decl. ¶ 3 & Exh. 1 (with date stamp showing document received on Sept. 18, 2009). The District did not object to the lateness and considered the two data sheets included with the letter.

[3] CLP claims that the District is asserting for the first time in its opposition brief that it did not receive all four data sheets with CLP's September 16, 2009 comment letter. CLP Reply Brief at 21. But the District only realized that it had not received all of the attachments that CLP apparently intended to include with that letter until CLP filed its Petition and bringing the discrepancy to light. CLP cannot therefore claim that the District should have raised the issue earlier. The District also specifically asked CLP for further explanation of the basis for its cost-effectiveness analysis calculations, but CLP failed to provide any additional information. *See* District Response to Petition 10-02 at 34-35.

CLP claimed could be achieved in the Table presented on page 3 of its September 16, 2009, comment letter (reproduced in the District's Response at p. 34), which appear to come from some other source. Using any of these emission reduction estimates, the costs of installing and operating an auxiliary boiler would not be justified. Using the data from a similar facility in Mankato, Minnesota, the cost-effectiveness calculation for this additional control equipment comes out at $82,800 per ton of CO reduced. *See* Responses to Public Comments at 114. Using the two data sheets that CLP submitted with its September 16, 2009, letter, the cost-effectiveness calculation for the auxiliary boiler comes out at $21,140 per ton of CO reduced. *See* District Response to Petition 10-02 at 36 (citing Responses to Public Comments at 115). Using the data sheets that CLP claims it *intended* to submit from Exhibit 4 to CLP's Petition, the cost-effectiveness calculation comes out at $14,594 per ton. *Id.* at 38-39. And using CLP's calculation it submitted in its September 16, 2009, comment letter (the source of which has still not been clearly explained), the cost-effectiveness comes out at $11,515 or $11,451 per ton, depending on which version is used. *Id.* at 34-35 (citing CLP 9/16/09 comment letter and subsequent 10/9/09 follow-up letter).[4] Whichever of these numbers is used, the auxiliary boiler would not be cost-effective, compared to the similar analyses the District examined showing that additional controls would not be justified if they cost more than a few hundred to a few thousand dollars per ton. *Id.* at 39 (citing Responses to Public Comments at 72-74). CLP's attempt to generate a "he said, she said" debate about what CLP did and did not submit is therefore moot, and the Board may simply reject the argument as immaterial to the outcome of the permitting analysis.

[4] CLP also claims (again for the first time in its Reply brief) that the District has not adequately explained whether the facility will have 6 cold and 100 warm startups per year or 12 cold and 200 warm startups per year. CLP Reply at 20-21 n.7. But the District did clearly explain that the "6 x 16" operating scenario would mean 3 cold and 50 warm startups per turbine per year, and correctly included a total of 6 hot and 100 warm startups in its analyses to reflect the fact that one auxiliary boiler would be able to serve two turbines. *See* Responses to Public Comments at 115-16, 121-25.

2. CLP's New Argument That The District Should Have Ignored Cost-Effectiveness And Used An "Achieved-In-Practice" Approach Instead Must Be Rejected.

CLP also attempts to bring up for the first time in this Reply brief the argument made by Citizens Against Pollution that the auxiliary boiler should have been required here because it is "achieved in practice", regardless of costs. CLP Reply Brief at 18, 20-21. The Board should reject this argument as not having been raised in CLP's Petition. To the extent that the District needs to respond in this sur-reply, it incorporates the points it makes regarding CAP's arguments on this issue.

3. The District's Evaluation Of The Costs Associated With Using An Auxiliary Boiler Was Completely Justified, And CLP Presents No Colorable Argument To The Contrary.

CLP also attempts to bolster its argument that the District based its cost estimates for installing and operating an auxiliary boiler was based on data from a facility with a much larger boiler than would be needed for the Russell City facility. CLP Reply Brief at 21-23. CLP first misrepresents the record in an attempt to circumvent its failure to have preserved this issue for review by not having raised it during comments. CLP claims that "it was not until BAAQMD's publication of its response to comments that BAAQMD disclosed that it was relying on facilities like Mankato" for its cost estimates. *Id.* at 21-22. This contention is simply false. The District provided a full discussion of the basis for the auxiliary boiler cost estimates in the Additional Statement of Basis that was almost identical to the discussion provided in the Responses to Public Comments, including the same citation to the supporting record document. *Compare* Additional Statement of Basis at 69-70 & n.129 *with* Responses to Public Comments at 114 & n. 237. CLP was therefore fully on notice during the second comment period as to the basis for the District's analysis, and there is no reason why CLP could not and should not have raised these concerns at that time. Having failed to do so then, CLP is barred from doing so now on appeal.

CLP then claims that the cost data used in the analysis "must" be based on a larger 320 MMBtu/hr auxiliary boiler, asserting that using an overly large boiler is the only way that one could "arrive at such high cost estimates." CLP Reply Brief at 22. But CLP offers no reason to

conclude that the cost estimates are "high" in any respect; indeed, CLP has never offered any evidence or argument as to what it believes a properly-sized auxiliary boiler should cost. *See* District Response to Petition 10-02 at 42-43 (noting that although CLP claimed that the Russell City facility could use a smaller auxiliary boiler than at Mankato, it never explained what the cost differential would be based on a smaller boiler or how that could make the boiler cost-effective). The Board should reject this attempt to come in at this late stage and baldly claim that the District's cost data simply "must" be overstated, without any supporting analysis whatsoever.[5]

E. *Prairie State* Supports The District's Environmental Justice Analysis

Finally, CLP also attempts to distinguish this Board's precedent in *In re Prairie State Generating Co.*, in which the Board found that a facility whose emissions would not be "anything more significant than de minimis or trivial" would not have a significant disproportionate impact on environmental justice populations. The District cited *Prairie State* in support of its position that its environmental justice analysis – which found that there would be

[5] CLP also notes that the Mankato emission reductions spreadsheet states that it is a start profile for the winter months. CLP Reply 10-02 at 22. Winter is the time when one would expect to have the auxiliary boiler operating, as the auxiliary boiler keeps the equipment warm during shutdowns and is therefore most useful in the winter. Moreover, this issue would not concern the cost comparison with Mankato, as costs are costs and are not greatly dependent on whether the equipment is operated during the winter or summer. Furthermore, this notation does not implicate the size of the boiler used at Mankato, which CLP now concedes is 70 MMBtu/hr. *Id.* This point is therefore not related to anything in CLP's arguments regarding the basis for the District's cost estimates. This issue would not undermine the use of emission reductions estimates based on Mankato, either, as the biggest startup reductions would likely come in the winter, when there is the biggest temperature difference between equipment at ambient outdoor temperatures and equipment being kept warm by the auxiliary boiler. That is, looking only at winter months would *overstate* the usefulness of the auxiliary boiler and make it appear *more* cost-effective than if one used a comparison from warmer months (or warmer regions). CLP also notes that the spreadsheet says "LMEC Aux Boiler 320" in one spot, *id.* at 22-23, but as the District explained in its Response to CLP's Petition, this notation refers to the fact that the District used the Los Medanos Energy Center ("LMEC") as the basis for its estimate of the offsetting emissions that would come from the auxiliary boiler itself, and pro-rated them to reflect the fact that a smaller boiler would be used at Russell City. *See* Response to Petition 10-02 at 42. At bottom, none of these observations adds anything to CLP's case.

no significant impacts to any community, and thus no significant disproportionate impacts to any environmental justice community – satisfied the applicable environmental justice requirements here. *See* District Response to Petition 10-02 at 45-46. CLP now asserts that *Prairie State* is distinguishable because there was "no evidence of disproportionate impact . . . ." CLP Reply Brief at 24. But far from distinguishing *Prairie State,* that fact makes *Prairie State* exactly on point with this case. The District found in response to comments that there is no evidence of any significant adverse impact anywhere, so there is no evidence that there could be any significant disproportionate impact that could implicate environmental justice concerns. CLP does not address the District's arguments on this point or explain how the District's responses to comments on this issue could be flawed in any way, and claims instead that the area near the facility already experiences "too much pollution." *Id.* But this ignores the fundamental question of any environmental justice analysis, which is what impact *the facility's* emissions will have on an environmental justice community. Here, the District found that the facility's emissions will not have any significant adverse impact, and nothing CLP has cited in any of its briefing to date challenges that conclusion.

