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

In re: Russell City Energy Center	)	PSD Appeal No. 10-05 (CARE, Rob Simpson & Robert Sarvey, Petitioners)
PSD Permit No. 15487	)	[Related to PSD Appeals No. 10-01, 10-02, 10-03, 10-04, 10-06, 10-07, 10-08, 10-09, & 10-10.]

RESPONSE TO PETITION FOR REVIEW 10-05

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Pursuant to the April 14 and 20, 2010, Orders of the Environmental Appeals Board, Respondent the Bay Area Air Quality Management District ("District") submits this Response the Petition for Review filed by Petitioners CAlifornians for Renewable Energy, Inc. ("CARE"), Rob Simpson and Robert Sarvey in PSD Appeal No. 10-05. The District respectfully requests that the Board dismiss the Petition in its entirety.

The Petition claims that the District did not provide sufficient public notice regarding this PSD permit and sufficient opportunities for interested members of the public to participate in the permitting process. In particular, the Petition claims that the District did not adequately make the administrative record on which this permit was based available for members of the public to review. But a review of the record shows that the District provided a very high level of public notice regarding the draft permit, going over and above the minimum required by 40 C.F.R. Part 124. The District also made the administrative record publicly available for review, and also made the principal documents available electronically on its website, along with in index of the complete record, which is again over and above the minimum required. These efforts were successful in allowing interested members of the public to review and understand the basis for the District's permitting action and to submit informed and meaningful comments, as evidenced by the many pages of highly detailed comments that the District received. The Petition simply has no viable argument that the District failed to provide adequate public notice and public participation opportunities here.

Beyond these procedural issues, the Petition also asserts a number of other miscellaneous claims, none of which has any merit. The majority of them simply restate objections made in comments on the draft permit without providing any reason why the District's responses to these comments could be flawed or how the District could have erred in its analysis of them. In addition, a number of them concern issues unrelated to any PSD permitting requirements in 40 C.F.R. Section 52.21, and several are so vague that they fail to challenge the District's action in any specific way. These claims should all be dismissed as well, as explained in detail herein.

FACTUAL AND PROCEDURAL BACKGROUND

This Petition for Review seeks to appeal a Prevention of Significant Deterioration ("PSD") Permit issued by the District for the Russell City Energy Center. This PSD Permit was issued in response to a Remand Order issued by the Environmental Appeals Board in PSD Appeal No. 08-01, which remanded an earlier version of the permit to the District to provide additional public notice and comment opportunities. *See* Remand Order, *In re Russell City Energy Center*, 14 E.A.D. __, PSD Appeal No. 08-01 (EAB July 29, 2008) (hereinafter, "Remand Order").

In response to the Remand Order, the District re-issued a draft PSD permit and conducted a great deal of public outreach notifying the public of the draft PSD permit and inviting public comment. To ensure that the District complied with all of the notice requirements established in 40 C.F.R. Section 124.10 as directed in the Remand Order, the District first prepared a mailing list of interested parties who would like to receive notice of proposed PSD permits in the District's jurisdiction. The District developed this mailing list by including all members of the public who asked to be on the list; by notifying the public about the list and the opportunity to be included on it; and by reviewing files from past permit proceedings and including on the list members of the public who had participated in those proceedings.

With respect to notifying the public about the list and the opportunity to be on it, the District published a notice in a total of 19 publications as listed in Paragraph 6 of the Declaration of Barry G. Young, the District's Permit Evaluation Section, submitted herewith (hereinafter, "Young Declaration"). These publications included major newspapers in all of the nine counties within the District's jurisdiction; the two major legal journals in the San Francisco Bay Area, the Daily Journal and the Recorder; and the newsletters of the Sierra Club's regional organizations in the Bay Area. *See* Young Declaration ¶ 6 & Exh. 1. The District also issued a press release to further publicize the notice and the PSD mailing list. *See id.* After publishing these notices and press release, the District received requests from members of the public asking to be added to the list, and it ensured that these interested parties were added. *See id.*, ¶ 7.

With respect to past permit proceedings, the District reviewed its files for major permits and added the names of all members of the public who had participated by submitting written comments or attending public meetings. The District reviewed its files for all Title V permits, all Major New Source Review ("NSR") permits, and all PSD permits it has issued going back to 1999, as well as any additional permits before 1999 that District staff considered significant, and any other persons District staff could think of who might have an interest in PSD permits. *See id.*, ¶ 9. In addition, the District also added names from California Energy Commission ("CEC" or "Energy Commission") mailing lists that the District had in its files. These mailing lists included the CEC's lists from its licensing proceedings for the Russell City Energy Center license amendment in 2007, for the Eastshore Energy Center, for the Gateway Generating Station, and for the Delta Energy Center. *See id*.