II. CAP'S REPLY BRIEF PROVIDES NO REASON WHY ITS PETITION SHOULD NOT BE DISMISSED

Petitioner Citizens Against Pollution ("CAP") also filed a reply brief in PSD Appeal No. 10-03, raising issues about (i) the District's determination that it would not require an auxiliary boiler to be used as BACT for startup emissions based on cost-effectiveness grounds, and (ii) the NO2 limits that the District imposed for startups. As explained below, none of the arguments in this Reply Brief provides any reason to grant review.

A. CAP Bears The Burden Here In Demonstrating How The District Failed To Adequately Respond To CAP's Comments Criticizing The District's BACT Analysis.

At the outset, the District wishes to clarify that it is CAP that carries the burden here to justify its criticisms of the District's BACT analysis. It is not the District's burden to demonstrate CAP's criticisms have no merit, as CAP seems to suggest. *See* CAP Reply Brief at 5; *see also* Petition 10-03 at 5. CAP is correct that the permit applicant must present evidence, and the District must rely on such evidence, in order to eliminate a control alternative in Step 4 of the Top-Down BACT analysis. *See, e.g.*, *In re Pennsauken County, New Jersey Resource Recovery Facility*, 2 E.A.D. 667 (Adm'r 1988) (cited in CAP Reply Brief at 5). But where the District has done so and presented its evidence in the permitting record, it is then incumbent upon the Petitioner to comment on any defects it believes exist in the District's analysis and reliance on such evidence, and then on appeal it is the Petitioner's burden to show how the District's response was erroneous, inadequate, or otherwise subject to review. *In re Prairie State Generating Co.*, 13 E.A.D. __, PSD Appeal No. 05-05 (EAB Aug. 24, 2006), *aff'd sub nom.*, *Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007), slip. op. at 145. This is the framework under which Petitioner's claims must be evaluated here. The District did provide a great deal of detailed evidence, documentation and analysis for its BACT determinations, including why an auxiliary boiler would not be sufficiently cost-effective to justify as BACT. CAP and others then submitted comments on that analysis, including comments questioning whether the facility would start up and shut down more frequently than assumed under the "6 x 16" operating

scenario and if such a more frequent startup profile might alter the outcome of the cost-effectiveness calculation. The District then responded to these comments on the record with even more documentation and analysis, and CAP appealed. At this stage, it is now CAP's burden to show how the District's responses could be flawed in some way such that the Board should grant review. CAP has failed to carry that burden.

B. The Board Should Reject CAP's Attempt To Shift Its Argument From The Facility's Realistic Operating Scenario To The Theoretical Maximum Number of Startups Possible; And Should Reject The Argument On The Merits Because The Auxiliary Boiler Would Not Be Cost-Effective Either Under A Realistic Scenario or Using The Theoretical Maximum.

CAP attempts to shift its argument regarding startup emissions from its initial claim that the District failed to base its cost-effectiveness analysis for startup emissions on a "credible operating scenario" to a new argument that, regardless of what the most credible operating scenario is, the District should have used the maximum number of high-emitting startups that would be physically possible under the permit. CAP's arguments in this regard should be rejected because they were not raised in comments or in the Petition for Review; and also on the merits because (i) a BACT cost-effectiveness analysis should be established based on a realistic evaluation of how the facility will operate, as the District did here, and not the theoretical maximum; and (ii) even if the District did use the absolute maximum number of high-emitting startups that would be physically possible under the permit, the use of an auxiliary boiler would still not be sufficiently cost-effective.

The issue that CAP raised in its Petition for Review regarding the District's startup BACT analysis was whether the District had used a "credible operating scenario" in its cost-effectiveness analysis of what emissions reductions could be achieved using an auxiliary boiler. CAP described this claim in its "Issues Presented For Review" section, where it alleged that the District "erred in failing to ascertain a credible operating scenario of the number and kind of startup and shutdown events that are expected to occur at RCEC . . . ." Petition 10-03 at 3. CAP presented its argument in the body of its brief in similar terms, stating that the District did not

provide "a credible scenario of likely SU/SD events", *id.* at 14, and that "[a] credible determination of a SU/SD scenario is material because the number of SU/SD events will determine whether certain pollution control equipment or technique [*sic*] is most appropriate," *id.* at 15. The District responded by explaining the documentation and analysis it relied on in determining that the most likely operating scenario for the facility was "6 x 16" operation, in which the facility operated 16 hours a day, 6 days a week, with 250 hot startups, 50 warm startups, and 3 cold startups per turbine per year (500 hot, 100 warm, and 6 cold startups per year in total). *See* District Response to Petition 10-03 at 9-40. CAP concedes that based on the evidence in the record this is the most likely operating scenario. *See* CAP Motion for Leave to File Reply Brief at 1 ¶ 1 ("The Air District set [BACT] for startups and shutdowns based on a likely operating scenario."); *see also* CAP Reply Brief at 1. CAP now contends that the District should not have used the most likely operating scenario, but instead should have used the scenario corresponding to the maximum number of startups the facility could have under its permit conditions. CAP Reply Brief at 1-6.

CAP attempts to hide this change in argument behind a semantic distinction between the "likely" operating scenario that the District used and a "credible" operating scenario, which CAP contends is the maximum number of startups that would be physically possible. That this is nothing more than a semantic difference is clear from CAP's own Petition, in which it used "likely" and "credible" interchangeably. For example, CAP claimed that it had asked for "a credible determination of the likely scenario of SU/SD events because, without such information, it was impossible to determine BACT," Petition 10-03 at 13, and claimed that the District had erred in "not respond[ing] to the public's significant comments asking for a credible scenario of likely SU/SD events . . . ," *id.* at 14. The Board should see through this semantic distinction and recognize CAP's change in course for what it is: An abandonment of CAP's initial argument that the District failed to adequately justify the "6 x 16" operating profile that it used in its cost-effectiveness analysis as the most reasonable and realistic basis for analyzing how the facility will actually operate for purposes of the BACT determination, and a new argument that the

District should have used the maximum number of startups that the facility could possibly have consistent with its permit, even if that scenario bears no resemblance to how the facility will actually operate. This is a new argument and the Board should reject it summarily for having been raised for the first time in the Reply brief.

But putting aside the procedural infirmities with CAP's new argument, on the merits CAP is wrong that a BACT cost-effectiveness analysis should be based on the absolute maximum number of startups that the facility could have under its permit. CAP's primary argument is based on the NSR workshop manual, which CAP discusses on pp. 1-2. CAP acknowledges that the analysis must be based on "a realistic scenario", CAP Reply Brief at 1 (quoting NSR Workshop Manual at B.37). But CAP claims that without a permit limit on the number of startups that the Russell City facility will have, the District must use "the worst case uncontrolled emissions" as the baseline for the analysis. *Id.* at 2 (citing NSR Workshop Manual at B.39). CAP argues that without a permit limit on the number of startups the facility may have,[6] the District should have used the theoretical maximum number of startups the facility could possibly have under its permit, and the corresponding theoretical maximum startup emissions the facility could have. This analysis misreads the direction EPA laid out in the NSR workshop manual.