The District then included all of these parties on a general PSD mailing list of interested parties, which the District used to notify the public about this permit and will use in future to inform the public whenever the District proposes to issue a PSD permit. This general PSD interested parties mailing list had approximately 1,900 names on it. *See id.* at ¶ 11.2.

The District then re-issued a draft of the PSD Permit for the Russell City Energy Center for public review and comment, along with a Statement of Basis describing the legal and factual basis for the draft PSD Permit. The District mailed written notice of issuance of the draft permit and the Statement of Basis to all of the parties on the general PSD mailing list, and also to the specific entities required pursuant to 40 C.F.R. Section 124.10(c)(1). *See id.*, ¶¶ 10, 11. The District's notice was printed in both English and Spanish. *See id.*, Exh. 2. The District also published notice in three newspapers, the Hayward Daily Journal, which is the main newspaper of the City of Hayward where the project will be located; the Oakland Tribune, which is the main newspaper in Alameda County as a whole; and El Mansajero, which is the main Spanish-language newspaper in the Bay Area. *See id.*, ¶ 11.

The District initially published its draft PSD permit, along with a Statement of Basis explaining the District's basis for the draft permit, on December 8, 2008. The District provided a

comment period of 60 days, accepting written comments until February 6, 2009. The District also held a public hearing during this time period to receive verbal comment, on January 21, 2009 at Hayward City Hall. *See id.*, ¶ 13-15.

The District also provided for public review copies of all of the documentation it relied on in preparing the draft PSD Permit and Statement of Basis. *See* Young Declaration, ¶ 12. The District collected all of these documents and made them available for members of the public to review and make copies of, and several interested members of the public did so. *See id*.

The District then reviewed and considered the public comments it received, and based on the public comments (and other new information) it revised and re-issued the draft permit for a further round of public review and comment, along with an Additional Statement of Basis. *See id.*, ¶ 16. In this revised draft, the District strengthened some of the proposed permit conditions to make them more environmentally protective, as requested by some of the comments. *See generally* Additional Statement of Basis, Exh. 4 to Declaration of Alexander G. Crockett, Esq., in support of April 23, 2010, Responses to Petitions For Review 10-02, 10-03, & 10-04 (hereinafter, "Crockett 4/23/10 Declaration"). The District also undertook an additional analysis of $PM_{2.5}$ issues, based on the fact that EPA had revoked its "surrogate policy" for addressing $PM_{2.5}$. *See generally id.*, at 84-89. The District also responded to some comments raised during the initial comment period and provided additional information regarding the draft permit and the basis for it.

The District used the same public notice and outreach procedures as it had for the initial draft PSD Permit and Statement of Basis in December of 2008, which was to mail notice of the revised draft PSD Permit and Additional Statement of Basis to the parties on its general PSD interested parties mailing list and to all of the entities required pursuant to 40 C.F.R. Section 124.10(c), as well as publishing the notice in local newspapers in English and Spanish, and to publish electronic copies of the proposed permit conditions and statement of basis supporting them on the District's website. *See* Young Declaration, ¶ 17 & Exh. 3.

The District also again made all of the documentation on which the draft PSD Permit and Additional Statement of Basis was based available for public review as it had done during the initial comment period. *See id.*, ¶ 18. The District also organized all of the documents into subject matter categories, placed all of the documents into hanging file folders in file crates designed to accommodate the hanging folders to make them easily accessible, and prepared an index of all of the documents in this administrative record to help make the documentation more accessible to interested members of the public. *See id.*, ¶ 18 & Exh. 4. The District published an electronic version of this index on its website. *See id.*, ¶ 18.

The District issued the revised draft PSD Permit and Additional Statement of Basis, on August 3, 2009, and provided a comment period of 44 days, accepting written comments until September 16, 2009. The District also held a second public hearing at Hayward City Hall on September 2, 2009. *See id.*, ¶ 20.

The District then reviewed and considered all of the comments received during this second comment period as well, and issued the Final PSD Permit that is the subject of this Petition for Review on February 3, 2010, *see* Final PSD Permit, Crockett 4/23/10 Declaration, Exh. 1, at p. 2., along with comprehensive responses to all public comments it received, *see* Responses to Public Comments, Crockett 4/23/10 Declaration. Exh. 3. At the time of issuance, the District established an effective date of the permit of March 22, 2010, pursuant to 40 C.F.R. Section 124.15(b)(1). *See* Final PSD Permit, Crockett 4/23/10 Declaration Exh. 1, at p. 2. The District mailed notice of final permit issuance to all members of the public who had submitted comments. *See* Young Decl., ¶ 23 & Exh. 5. The District also published notice of issuance of the final permit in the newspaper, even though that was not technically required by anything in 40 C.F.R. Part 124. *See id.*, ¶ 24.