The NSR Workshop Manual is clear that the analysis must be based on "a realistic scenario of upper boundary uncontrolled emissions for the source", as CAP recognizes. NSR Workshop Manual at B.37. The Manual goes on to recognize, however, that "[e]stimating realistic upper-bound case scenario does not mean that the source operates in an absolute worst case manner all the time." Instead, the Manual explains that "realistic upper-bound scenario" should be based on how the source will reasonably be expected to operate. The Manual gives a

[6] The District addressed the reasons why it did not include a limit on the maximum number of startups the facility could have in the Responses to Public Comments at 124, and this determination has not been challenged. CAP's concern here is that since the District chose not to include such a limit, it must use the theoretical maximum number of startups that could be physically possible under the permit as the basis for the BACT cost-effectiveness analysis.

number of examples to illustrate this point, explaining that using the absolute worst case scenario instead of a reasonable scenario can result in an overestimation of emissions. For example, emissions would be overstated if one unrealistically assumed that a storage tank built to hold fuel for an oil-fired power boiler would be continually filled and emptied, as such a tank will only need to be filled occasionally when the unit needs to be refueled. *Id.* at B.38. Similarly, if a source normally operates for two shifts per day, it is not necessary to estimate emissions based on full-time operation, as this would not be a realistic operating scenario. *Id.* And if a coating source is expected to use numerous colored inks over the course of a year with a wide range of VOC content, emissions should realistically be estimated "based on the expected mix of inks that would be expected to result in an upper boundary case annual VOC emissions rather than an assumption that only one color (i.e., the ink with the highest VOC content) will be applied exclusively during the whole year." *Id.* at 38-39. These provisions of the NSR Workshop Manual make clear that CAP is wrong that the cost-effectiveness analysis must use the absolute maximum emissions that the facility could possible have under its permit. To the contrary, the analysis must use a "realistic" scenario, which is what the District did here in basing its analysis on the "6 x 16" operating scenario that was documented by the facility's Power Purchase Agreement and was consistent with all of the other evidence in the record. The operating scenario that is used must of course be based on reasonable assumption to ensure that it represents a "realistic upper-bound case scenario," but the District was more than reasonable here in using the "6 x 16" scenario and then conservatively assuming, in response to comments concerned that the facility could actually have more frequent startups, that there could be two or more times the number of startup events. Even at this conservatively high estimation of a realistic operating scenario, the District explained, an auxiliary boiler still would not be sufficiently cost-effective. *See* Responses to Public Comments at 115-16.

But even taking CAP's argument at face value and assuming that the cost-effectiveness analysis should have been based on the theoretical maximum number of startup the facility could have under its permit, the auxiliary boiler would still not be cost-effective. Theoretically, the

facility could be operated solely in cold-startup mode throughout the entire year. Theoretically, Calpine could commence a cold startup, have a cold startup event with 2514 pounds of CO emissions, and then shut down immediately without selling any power to the grid and cool down for two days in order to have another cold startup. This type of operation obviously makes no sense whatsoever and could never be considered "realistic" by any stretch of the imagination, but as a technical matter Calpine could theoretically operate this way in cold-startup mode 100% of the time. Under this unrealistic but theoretically possible scenario – the one CAP asserts should form the foundation of a cost-effectiveness analysis – the facility's maximum number of startups would be 262, at which point the facility would reach its annual permitted CO emissions of 330 tons (*see* Permit Condition ¶ 23(b)).[7] Using this assumption for the maximum operating scenario, the auxiliary boiler would be able to achieve emissions reductions of 102 tons per year of CO using the District's assumption of a reduction of a 31% reduction in CO per cold startup based on the Mankato data,[8] or 202.5 tons per year of CO using the optimistic assumption of a 61.5% reduction based on the Siemens vendor estimates attached as Exhibit 4 to the Chabot-Las Positas Petition.[9] With an annualized cost for the auxiliary boiler at $1,029,521, the cost-effectiveness of using the auxiliary boiler in this highly unrealistic scenario would be $10,093 per ton or $5,084 per ton, depending on the emission reduction assumptions used. Using either of these numbers, this level of cost would not be sufficiently cost-effective, given the District's evaluation of what costs other similar facilities are being required to bear to reduce CO

[7] At 2514 pounds per cold startup, the facility would exceed the 330 ton annual limit if it went over 262 cold startups.

[8] As the District explained in the Responses to Public Comments (at p. 114) and the Additional Statement of Basis (at p. 69), the Mankato data show that the auxiliary boiler could achieve a 31% reduction for cold startups. That would be a reduction of 779 pounds per cold startup (2514 x 31% = 779). Over 262 startups, the total reductions would amount to 204,000 pounds, or 102 tons.

[9] The Siemens vendor estimates (using the tables for natural-gas-fired startups) show 2164 pounds of CO for a cold startup without the auxiliary boiler and 833 pounds with the auxiliary boiler, a reduction of 1331 pounds or 61.5%. *See* CLP Petition Exh. 4. That would be a reduction of 1546 pounds per cold startup (2514 x 61.5% = 1546). Over 262 startups, the total reductions would amount to 405,000 pounds, or 202.5 tons.

emissions, which found that costs of over a few hundred to a few thousand dollars per ton have been determined to be insufficiently cost-effective. *See* Responses to Public Comments at 70-74, 116 n.240 (discussing evidence showing that the CO cost-effectiveness threshold should be less than $4,500 per ton).[10] Thus even if the District assumed that the facility operated entirely in cold-startup mode, this would make no difference in the District's determination that an auxiliary boiler is not warranted here.

This analysis renders moot the other claims that CAP makes (i) criticizing the District's observation that the five data points in the Palomar data show that cold startups are relatively uncommon events and (ii) that operating data from the Gateway facility show 16 cold startups per year. CAP Reply Brief at 5-6. As the District observed in its Reponses to Public Comments, an auxiliary boiler would not be cost-effective even assuming startup activity several times greater than the levels the District used in its analysis, *see* Responses to Public Comments at 116, and as outlined above this conclusion would not change even assuming *all* operation involved cold startups.

Similarly moot is CAP's contention that the District erred in describing the Power Purchase Agreement as providing for operation of "at least" 16 hours per day, 50 weeks per year, instead of operation "up to" 16 hours per day, 50 weeks per year. The District based its analysis on the assumption that the most realistic operation scenario was exactly at the expected 16 hours per day, 50 weeks per year scenario, and so the question of whether the Power Purchase agreement contemplates "6 x 16" as a maximum or a minimum was not material the District's conclusion. Moreover, less frequent operation would normally involve fewer startups, not more; and even if it did involve substantially more startups, that still would not make the auxiliary boiler cost-effective as outlined above.

[10] Note also that neither CAP nor any other petitioner has objected to such a cost-effectiveness threshold.

C. CAP Is Incorrect That The Delegation Agreement Requires The District To Jettison The Federal PSD BACT Requirement In 40 C.F.R. Section 52.21 And Its Mandate To Consider "Economic Impacts And Other Costs"

CAP next tries to bolster its argument that the District should have jettisoned the requirement that a PSD BACT analysis take into account "economic impacts and other costs" by attempting to distinguish the *West Suburban* case. CAP claims that unlike in *West Suburban*, the District's Delegation Agreement here "specifically incorporated Regulation 2-2," and that this situation requires that the District depart from the BACT requirement in 40 C.F.R. section 52.21 and its requirement to consider cost-effectiveness.