Petitioners then filed the original of their Petition for Review with the Board on March 30, 2010 (with an earlier version submitted as a Microsoft word document sent to the Clerk by email). *See* Original – Petition for Review (HARD COPY ONLY), Docket Entry No. 18 (submitted by Michael E. Boyd).

In addition, during this permitting process the District also received two requests from one of the Petitioners here, Mr. Rob Simpson, under the California Public Records Act. The first request was made on September 11, 2008, and it requested copies of "Documents subsequent to EPA remand" regarding the facility. *See* Public Records Act Request, Sept. 11. 2008, attached as Exh. 1 to Declaration of Alexander G. Crockett in support of Response to Petition No. 10-04, submitted concurrently herewith (hereinafter, "Crockett 4/29/10 Declaration"). The District provided an initial response one week later, on September 18, 2008, when it made available the permit engineer's working file – which were the most relevant and readily available documents – for Mr. Simpson to review. *See* Letter from R. Henderson to R. Simpson, Jan. 7, 2009, Exhibit 2 to Crockett 4/29/10 Declaration, at p. 1. The District then searched all of its files, paper records, and electronic records, including email correspondence and other electronic files such as word processing documents and PDF documents stored on the District's central computer servers as well as on staff's individual computers, to locate all documents within the District's possession that could be responsive to Mr. Simpson's request. The District then made the full set of responsive records – which constituted several boxes of documents – available for Mr. Simpson to review, on December 18, 2008. *See id.* In addition, the District also mailed photocopies of the documents to Mr. Simpson when he requested them. *See id.*

Mr. Simpson's second Public Records Act request was broader and sought "all public documents relating to RCEC from 2008 and [2009]." Public Records Act Request, Jan. 15, 2009, Attached to Letter from A. Crockett to R. Simpson, June 16, 2009, Exhibit 3 to Crockett 4/29/10 Declaration. (Mr. Simpson had asserted that he wanted to see additional records previously, but he only clarified his request on January 15, 2009.) The District therefore began the process of compiling and reviewing all documents related to the facility back to January 1, 2008, as it had done with the requestor's first request of September 11, 2009. The District completed these tasks and made the requested documents available for Mr. Simpson's review by June 16, 2009. *See id*. The District has therefore fully responded to Mr. Simpson's California Public Records Act requests regarding this facility.

STANDARD OF REVIEW

Petitions for Review of PSD permits are adjudicated under 40 C.F.R. Section 124.19(a). Pursuant to Section 124.19(a), the Board may grant review only if the permitting authority's decision to issue the permit was based on a clearly erroneous finding of fact or conclusion of law, or if it involves an important matter of policy or exercise of discretion that warrants review. *See In re Zion Energy, LLC,* 9 E.A.D. 701, 705 (EAB 2001); *In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121, 126-27 (EAB 1999). The Board's power of review should be only sparingly exercised, and most permit conditions should be finally determined at the permit issuer's level, absent exceptional circumstances. *See In re Kawaihae Cogeneration Project,* 7 E.A.D. 107, 114 (EAB 1997).

The burden of demonstrating that review is warranted rests with the petitioner challenging the permit decision. *Kawaihae Cogeneration,* 7 E.A.D. at 114; *In re EcoElectrica L.P.,* 7 E.A.D. 56, 61 (EAB 1997). In order to establish that review of a permit is warranted, section 124.19(a) requires a petitioner both to state the objections to the permit that are being raised and explain why the agency's previous response to those objections – that is, the agency's basis for the decision – is clearly erroneous or otherwise warrants review. *See Kawaihae Cogeneration,* 7 E.A.D. at 114; *see also In re P.R. Elec. Power Auth.,* 6 E.A.D. 253, 255 (EAB 1995); *In re Genesee Power Station L.P.,* 4 E.A.D. 832, 866-67 (EAB 1993). Petitioners must explain how the agency's PSD analysis constituted clear error or an abuse of discretion, and it is not enough simply to repeat objections made during the comment period. *See 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 (collecting cases).

ARGUMENT

For the following reasons, none of the claims that Petitioners assert in this Petition for Review has any merit, and the Board should therefore dismiss the Petition in its entirety.

I. The Board Should Summarily Dismiss The Petition Unless Its Untimeliness Resulted From Problems With The CDX Electronic Filing System

As the District explained it its April 8, 2010, Response Requesting Summary Dismissal, this Petition was not timely filed by the March 22, 2010, appeal deadline in this case, and should therefore be summarily dismissed. The Board acknowledged this timeliness problem in its April 14, 2010, Order Denying Request For Summary Dismissal Of CARE Petition And Requesting Response On The Merits (at p. 2), but stated that Petitioners have asserted that they experienced filing problems with the CDX electronic filing portal on the evening of March 22, which the Board is investigating. Should the Board determine that the late filing was "solely attributable to a CDX malfunction that may result in the inability to complete an electronic transaction" in accordance with the Board's policy set forth in its electronic filing instructions (*see* http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/Electronic+Submission?OpenDocument), the District would have no objection to the Board's consideration of this Petition for Review on the merits. Should the Board determine that the late filing was not caused by a CDX malfunction, the Board should dismiss the Petition as untimely for the reasons stated in the District's Response Requesting Summary Dismissal.

II. The District Provided Ample Opportunities for Meaningful Public Participation

Petitioners' first substantive claim is that the District violated the public participation requirements of 40 C.F.R. Part 124 in issuing this permit. But a review of the record shows that the District not only complied with all of the requirements of Part 124, it went over and above and what is required to ensure that the public was fully engaged in this proceeding. The Board should therefore dismiss these claims. The District responds to each specific point Petitioners raise in turn below.

A. The District Made All Of The Supporting Administrative Record Documentation On Which The Permit Analysis Was Based Available For Public Review

The main thrust of Petitioners' argument in this regard is an assertion that the District did not provide an "accessible docket" for the proceeding. *See* Petition 10-05 at 4-5. This claim is completely false. The District made all of the administrative record documents on which it based this permit available for public review during the two comment periods, along with a detailed analysis and explanation of how the permit complies with applicable regulatory requirements in the Statement of Basis and Additional Statement of Basis. These efforts provided interested members of the public with the opportunity to review the District's draft permit and permit analysis, and to provide meaningful comments in any area where they believed that the District's analysis was incorrect or could be improved.

The success of the District in helping interested members of the public become educated about the basis for this permit is demonstrated here by the sheer volume of well-informed and well-researched comments the District received. To take one example, the District received a 23-page letter going into great detail about the District's Statement of Basis, which it noted was based on "the document repository and information that the District provided through its staff." *See* CAP 2/5/09 Comment Letter, Exh. 3 to Petition for Review 10-03 (Citizens Against Pollution), at p. 1. To take another example, a commenter used the AERMOD modeling files the District made available for public review and conducted its own computer modeling analysis as a way to evaluate whether the District's approach was justified. *See* CLP 9/16/09 Comment Letter, Exh. 9 to Crockett 4/23/10 Declaration. Even Petitioners concede the extent of the well-informed public comment on this permit, noting that after the Remand Order and the District's extensive public outreach, "[s]ubsequent iterations of the permit received extensive comment from agencies, organizations and individuals." Petition 10-05 at 13. This situation would not have come about if the District was failing to make the permitting record accessible to the public.

The Petition does note that not all of the District's supporting documentation was made available electronically on the District's website. Petition 10-05 at 4, 14. But that is not required

by anything in 40 C.F.R. Part 124 or 40 C.F.R. Section 52.21, and EPA has not required it of the District in its PSD Delegation Agreement. *See* PSD Delegation Agreement, Exh. 16 to Crockett 4/23/10 Declaration. The Environmental Appeals Board has also held that it is not required. *See In re Dominion Energy Brayton Point, L.L.C.*, 12 E.A.D. 490, 530-31 (EAB 2006), *aff'd sub. nom, Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006). In that case, the petitioner requested access to the administrative record, and the permitting agency made the record available and provided a type-written index. The agency did not immediately provide a copy of the index electronically, however, and did not provide the electronic copy of the index until several weeks later. The petitioner claimed that the lack of an electronic index violated the administrative record and public participation requirements of 40 C.F.R. Part 124. The Board rejected this argument, noting that "the Petitioner was provided with a typed index and there is no requirement that an electronic index be prepared". *Id.* at 531. Clearly, if there is no requirement to make even an index of the record available electronically, there can be no requirement to make the underlying record documents themselves available electronically.

Moreover, the District did make principal documents such as the Statement of Basis and Additional Statement of Basis available electronically, even though that is not required by Part 124. These documents cited much of the important underlying documentation in their footnotes, and allowed members of the public to identify documents related to the issues of interest to them and request them from District staff without having to visit District headquarters. *See* Statement of Basis and Additional Statement of Basis, *passim*. The District also provided an index of all of the documents in its permitting record on its website (as Petitioners note at pp. 4-5), which further allowed interested members of the public to identify and request specific documents of interest to them without having to visit District headquarters. *See* Young Decl., ¶ 18 & Exh. 4.[1]

[1] In this regard, the Petition is wrong that "with no docket posted there is no way for the public to know what to ask for." Petition 10-05 at 14. With an index posted on the website, members of the public could see exactly what was in the record and ask for documents they were interested in.

The District also published web addresses for the documents cited in the Statement of Basis and Additional Statement of Basis, where such documents were available electronically on third-party websites. *See* Statement of Basis and Additional Statement of Basis, *passim*. These efforts allowed the District to provide most of the benefits of posting all of the record documents on its website – that is, ease of public access to documents electronically without having to make a visit to District headquarter in person – without the burden of having to post every document on the website, which would have been considerable given the sheer volume of the record. In this manner, the District went well beyond what the Board found satisfactory in *Dominion Energy*, and the Board should therefore reject Petitioners' argument here as it did in that case.