But the EAB's holding in *West Suburban* that a state agency issuing a PSD permit under EPA's delegated authority pursuant to 40 C.F.R. section 52.21(u) "stands in the shoes" of EPA and must issue the PSD permit according to the same rules that EPA would use under Section 52.21 – a conclusion that the EAB has also reached in a large number of similar cases – is not based on the specific language of the delegation agreement that was involved in that case. To the contrary, this well-settled rule comes directly from the fundamental principles of administrative law, under which an administrative agency that adopts regulations in the Code of Federal Regulations, after public notice and comment, to govern how its permitting system will work is bound to follow those regulations in administering the permitting system, and can only depart from such regulations by changing them through a further notice-and-comment rulemaking. Thus, federal PSD permits issued under federal authority must be issued consistent with the PSD permitting regulations in 40 C.F.R. section 52.21, and nothing short of a further rulemaking to change section 52.21 can alter this reality.[11] Certainly, authorization to depart from the Code of

[11] Of course, a state may decide to develop its own state program and have it approved into its State Implementation Plan by EPA. At that point, when the state has its own SIP-approved program, it will implement PSD itself under its own rules and will not be acting on EPA's delegated authority in a delegation agreement pursuant to 40 C.F.R. Section 52.21 (and such permits will not be federal permits appealable to the EAB). But that is not the situation here, and no Petitioner has alleged that it is. This is a situation where the District is implementing the federal regulations in 40 C.F.R. section 52.21 on EPA's behalf pursuant to the delegation agreement between the two agencies, and the permit is a federal permit subject to the requirements of EPA's regulations established in the Code of Federal Regulations.

Federal Regulations cannot be legally granted by a regional staff member of EPA through an administrative agreement – even if that regional staff member is the head of the region's Air Division.

Thus the rule expressed in *West Suburban* that a delegated state agency "stands in the shoes" of EPA and must follow the same rules as EPA was not specific to the IEPA delegation agreement involved there, and cannot be explained away by purported factual distinctions between the delegation agreement in that case and the delegation agreement here. The Board's reasoning in a subsequent PSD case involving IEPA's delegation agreement, *In re Desert Rock Energy Co., LLC*, PSD Appeal No. 09-02 through 08-06, 14 EAD __ (EAB Sept. 24, 2009), makes this point clear. In explaining why IEPA was required to follow the requirements of the Code of Federal Regulations in that case, the Board did not cite the language of the delegation agreement, but rather general authorities discussing delegation such as the preamble to 40 C.F.R. Part 124 and legal opinion of the General Counsel of EPA's Offices of Air & Radiation,[12] as well as a long list of prior Board decisions. As the Board explained,

> [A] delegate State stands in the shoes of the Regional Administrator * * * [and] must follow the procedural requirements of Part 124. * * * A permit issued by a delegate is still an 'EPA-issued permit' * * *." *Consolidated Permit Regulations*, 45 Fed. Reg. 33,290, 33,413 (May 19, 1980); *accord Prairie State*, slip op. at 5 n.1, 13 E.A.D. at __ ("Permits issued by states acting with delegated authority are considered EPA-issued permits."); *Indeck*, slip op. at 105, 13 E.A.D. at __ ("Where EPA delegates administration of the federal PSD program, the delegate state implements the substantive and procedural aspects of the federal PSD regulations on behalf of EPA * * * [thereby] stand[ing] in the shoes of EPA, and the permit remains a federal action * * *." (quoting EPA's Offices of Air and Radiation and of General Counsel)); *In re Zion Energy, L.L.C.*, 9 E.A.D. 701, 701

[12] The OAR General Counsel opinion was expressed in the context of a specific case, *In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04, 13 E.A.D. __ (EAB Sept. 27, 2006), which also involved IEPA. But the opinion (which the Board quoted in its opinion in that case) is clear that the OAR General Counsel was discussed PSD permitting generally when it explained that a delegated state agency "stands in the shoes" of EPA when acts pursuant to a delegation agreement. *Indeck-Elwood*, *supra*, slip op. at 105-06 & n.147 (discussing generally how PSD permits would be issued by EPA directly, by a state agency using EPA's delegated authority pursuant to a delegation agreement under 40 C.F.R. section 52.21(u), or by a state with a SIP-approved PSD program).

> n.1 (EAB 2001); *In re W. Suburban Recycling & Energy Ctr., L.P.*, 6 E.A.D. 692, 695 n.4 (EAB 1996); see also 40 C.F.R. § 124.41 (definitions applicable to federal PSD permits).

Desert Rock, supra, slip op. at 58-59. Notably, this discussion includes the *West Suburban* case as support for the proposition that delegated state agencies "stand in the shoes" of EPA and must implement the same rules from the Code of Federal Regulations as EPA, apart from the specific language of the delegation agreement involved. In light of all of the foregoing, CAP is simply incorrect that the District should have ignored 40 C.F.R. section 52.21(b)(9) and its requirement to consider "economic impacts and other costs" when making a BACT determination, as EPA would be required to do if was issuing the permit directly.

Petitioners are of course correct that the Delegation Agreement in effect here references District Regulation 2, Rule 2, a situation that has led to a great deal of confusion on the part of many as to what requirements the District must actually apply in issuing PSD permits. The Agreement states (among other references) that District regulations "generally meet the requirements of 40 CFR 52.21 for issuing PSD permits; therefore District permits issued in accordance with the provisions of Regulation 2 – Rule 2 shall be deemed to meet federal PSD requirements pursuant to the provisions of this delegation agreement." Delegation Agremeement, 4/23/10 Crockett Decl. Exh. 16, at ¶ II.2. Many have read this language to mean that the District can simply follow its own permitting rules and not worry about the requirements of 40 C.F.R. 52.21, as District permits issued under Regulation 2, Rule 2 will be "deemed" by EPA Region 9 to satisfy PSD requirements. It was this confusion that in part led to the notice defects that were the subject of the Remand Order in this case, as the District had relied on its own permit notice procedures (including through its role in the CEC licensing process) and not those required under the Code of Federal Regulations. *See* Remand Order at 35-38.[13] But other language in the Delegation Agreement makes clear that EPA Region 9 never intended to authorize or require the

[13] As noted in the District's Response to Petition 10-03 (at p. 46 n.13), the District is currently negotiating a revised delegation agreement with Region 9 that will clarify these confusing references.

District to reject the requirements of 40 C.F.R. section 52.21 in a case like this one. For example, it clearly states that Region 9 "may review the PSD permit(s) issued by the District to ensure that the District's implementation of this delegation Agreement is consistent with federal PSD regulations for major sources and major modifications (40 CFR 52.21)," *id*. ¶ IV.2., which includes the requirement to consider "economic impacts and other costs" in making BACT determinations. Reading all of these provisions together in their entirety, the only reasonable conclusion is that Region 9 and the District intended that, since Regulation 2, Rule 2 is "generally" consistent with Section 52.21 but not the same in every respect, the District would apply the PSD provisions of District Regulation 2, Rule 2 generally to the extent that they are consistent with the requirements of 40 C.F.R. Section 52.21, but follow Section 52.21 in any area where Regulation 2, Rule 2 differs. But of course, even if the Board were to read the intent behind the Delegation Agreement differently, that would still not alter the fundamental requirement that the PSD permitting authority – be it EPA or a delegated state agency "standing in the shoes" of EPA – must follow the requirements set forth in the Code of Federal Regulations, as the Board has consistently held on numerous occasions as discussed above.[14]

[14] CAP also cites an unspecified "Manual applying Regulation 2-2" as being consistent with the Federal PSD program. CAP Reply Brief at 9. The District is not certain which "Manual" this passage refers to, but to the extent that it is consistent with the Federal PSD program, and its requirement to consider "economic impacts and other costs" in determining BACT, then such a Manual would support the District's argument here. CAP's next sentence cites p. B.44 of the NSR Workshop Manual, which discusses the requirement to analyze costs and adverse economic impacts, *id.* at 9-10, which again supports the District's argument that cost-effectiveness must be evaluated for federal PSD BACT determinations. CAP then asserts that the District has failed to explain how an auxiliary boiler would not be sufficiently cost-effective where this type of equipment is in fact being used at other facilities. *Id.* at 10. The District responds to this argument – which appears to concede that cost-effectiveness is appropriately considered in a federal PSD BACT analysis – by pointing to all of its responses in this proceeding as to why its cost-effectiveness analysis for the auxiliary boiler was appropriate, well-documented, and fully justified.