Finally, the Petition also claims that the District's posting of the index of the record on its website was somehow constituted "the reconstruction of a record after the fact". Petition 10-05 at 14. It is not clear what this assertion is intended to mean. Under 40 C.F.R. Section 124.18(c), the record is not considered complete until the date of final permit issuance, and so an index provided during the public comment period is not "after the fact". Moreover, the important time period for purposes of public review and participation is during the comment periods themselves, where the agency has published its statement of basis for the permit and is asking the public to review and comment on it. In this respect, the District's record documents were all made publicly available during this time, and not "reconstructed" in any way. There is therefore nothing in this assertion that alleges any sort of error on the District's part.

B. The District Also Duly Responded To Petitioner Rob Simpson's Public Records Act Requests; But Public Records Act Compliance Is Not A Proper Issue For A PSD Permit Review In Any Event

Petitioners also allege that the District failed to respond to Mr. Simpson's requests under the California Public Records Act to review documents related to the Russell City facility, and that this alleged failure impeded his ability to participate in the proceeding and comment on the draft permit. *See* Petition 10-05 at 4, 14-15. But again, Petitioners' assertion is incorrect. Mr. Simpson made two requests for public records related to this facility, and the District responded

to both of them and made the requested records available. Furthermore, the District's responses to Public Records Act requests are not relevant to the PSD permitting process in any event, as explained below. What is relevant is the requirement that the District make all of the administrative record documents available for public review so that the public can be informed about the basis of the permit, which the District did. Where a member of the public requests additional documents beyond the administrative record, even a failure by the agency to provide them – which is not what happened in this case – does not invalidate the permit. For all of these reasons, Petitioners' claims with respect to the California Public Records Act should be rejected.

The District recounted Mr. Simpson's history of public records act requests in the Responses to Comments at pp. 211-213. As explained there, Mr. Simpson's first request was submitted on September 11, 2008, and it requested "Documents subsequent to EPA Remand". *See* Public Records Act Request, Sept. 11. 2008, Exh. 1 to Crockett 4/29/10 Declaration. The District began working on responding to that request, and provided the documents from the permit engineer's working file – which were the most relevant and readily available documents – one week later, on September 18, 2008. See Letter from R. Henderson to R. Simpson, Jan. 7, 2009, Exh. 2 to Crockett 4/29/10 Declaration, at 1. To provide a complete response, the District then conducted a comprehensive records search of all records created since the EAB Remand Order on July 29, 2008, that could be located anywhere within the District's possession. This included searching paper records as well as electronic records, such as email correspondence and other electronic files like word processing documents and PDF documents stored on the District's central computer servers and on staff's individual computers. This search included paper and electronic files from the large number of District staff who have worked on or had contact with this project from multiple District divisions. Once all of the public records since the EAB Remand Order had been collected, they were reviewed by legal counsel to remove any documents not subject to public disclosure, such as privileged attorney-client communications. When all of these tasks were completed, the District made the full set of responsive records – which constituted several boxes of records – available for Mr. Simpson to review, on December

18, 2008. *See id.* In addition, the District mailed photocopies of the documents to Mr. Simpson when he requested them. *See id.*

During this time period, Mr. Simpson also engaged in a large volume of email correspondence with various District staff, and in some of those emails he suggested that he wanted to review additional documents beyond the documents "subsequent to EPA Remand" that he had originally requested. *See, e.g.*, email chain included in Petition 10-05, Exh. 1. After some further communications to ascertain exactly what universe of records he was requesting, on January 15, 2009, Mr. Simpson clarified that he was requesting all documents anywhere within the District's possession related to the Russell City facility "from 2008 and this year [2009]". *See* Public Records Act request, attached to Letter from A. Crockett to R. Simpson, June 16, 2009, Exh. 3 to Crockett 4/29/10 Declaration. The District therefore began the process of compiling and reviewing all documents related to the facility back to January 1, 2008, as it had done with the requestor's first request of September 11, 2009. The District completed these tasks and made the requested documents available for Mr. Simpson's review by June 16, 2009. *See* Letter from A. Crockett to R. Simpson, June 16, 2009, Crockett 4/29/10 Declaration Exh. 3. The District has therefore fully responded to Mr. Simpson's California Public Records Act requests regarding this facility.

Moreover, during this time period, the Air District made available for public review and inspection all of the administrative record documents on which the December 2008 draft permit and Statement of Basis were based, as explained above. The District had notified the public of the availability of these documents in its public notice for the draft permit, *see* Young Declaration ¶ 11 & Exh. 2, as well as in the Statement of Basis, *see* Additional Statement of Basis at 8. The District also explicitly reminded Mr. Simpson that these documents were available for his review in communications with him regarding his public records requests, and suggested that he should review these documents to learn more about the District's basis for the draft permit. *See* Email from A. Crockett to R. Simpson, Dec. 31, 2008, Petition 10-05, Exh. 1, at 1-2. These documents were clearly available for public inspection, as described earlier.