D. CAP Provides Nothing Of Substance To Rebut The District's Demonstration That Its Startup BACT Limits Were Properly Justified.

CAP first attempts to characterize the District's detailed demonstration in the Responses to Public Comments and Statement of Basis documents that startup emissions are highly variable as "simply [a] conclusory statement". CAP Reply at 10. But the District carefully evaluated the variability of startup emissions from this type of equipment and documented how and why the variability exists and to what extent it can be expected from the Russell City Energy Center when it is constructed and operated. The District provided both a qualitative discussion of the technical factors that cause startup emissions to vary so greatly, *see* Response to Petition 10-03 at 56 (citing Statement of Basis at 44), as well as a review of actual operating data from similar facilities documenting the variability in practice on real equipment, *see id.* at 55-59 (citing Statement of Basis, Additional Statement of Basis, and Responses to Public Comments). Based on this comprehensive analysis, the District concluded that startup emissions would be highly variable and the BACT permit limit would have to be established accordingly with a reasonable compliance margin to ensure that the limit would be "achievable" for purposes of BACT. The fact that the only criticism that CAP can mount at this stage is that the District's analysis was somehow "conclusory" shows how little substance its objection to the startup BACT limits ultimately has.

CAP then attempts to distinguish three of the cases that support the District's argument for setting BACT limits using a reasonable compliance margin, *In re Newmont Nevada Energy Investment*, 12 E.A.D. 429 (EAB 2005), *In re Knauf Fiber Glass GmbH*, 9 E.A.D. 1 (EAB 2000) ("*Knauf II"*), and *In re Kendall New Century Development*, 11 E.A.D. 40 (EAB 2003). CAP argues that in *Newmont Nevada*, the agency explained the reasons why the compliance margin was justified (because the SCR control technology was relatively new at the time and because higher efficiencies would require higher ammonia injection rates), whereas it claims that here the District did not provide any evidence regarding why emissions would be variable. But the District did provide such an explanation, reciting factors such as the ambient temperature of the

equipment when the startup commences, limitations on the loading sequence to ensure safe loading, and limitations on the steam-cycle side of the facility to ensure that the steam turbine and associated equipment are safely warmed. *See* District Response to Petition 10-03 at 56 (citing Statement of Basis at 44). This explanation is at least as detailed and specific as the reference to the newness of the technology and the concern regarding additional ammonia injection that the Board approved of in *Newmont Nevada*. CAP's argument seems to question whether the Russell City facility will actually experience these operational factors, in that it alleges that the District did not provide "reference to any specific facts pertaining to RCEC." CAP Reply at 10. But this discussion obviously pertained to the Russell City facility, as it was presented in an analysis of what could be achieved at Russell City based on an evaluation of other facilities using the same type of equipment as Russell City. In this regard, the District's exercise of its discretion here was "solidly grounded on what [was] presently known" about how the Russell City facility will operate, which is the standard CAP quotes from *Newmont Nevada*.[15] CAP's attempts to distinguish *Newmont Nevada* are therefore unavailing, as the case supports the District's position that the District's exercise of its permitting discretion to include a reasonable compliance margin is appropriate where it is based on a significant degree of variability in the emission rates to be expected at a facility, which has been fully documented and explained through a review of actual operating data from similar facilities coupled with a qualitative explanation of the technical reasons as to why such variability is expected. The documentation and explanation that the District provided was more than sufficient to support the District's exercise of its discretion to include a reasonably compliance margin here to allow for the variability that is expected in turbine startup emissions. Indeed, it would have been error for

[15] Note also that CAP never questioned the District's technical explanation of the reasons for the variability in its comments. CAP claimed that the District should have set lower limits based on the available data, but never raised a concern that the District should have provided more explanation beyond what the District had already documented as to why the variability occurs. The District cannot be expected to have provided any additional more detailed rationale at this stage given that all indications were that the technical explanation was already sufficiently clear and well-explained.

the District not to have made an allowance for this variability here, based on all of the information the District had before it in the record.

With respect to *Knauf II* and *Kendall New Century*, CAP simply observes that they upheld the use of a larger safety factor than the District applied here. That is the exactly the proposition for which the District cited them, in order to rebut CAP's argument in its Petition that "there is no precedent for allowing such a large margin." CAP Petition 10-03 at 27. These cases show that CAP is wrong on this point. The District has carefully documented and justified its use of a compliance margin here based on considerable evidence in the record, and these cases show that in such a situation the EAB should defer to the agency's discretion in incorporating a reasonable safety margin to ensure that the BACT limit is achievable.

E. CAP Provides No Reason To Question The District's Consideration Of The Mankato Startup Emissions Data.

CAP's Reply ends with two concessions. CAP first concedes that the table "SU-SD Analysis final 4-1-09.pdf", one of the analyses on which the District based its determination that the use of an auxiliary boiler would not be sufficiently cost-effective under the facility's "6 x 16" operating profile, was part of the record for this permit. The issue of whether the District did in fact rely on this evidence supporting the "6 x 16" operating scenario for the facility is therefore now off the table.

CAP also concedes that it did not raise any concern in its comments regarding the District's use of startup emissions estimates from the Mankato Energy Center in evaluating what emissions reductions could be achieved from installing an auxiliary boiler at the Russell City facility. CAP Reply Brief at 11. Since issues to be raised on appeal need to be raised during the comment period in order to be preserved for review, this concession should be the end of the matter. CAP attempts to overcome this fatal defect by arguing that it was the District's obligation to have somehow anticipated CAP's concern about the Mankato data and responded to it in its Responses to Public Comments based on CLP's submission of emission reduction estimates from another facility. But as the District explained in Section II.A. above, once the

District satisfies its obligation to present specific evidence and analysis on which it has eliminated a BACT alternative, it is then the Petitioner's obligation to present its criticism of the District's justification in specific comments to allow the District an opportunity to consider and respond to Petitioner's objections; and it is the Petitioner's burden on appeal to demonstrate that it made such comments and that the District has not adequately responded. CAP has got the relevant burdens on the District and on Petitioners at this stage in the proceeding backwards, and as a result it claims that the burden is on the District and all CAP needs to do is "point out that the District's justification is without factual support . . . ." But that is not how a PSD appeal works. CAP must do more at this stage than simply alleged generally that the District should have provide additional information to support its analysis. It must show that it raised a specific concern with the analysis during the comment period and that the District failed to respond adequately to that concern in its Responses to Public Comments. CAP has not done so here, and so its Petition should be dismissed on this point.

III. PETITIONER SARVEY'S REPLY BRIEF PROVIDES NO REASON WHY HIS PETITION SHOULD NOT BE DISMISSED

Petitioner Robert Sarvey has also filed a Reply Brief in PSD Appeal No. 10-04. He makes arguments regarding four specific issues, but none of the arguments provides any reason why his Petition should be granted.