This record shows that Mr. Simpson had full access to the administrative record documents for this permit during the permitting process, contrary to what Petitioners now claim. During the first comment period in December 2008 – February 2009, he had access to the administrative record documents that the District made available for public review, for which the District did not even require a Public Records Act request. He also had been provided in September of 2008 with the records in the permit engineer's working file, which contained much of the documentation on which the draft permit was subsequently based. The only records that he had not received during this comment period were the additional documents responsive to his very broad Public Records Act requests for *all* documents in any way related to the facility located anywhere within the Air District's possession. These included documents such as communications regarding tangential issues, housekeeping matters such as arranging meetings to discuss the project, *etc.*, as well as sensitive privileged documents such as attorney-client communications. Mr. Simpson could not have been prejudiced in any way by not having access to these documents during the comment period, as they were either not relevant to any PSD issues or were not documents to which he was entitled to review. Furthermore, the District did in fact respond to both of Mr. Simpson's requests by June 16, 2009, and made available all of the disclosable documentation he requested. He therefore had access to all of this additional documentation as well in advance of the second comment period in August – September of 2009. The District invited the public to comment during this second comment period based on any information that was not readily available during the first comment period, *see* Additional Statement of Basis at p. 3, and so if there was anything relevant in these documents Mr. Simpson had full opportunity to comment on it during the second comment period. Based on this record, Mr. Simpson cannot claim that he was denied access to any documentation that in any way could have prejudiced his ability to submit informed comments on this permit.

The Petition's claims based on the District's responses to Mr. Simpson's Public Records Act requests therefore fail on many levels. As a threshold matter, the claims fail because the District addressed this issue in response to comments, *see* Responses to Public Comments at

211-13, and the Petition has not provided any explanation as to how the District's response was incorrect. A Petition that simply re-states comments without explaining how the permitting agency erred in responding must be dismissed. *See 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 (collecting cases). In particular, the Petition does not cite any documents that it claims should have been disclosed under the Public Records Act but were not, nor any prejudice to Mr. Simpson that could have resulted.

Furthermore, as a factual matter, the Petition is simply wrong that the District failed to respond to Mr. Simpson's requests, as noted above. Mr. Simpson had access to the requested documents during the second comment period with adequate opportunity to comment based on them. And even if the District had not provided the second comment period, Petitioners still would have no grounds for relief because the District was required to provide only the administrative record on which the draft permit was based, which it did. The District was not required to make available any of the additional documentation that Mr. Simpson had requested in his very broad requests for any and all documentation that was in any way related to the project. These documents included non-substantive matters that are not relevant to any substantive issues the District considered as part of its permitting analysis and are therefore not included in the administrative record, as well as privileged documents that the District is not required to disclose under any circumstances. The District made all of the record documents available during the first comment period, and cannot be faulted for allegedly trying to circumvent public participation based on how it responded with respect to these additional non-record documents. *See Dominion Energy Brayton Point*, 12 E.A.D. at 531 (rejecting arguments that the administrative record was deficient where it excluded "documents that the Region did not include in the record because it believed them to be privileged or irrelevant").

Finally, complaints about an agency's compliance with a California Public Records Act request – of a Freedom of Information Act Request in the case of EPA-issue permits – are an issue to be reviewed elsewhere, and not in an appeal to the Environmental Appeals Board under

40 C.F.R. Section 124.19. The Board reviews substantive issues regarding whether permits have been properly issued, not whether the permitting agency has complied with other legal obligations such as providing access to public records. *See In re City of Fort Worth, Texas*, 6 E.A.D. 392, 400 n.7 (EAB 1996) ("The authority for resolving this dispute [concerning FOIA requests] rests with the Agency's General Counsel . . . and not with this Board.") (citation omitted). The Board must of course ensure that the agency has provided the public with access to the record on which it made its decision, as the District did here. *See Dominion Energy Brayton Point*, *supra*, 12 E.A.D. at 516 (citing cases). But where a member of the public asks for additional documents that go beyond the permitting record on which the agency bases its decision, the agency's level of compliance with that request is not a proper subject for EAB review under Section 124.19.

C. The District Made The Permit Application Available For Public Review

Petitioners also claim that a copy of the permit application for this proceeding was not included in the public notice that the District issued for the draft permit in December of 2008, and that it was not listed on the index of record documents that the District published with the Additional Statement of Basis in August of 2009. *See* Petition 10-05 at 4-5 and nn.8-10. These claims do not allege any violations of any procedural requirements of 40 C.F.R. Section 52.21 or Part 124, they just allege that the District did not include the application in the public notice or on the index.

With respect to the public notice the District provided in accordance with Section 124.10, the District was not required to include a copy of the application in the public notice. Section 124.10(d) provides an extensive list of what the notice must contain, and a copy the permit application is not one of the pieces of information that is required. Moreover, such a requirement would not make any sense, as it would be overly burdensome and of little value for the District to have mailed an actual copy of the complete application document to everyone on its mailing lists and to have published a copy of the application in the newspaper.

With respect to including the application on the index of record documents that the District made available during the second public comment period, Petitioners are simply wrong on this issue. A review of the index shows that the application is the very first document listed, in a section entitled "Permit Application And Related Materials". *See* Young Decl., Exh. 4 at 2. The document was available in the administrative record collection at District headquarters for anyone to review, as several interested parties did.[2]

There is nothing in the Petition on which to grant review with respect to the District's handling of the permit application in this case.[3]

D. The District Properly Clarified The Permitting History For This Project In Its Additional Statement of Basis and Responses to Public Comments.

Petitioners also note the fact that the District did not in fact issue a federal PSD Permit for this project in 2002, when the project was initially licensed. Although the project was licensed by the CEC at the time and the District issued an Authority to Construct (the District's Non-Attainment NSR Permit issued under the District's SIP-Approved Regulation 2, Rule 2), and the District issued a proposed PSD permit, the District never actually issued the final PSD Permit because EPA Region 9 did not complete its Endangered Species Act consultation. Petitioners note that when the District issued its initial draft permit, it incorrectly stated that the permit was an amendment to a permit issued in 2002, when in fact there had not been a permit issued then. *See* Petition 10-05 at 5-6.

But the District clearly corrected this misunderstanding, and it did not affect the final permit or any of the issues addressed in the permitting analyses. The District explained the situation at the beginning of the Additional Statement of Basis (*see* pp. 5-6), and provided

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[2] Note also that the asterisk next to the document denotes that it was available during the first comment period as well.

[3] Mr. Simpson alleges that he asked to see the application at District headquarters but it was not produced. The District does not have any record of such a request. As explained in the Young Declaration, the District made a practice of providing all record documents to any member of the public who wanted to see them, including the permit application.

complete permitting analyses for all aspects of the project. At that point, the record was clear that this permit was being treated as a new permit, not as an amendment, and there is no way that any party could have misunderstood how the District was proceeding. Moreover, if there were any members of the public who had initially misunderstood this permitting action as an amendment and not a new permit based on the District's prior statements, the District specifically invited such person to provide any comments they had not provided earlier because of the misunderstanding. *See id*. at 6. Thus there could not have been any prejudice to public participation from the earlier misstatement.

The District also addressed this issue in the Responses to Public Comments and explained how it had corrected the record and invited further comments. *See* Responses to Public Comments at 213-14. Petitioners fail to provide any explanation of how this response may have been inadequate, and their claim should therefore be dismissed on that ground alone. *See Prairie State*, *supra*, slip. op. at 145. Furthermore, their claim should be dismissed on the merits because there is no way that anyone could have been misled by the District's earlier misstatement after it clarified the record in the Additional Statement of Basis. Addressing erroneous factual information that a permitting agency may have in this manner is exactly what the notice-and-comment process is for. Petitioners cannot fault the District for having made an earlier erroneous statement, where as here the District has corrected the record and issued the permit based on the correct information. The reality is that the District issued this permit as a new permit fully supported by a complete PSD permitting analysis, and will full notice to the public that it was proceeding on that basis. Petitioners' assertions regarding the District's initial misstatement cannot alter that reality.

E. 40 C.F.R. Section 51.166 Does Not Govern PSD Permitting Under 40 C.F.R. Section 52.21; And In Any Event The District Issued The Permit Within One Year Of The Application.

Petitioner also claims that the District failed to comply with 40 C.F.R. Section 51.166(2). *See* Petition 10-05 at 5. 40 C.F.R. Section 51.166 requires (*inter alia*) that State Implementation

Plans that incorporate PSD permitting programs include provisions requiring the state to make a final determination on PSD Permit applications within one year after receipt of a complete application.

At the outset, this claim fails because the District addressed this issue in response to comments, *see* Responses to Public Comments at 196-98, and the Petition has not provided any explanation as to how the District's response could be wrong. A Petition that simply re-states comments without explaining how the permitting agency erred in responding must be dismissed. *See Prairie State*, *supra*, slip. op. at 145 (collecting cases) ("It is not sufficient simply to repeat objections made during the comment period; instead, a petitioner must demonstrate why the permit issuer's response to those objections (the permit issuer's basis for its decision) is clearly erroneous or otherwise warrants review.") (citations and internal quotation marks omitted).