A. Mr. Sarvey Should Be Barred From Bringing Up The Delta Energy Center's 300-pound Cold Startup NO2 Limit For The First Time In His Reply Brief; And He Is Wrong In Any Event That The Limit Provides The Basis For A Lower Cold Startup Limit At The Russell City Facility

Mr. Sarvey's first argument concerns the NO2 limit for cold startups that the District established for the Delta Energy Center, another Calpine facility. Mr. Sarvey notes that the facility has a cold-startup NO2 limit of 300 pounds. Sarvey Reply Brief at 5-6 and n. 9 (citing the Title V permit that the District issued for the Delta Energy Center). Mr. Sarvey's reply brief is the first time that he (or anyone else) has raised this point regarding the Delta permit limit, and so the Board should decline to consider this argument at this late stage. Mr. Sarvey and others have made arguments regarding test data documenting the emissions performance seen in source tests at the facility, which the District published in its Statement of Basis at p. 45 (Table 15), but this is the first time that anyone has stated that the District should have used the 300-pound Delta Energy Center startup permit limit as the cold startup NO2 limit for this facility.[16]

Furthermore, Mr. Sarvey's argument should also be rejected on the merits because the Delta permit limit does not establish that such a limit would be achievable in this case, given the Delta permit's very high CO limit and the inherent trade-offs between reducing NO2 emissions are reducing CO emissions. As the District explained in its Responses to Public Comments and

[16] Note that Mr. Sarvey claimed in his Petition that the District should have used the 281 pound source test result from Delta – the highest of the 6 source tests from the facility the District included in Table 15 in the Statement of Basis – as the basis for the Russell City limit. In doing so, he inaccurately characterized the 281-pound test result as a "limit," which the District pointed out in its Response was not correct. District Response to Petition 10-04 at 13-14. But he never made any argument regarding the actual Delta limit of 300 pounds that is the basis for his new argument in the Reply brief.

Statement of Basis, lowering flame temperature to decrease NOx formation necessarily increases incomplete combustion, which forms additional CO. *See* Responses to Public Comments at 66-67; Statement of Basis at 22, 29, 31. The low 300-pound Delta NO2 limit for cold startups therefore comes at the expense of a much higher CO limit, which is 9750 pounds or nearly four times higher than the Russell City CO limit of 2514 pounds. *See* Delta Energy Center Title V permit, cited in Sarvey Reply Brief at 5-6 n. 9. And achieving this low NO2 limit comes at the expense of much higher CO emissions rates as measured by the source tests the District reviewed at the facility. Those source tests, which the District published in Table 15 and Mr. Sarvey republishes on p. 5 of his Reply Brief, show CO emissions of up to 8288 pounds, well above what the Russell City facility will achieve. In fact, five out of the six startup tests from the Delta facility showed emissions that would be over the Russell City CO limit of 2514. Conversely, the test results from other facilities with lower CO emissions show higher NO2 emissions. *See* Statement of Basis at 45-46, Tables 14, 16 & 17. The Delta permit therefore does not show that a lower NO2 cold-startup limit of 300 would be achievable at Russell City with its low CO limit.[17] Had Mr. Sarvey raised this point earlier, the District could have responded to it and explained that it is not willing to allow such high CO emissions in order to reduce the already-stringent NO2 limits further. To the contrary, the Air District struck a reasonable balance in the tradeoff between reducing NO2 and reducing CO, and Mr. Sarvey's belated arguments do not show that the District abused its discretion in any way in doing so.

[17] Mr. Sarvey also quotes the NSR Workshop Manual's statement that "[i]n the absence of a showing of differences between the proposed source and previously permitted sources achieving lower emissions limits, the permit agency should conclude that the lower emissions limit is representative for that control alternative." Sarvey Reply Brief at 6 (quoting NSR Workshop Manual at B.24.). As this discussion shows, there are indeed differences between the Delta facility and the Russell City facility: the Russell City facility has a much more stringent CO limit, which makes lowering its NO2 limit any further infeasible.

B. Mr. Sarvey Does Not Provide Any Reason To Conclude That The District Should Have Required The Facility To Install Op-Flex Technology

Mr. Sarvey next makes further argument regarding the District's determination not to require the facility to install "Op-Flex" technology as BACT for startup emissions. He mischaracterizes the District's reasons why it did not require Op-Flex, however, because he cites only the District's initial treatment of the issue from the initial Statement of Basis from 2008, at which point the District did not have enough information on Op-Flex to find that it would be an available control technology. *See* Sarvey Reply Brief at 8 & n.14 (citing Statement of Basis at 42). Based on this mischaracterization, Mr. Sarvey claims that the District erred in declining to require Op-Flex in light of further information showing that the product has been used at other facilities. *Id.* at 8-9.

This argument must be rejected because it fails to address the full reasoning why the District ultimately declined to require the facility to use Op-Flex, after careful consideration of all of the evidence. As the District explained in Section VIII.C.3. of the Responses to Public Comments (and in particular regarding Comment VIII.C.5., pp. 116-17), the District determined that Op-Flex is not mandated under the PSD BACT requirement for the threshold reason that BACT is an emission limitation and not a technology requirement *per se*. Since there was no evidence that using Op-Flex would allow the facility to achieve a lower BACT emissions limitation, there was no reason why BACT would require Op-Flex to be used. Put another way, the facility's startup limits were so low already that the District found no indication that installing Op-Flex would have any additional benefit, and so there was no reason to require it as BACT. *See* Responses to Public Comments at 116-17. After making that determination, the District then went on to address comments regarding whether Op-Flex is in fact an "available" control technology. The District found that the information from the Palomar facility where Op-Flex has been installed was so preliminary and limited that it would not support a conclusion that the technology is "available" for purposes of a BACT determination. The District did not therefore change its earlier assessment that Op-Flex should be excluded at Step 2 of the Top-

Down BACT analysis because it is not yet available, but explained that the issue was immaterial in any event because even if the analysis proceeded to Step 3, Op-Flex would not be ranked as the top control technology because there was no evidence that it would have a better emissions performance. *Id*. at 117.

Mr. Sarvey now challenges one small piece of this comprehensive analysis, the District's conclusion that, based on the information submitted during the comment periods, Op-Flex is not yet an "available" control technology for purposes of BACT. Mr. Sarvey does not explain any way in which the District's analysis on this issue in the Responses to Comments was flawed in any way, and so it must be rejected on that issue.[18] But in any event, whether the technology is ultimately considered "available" or not is moot, because even if it is available to be installed at the facility, there is no indication that it could achieve a better emissions performance and therefore a lower permit limit. As a result, there can be no argument that the District's BACT permit limit – which is ultimately what the BACT determination represents – was erroneously established. Nor is there any argument that the District erred in its BACT technology choice because Op-Flex was not a better-performing alternative that would have been ranked higher at Step 3 of the Top-Down BACT analysis. Mr. Sarvey's challenge to the District's BACT determination in this respect should therefore be rejected.

C. Mr. Sarvey Provides No Reason Why Ammonia Slip Emissions Should Be Subject To The BACT Requirement

Mr. Sarvey next challenges the District's determination not to undertake a BACT analysis for ammonia slip. Sarvey Reply Brief at 10-11. The District based this determination on EPA's recent PM2.5 rulemaking, in which it made clear that ammonia is presumptively excluded from federal PSD regulation under 40 C.F.R. Section 52.21. *See* Responses to Public

[18] Mr. Sarvey relies heavily on a new factual argument that he did not raise during the comment period, regarding the Gateway Generating Station. *See* Sarvey Reply Brief at 9. Again, Mr. Sarvey is barred from raising this issue now since he did not raise it during the comment period. But he cites no emissions data or other information to show that Op-Flex installed at the Gateway facility is achieving a better level of emissions performance, which is the reason why the Air District did not require it as BACT.

Comments at 80. Mr. Sarvey offers no reason why this interpretation of Section 52.21 was erroneous,[19] and the Board should reject his challenge on this issue for that reason alone.

Beyond the legal issue of whether ammonia slip should be subject to the federal PSD BACT requirement, the District also went on and evaluated whether, if it had the discretion to subject ammonia slip to the BACT requirement, it would do so in this case. The District concluded that it would not, for a number of reasons including the preliminary nature of the scientific understanding of the connection between ammonia emissions and secondary particulate matter formation. *See id.* at 80-83. Mr. Sarvey does not explain how the District could have erred in this determination, and simply notes that the regional computer model used in the District's draft study found that reducing ammonia emissions region-wide would reduce regional PM2.5 levels by zero to four percent; and that ammonia was the only precursor that had any significant effect in the model. The District considered this information and responded that it did not provide sufficiently strong evidence to conclude at this time that the facility's ammonia emissions would have a significant impact on secondary particulate formation that would cause the District to conclude that the facility's ammonia slip emissions should be subject to BACT, even if the District could legally have done so. Mr. Sarvey provides no argument why the District's analysis of the draft report was erroneous in this regard. Mr. Sarvey may disagree with the District's reading of the draft report, but there is no indication that the District's reading was unreasonable or an abuse of discretion. And the District's position on the technical issue is moot

[19] Mr. Sarvey implies that the District could require BACT for ammonia slip as a PM2.5 precursor in a PSD permit under 40 C.F.R. section 52.21 if it found that ammonia was a significant contributor to secondary particulate formation. Sarvey Reply Brief at 10-11. But this is not correct. As the District explained in its Responses to Public Comments at 80-83, EPA has left open the possibility that states can include ammonia as a secondary particulate precursor – and subject it to BACT requirements – when they develop their own regulatory programs for PM2.5, provided they can make a showing to EPA as part of the approval process that ammonia is a significant contributor to particulate matter formation. But for purposes of federal PSD permitting, the District must follow the PSD federal regulations, and those regulations exclude ammonia from the BACT requirement regardless of what the District finds.

anyway, as EPA's PSD requirements clearly establish that ammonia is not subject to BACT requirements as a secondary particulate precursor.

D. Mr. Sarvey Is Incorrect That The District Failed To Consider Dry Cooling In Its BACT Analysis, Or That It Abused Its Discretion In Not Requiring Dry Cooling Here

Finally, Mr. Sarvey also presents further argument on his challenge to the District's determination not to require the facility to use dry cooling instead of wet cooling. He first challenges the District's concern that requiring the facility to be redesigned to use a dry cooling system would be prohibited under the Board's "redefining the source" doctrine, which the District explained in the Responses to Public Comments at pp. 87-88. But his only argument is that if dry cooling were required instead of wet cooling, the facility "would still be a combined cycle natural gas electrical generating facility." Sarvey Reply Brief at 12. This facile argument completely ignores all of the analysis that the District provided on this issue, including the design and siting of the facility adjacent to Hayward's wastewater treatment plant in order to be able to take advantage of the benefits of using recycled water. In not responding to this reasoning set forth in the Responses to Public Comments and explaining how it could be erroneous, Mr. Sarvey fails to provide any reason on which review could be granted.

Beyond the "redefining the source" doctrine, Mr. Sarvey also challenges the District's evaluation of dry cooling as an alternative in the Top-Down BACT analysis, in which the District eliminated dry cooling at Step 4 because of the ancillary environmental and energy impacts from using dry cooling instead of wet cooling, which has substantial environmental and energy benefits for this facility.[20] *See* Responses to Public Comments at 88-89. Mr. Sarvey cites a number of technical issues that he did not bring up in his Petition which he now claims the

[20] Mr. Sarvey asserts that the District never actually considered dry cooling in a BACT analysis, but this is not true. The District expressed considerable concerns about whether dry cooling could even be considered as a BACT alternative because of the "redefining the source" prohibition, but it ultimately concluded that it would not have to resolve that issue because dry cooling would be rejected in the BACT analysis in any event. The District therefore went ahead and provided all of the details on the BACT analysis to support that conclusion. *See* Responses to Public Comments at 88-89.

District should have evaluated in the BACT analysis. These points should be rejected because they were not included in the petition, but also because they do not provide any basis on which to conclude that the District abused its discretion in making the BACT technology determination.

Finally, Mr. Sarvey also implies that the Air District was required to provide another public comment period to give the public an opportunity to comment on the District's response to Mr. Sarvey's comments on this issue. This is a new challenge that Mr. Sarvey presents for the first time in his Reply brief, and it should be rejected for that reason alone. But in any event, PSD permitting does not require notice and comment on a response to comments, where the agency is not intending to make any substantial change to its analysis or permit determination on an issue. To hold otherwise would turn the notice-and-comment process into and endless loop of public comments, agency responses to the comments, further comments on the responses, further agency responses to the further comments, *etc.* Mr. Sarvey does not cite any authority that would require such an unworkable result, and there is none.

IV. CARE'S REPLY BRIEF PROVIDES NO REASON WHY ITS PETITION SHOULD NOT BE DISMISSED

Petitioners CARE and Rob Simpson (hereinafter, "CARE") have also filed a Reply Brief. But like the others addressed above, it does not provide any reason why the Board should grant review. Much of the Reply Brief is nothing more than irrelevant inflammatory accusations, and the District will not reply on those points. Many other parts simply restate arguments presented in the Petition for Review, or they raise entirely new issues in violation of the Board's admonishment that such issues cannot be raised for the first time in a reply brief. The District therefore responds in this sur-reply only to a few specific issues where further discussion of Petitioners' misunderstanding of the PSD permitting requirements may be useful to the Board in adjudicating this Petition.

A. The District Fully Complied With All Public Notice Requirements

CARE makes several arguments regarding the public notices that the District provided regarding this project. It first asserts that the public notices that the Air District issued were required under 40 C.F.R. Section 124.10(d)(iv) to contain an explicit reference to the permit application that gave rise to the permit proceeding. CARE Reply Brief at 4. This is an incorrect statement of what 40 C.F.R. Section 124.10(d)(iv) requires. That provision requires that the District reference the name and address of a person from whom the application is available, which the District did in identifying Weyman Lee, the permit engineer. *See* Declaration of Barry G. Young (4/29/10), Exh. 2 (notice for December 2008 Statement of Basis) & Exh. 3 (notice for August 2009 Additional Statement of Basis). But whether or not the notices were legally required specifically to reference the permit application is moot, because both applications did specifically mention the permit application and that it was being made publicly available. This issue is nothing more than a red herring.[21]

[21] Petitioners also disagree with the District's assertion that it listed the permit application in the index of administrative record documents that it was making available for public review during the second comment period. Petitioners note that the index listed the document as an "Application for Permit Modification", and claim that this was not a reference to the "permit

CARE also implies that the notices were defective for not stating "the degree of PSD increment consumed." CARE Reply Brief at 6. But as Petitioners concede, the notices did explain that "[t]he proposed project will not consume a significant degree of any PSD increment." *Id.* at 7. This information clearly satisfied any obligation to explain the increment consumption impact of the project, and CARE has no argument to the contrary.

CARE also points to a typographical error in the index of the administrative record indicating that the year of one of the District's PM2.5 analysis documents as being 2007, not 2009. *Id.* at 7. Clearly the correct year is obviously 2009, as there was not even any requirement to consider PM2.5 in PSD analyses in effect in 2007. And to the extent there was any confusion on the part of members of the public about what the correct date of this document was, the public could easily have asked the District for clarification, or even reviewed the document themselves to figure it out. Petitioners cannot seriously claim that the public was prejudiced in any way by this typographical error.

B. There Is No Reason To Grant Review Based On The Permitting Timeline

CARE also raises a new angle to the argument presented in its Petition that the District has somehow violated some permitting timeline requirement by not making a final determination on Calpine's permit application within one year. CARE Reply Brief at 9. CARE originally made this argument based on 40 C.F.R. section 51.166. CARE Petition 10-05 at 5. CARE now relies on 42 U.S.C. section 7475(c), section 165(c) of the Clean Air Act. The Board should reject CARE's attempt to raise this new authority for the first time in its reply brief. But even if the Board were to consider this new argument, this statutory provision does not provide any reason grant review here. As the District explained in its Response to CARE's Petition on this issue, it did in fact take final action to issue the permit within one year. District Response to Petition 10-05 at 21-23. And even if the District had not acted within a year, such delay would not provide a basis for granting review or remanding the permit. As the Board has held in *In re*

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application." The District declines to engage Petitioners in this semantic word game. The permit application was clearly available for public review.

Desert Rock Energy Co., LLC, 14 E.A.D. __, PSD Appeal Nos. 08-03 through 08-06 (EAB Sept. 24, 2009), slip op. at 25., the EAB does not have jurisdiction to address claims of excessive delay under Section 165(c) in a PSD permit appeal. To the contrary, such claims must be brought in federal District Court, where presumably the remedy would be an order compelling the agency to act to remedy unreasonable delay (and for which CARE would most likely not have standing to claim in any event).

C. CARE Presents No Evidence Of Any Concern About Use Of "Chlorine or Other Biocide" In The Cooling System, A New Issue It Raises For The First Time In Its Reply

CARE raises a new concern regarding the use of "chlorine or other biocide" in the cooling system as a means to prevent growth of bacteria. CARE Reply Brief at 12. This is a new issue that CARE did not raise in its Petition, and so it is barred from raising it at this point. And CARE has provided no evidence why such use could be a health concern in any event, or any argument that the District could have misapplied any PSD permitting requirement under 40 C.F.R. section 52.21 in connection with this concern. This concern therefore provides no basis for granting review.

D. There Is No Evidence That The District Misidentified The Project Location.

CARE continues to maintain that the District failed to identify the correct project location, but it has no basis for this claim. The District identified the project location as "3862 Depot Road, near the corner of Depot Road and Cabot Boulevard." *See, e.g.*, Final PSD Permit at 1. In its Reply Brief, CARE cited a California Energy Commission document containing a map of the project location. *See* CARE Reply Brief at 13 n.20 (citing page 203 of the referenced document). That map shows the project location outlined in red, very close to the corner of Depot Road and Cabot Boulevard, as the District had stated. The document also shows a view of the project location from the corner of Depot Road and Cabot Boulevard five pages later in the document (page 208), and then on the next page identifies 3862 Depot Road as a parcel on which the

facility will be located (page 209). There is simply nothing in this document to suggest that the facility will not be located at this site.

E. The District Properly Relied On Data From Nearby Monitoring Stations

CARE also raises a new argument – again, for the first time in the Reply Brief – regarding its claim the District should not have used the Fremont-Chapel Way monitoring station to obtain background data for its PM2.5 modeling analysis. The Board should reject this new argument as being raised for the first time in the Reply. But the argument has no merit in any event, and does not respond to any of the points that the District made in its Response to CARE's Petition regarding the validity of the Fremont-Chapel Way data under EPA's guidelines for the representativeness of background data. CARE simply has no argument that the Fremont-Chapel Way data are not sufficiently representative. Moreover, although CARE criticizes the District for using this data, it does not suggest in any way that the conclusions the District reached may have been flawed because of this data. That is, CARE offers no argument that if the District had used data from Oakland, the analysis would have shown that the facility could cause or contribute to a violation of the annual PM2.5 NAAQS (the only modeling analysis that was legally required that involved the use of background monitoring data). For all of these reasons, CARE's arguments should be rejected.

F. CARE Never Submitted Comments Regarding Impacts From Water Vapor

CARE also challenges the District's statement that CARE never submitted comments on the impacts of water vapor emitted from the facility. Reply Brief at 15. CARE cites comments stating that "[e]missions of 4 million gallons of effluent into the air could have public health risks . . . ." But these comments were made in the context of whether there could be health impacts from using treated wastewater discharged from the City of Hayward's wastewater treatment plant, and made no suggestion that there could be adverse impacts from water vapor emissions. This is the only possible reading of the comment's concerns about "effluent", as water vapor does not have any potential for heath impacts, which is what the comment was about.

Indeed, the concern raised in the exhibit to CARE's petition that raised this issue was not that the water vapor was a public health risk, but that it purportedly impacted the accuracy of the dispersion modeling that the District conducted for this permit. And in any event, the document raising this concern has been considered as a late-filed Petition for Review and has been dismissed by this Board as explained below, so any concerns about water vapor emissions are moot at this stage.

G. The Notice That The Air District Provided To Members Of The Public Satisfied All Requirements Of 40 C.F.R. Section 124.10.

CARE also reiterates its claim that the District erred in failing to send a notice of the permitting proceeding to Barbara George. Rather than responding to any of the points the District raised in its Response to their petition, CARE simply restates its point that Ms. George commented in an earlier CEC proceeding, and also cite a new point not raised in its Petition regarding a comment that Ms. George apparently submitted during a District permit proceeding in 2004. CARE Reply Brief at 16-17. But these points do not provide any reason why the Board could grant review based on this issue, as the District explained in its Response at 40-42.

First, there is no requirement that Ms. George had to be mailed a copy of the notice for this permit action or even to be included on the District's mailing list. Under 40 C.F.R. Section 124.10(c)(1)(ix), the requirement is that the District had to "develop" such a list by taking certain steps, including soliciting names from past permit proceedings. The District did so reasonably and good faith, *see* Declaration of Barry Young (Apr. 29, 2010) at ¶ 9, and thereby satisfied the letter and spirit of the Section 124.10's requirement, regardless of the fact that Ms. George's name was apparently not included as a result of that process, out of approximately 1,900 names that were identified, *id.* at ¶ 11.

Moreover, the comment Ms. George submitted that CARE cites in footnote 25 of its Reply Brief shows that Ms. George would most likely not have received the notice anyway even if the District had added her name to its mailing list as a result of her comment. The mailing address listed on her comment – which is what the District would have used on its mailing list if

it had added her based on the comment – is not the same as her current mailing address. *Compare* Comment from B. George cited in CARE Reply Brief at 17 n.25 *with* CARE Petition 10-05, Exh. 7. If the District had added her to its mailing list and mailed her a notice, she would not have been likely to have received it because she had moved. Even Ms. George herself recognizes this situation, as she implies in her declaration that the District should have e-mailed her to inquire about her new address because she had moved (which is categorically not required under Section 124.10). *See* CARE Petition 10-05, Exh. 7. Ms. George would therefore not be able to claim any prejudice here because of the fact that she was not on the District's mailing list based on her earlier comment submission. And of course, as the District explained in its Response at p. 42, she is not in fact claiming any prejudice here, and she has not asked to be able to participate in this appeal or claimed that there are any infirmities in the permit the District issued. For all of these reasons, nothing in CARE's Reply Brief adds anything new to its argument on this issue.

H. The Pacheco Declaration Is No Longer Part Of This Case And Requires No Further Discussion

The CARE reply brief also references and attaches as an exhibit a declaration of Earnest Pacheco. The Board has treated this declaration, which was also filed as a Petition for Review in its own right, as a separate petition and has rejected it for not having been timely filed. *See* Order Dismissing Two Petitions For Review As Untimely (June 9, 2010), at 7. The issues raised in this declaration are therefore no longer part of this appeal, and provide no grounds on which the Board can grant review.

CONCLUSION

In sum, none of the Reply Briefs filed in this matter provide any further information or argument on which this Board could or should grant review in this matter. The District respectfully requests that the Board dismiss all of these Petitions for Review in their entirety.

Dated: June 11, 2010

Respectfully Submitted

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

/s/
By: Alexander G. Crockett Esq.
Assistant Counsel

PROOF OF SERVICE

I, Alexander G. Crockett, declare as follows:

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

Andrew Wilson: andy_psi@sbcglobal.net

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

Executed on July 11, 2010, at San Francisco, California.

/s/
Alexander G. Crockett