But the claim also fails on the merits because 40 C.F.R. Section 51.166(2) is not applicable to this permit. 40 C.F.R. Section 51.166 applies to states when they submit PSD regulatory programs for EPA approval as part of their State Implementation Plan ("SIP), which the District has not done here. Section 51.166(2) requires that SIP-approved PSD permitting programs include provisions requiring the state to make a final determination on PSD Permit applications within one year after receipt of a complete application. It does not apply to states issuing Federal PSD Programs on EPA's behalf under delegated federal authority. PSD permits issued under delegation of authority from EPA are subject to 40 C.F.R. Section 52.21, not 40 C.F.R. Section 51.166.

As the District noted in the Responses to Public Comments, its Non-Attainment NSR regulations governing District Authorities to Construct do incorporate by reference to the provisions of 40 C.F.R. section 51.166. But to the extent that this makes 40 C.F.R. section 51.166 applicable to the District's Non-Attainment NSR permitting program, the District's program does fully comply with the requirements cited in the comments regarding making permit decisions within one year. *See* District Regulation 2-2-407 & 2-3-405, attached as Exhibit 17 to the Crockett 4/23/09 Declaration.

Furthermore, to the extent that there was a one-year time clock for the Air District to make a final determination on the permit application here, the District did make a final determination here within one year after receipt of a complete application, as the District also explained in its Responses to Public Comments. The application was originally received by the District on November 28, 2006 (and was not accepted as complete until some time later), *see* Young Decl. at ¶ 2, and the District took final action to issue the Federal PSD permit on November 1, 2007, *see* Remand Order, slip op. at 4. The Environmental Appeals Board subsequently remanded the permit to the District to reconsider its determination, which is why the permit is still before the District for decision, but that does not change the fact that the District did in fact take final action to issue the permit within one year after the application was submitted. And in the Remand Order the EAB instructed the District to undertake further proceedings to reconsider the permit determination it had made for this facility. The EAB did not instruct the District to reject the application because more than one year had past since the application was submitted.

Finally, the District also notes that even if this one-year requirement was applicable here and the Air District had failed to take action within a year, the remedy for any such delay would be to require the agency to make its determination as soon as possible. It would have no impact on the substance of the determination or on any conditions of the permit once the District issues the final permit.

For all of these reasons, the Petition does not provide any grounds for granting review with respect to 40 C.F.R. Section 51.166(2).

F. Petitioners Are Wrong That The District Has Contended That The Remand Order Resolved Substantive Issues

Finally, the District also objects to Petitioners' contention that the District has stated that the EAB affirmatively denied Mr. Simpson's substantive claims in the Remand Order. *See* Petition 10-05 at 3. The District does not read the Remand Order to have ruled on any substantive claims, and the District is not aware of any instance in which any District

representative has ever said so. The District also notes that the Petition does not cite any such instance, and instead cites testimony by PG&E. *See id*. at 3 n.5.[4] The District therefore concludes that Petitioners have no basis to make such an assertion.

III. Claims Regarding The Determination Of Compliance The District Issued In Accordance With State Law Are Not Properly Raised In An Appeal Under 40 C.F.R. 124.19; And They Have No Merit In Any Event.

Petitioners also devote a four-page section of their Petition to a discussion of the integrated state/federal permitting process that the District implements for major sources in the San Francisco Bay Area. *See* Petition 10-05 at 6-9.[5] The discussion appears to argue that because the District conducts its analysis of state-law permit requirements and its analysis of federal PSD permit requirements in an integrated proceeding, the EAB's Remand Order remanding the PSD permit must also have invalidated the Determination of Compliance that the District issued for the facility pursuant to state law. *Id.*

The District addressed this issue in the Responses to Comments, at pp. 216-17. As the District explained there, the licensing requirements that this facility is subject to under the California Warren-Alquist Act and the District's state-law regulatory requirements are legally separate from the federal PSD requirements that it is subject to. Similarly, the license the facility received from the Energy Commission and the Authority to Construct it received from the District are separate legal entities from the federal PSD permit. As the District explained, the state-law permitting of the facility conducted through the CEC in 2007 has been completed, and all appeal opportunities have been exhausted. That licensing proceeding is therefore final, and the EAB's Remand Order has not affected that fact. The District also explained that the EAB's

[4] Note also that the cited testimony of PG&E was not included with the Petition, and the District was not able to access the document at the website address listed in footnote 5, which appears to be an index of documents filed in a California Public Utilities Commission proceeding, but does not provide a link to the September 10, 2008 testimony that the Petition references.

[5] In addition, on page 19, the Petition quotes a sentence from the District's response to comments on the integrated state/federal permitting process, and then provides the following sentence fragment: "both notices to see what had changed". It is not clear what this sentence fragment was intended to represent.

remand could not legally have had any effect on the validity of the Energy Commission license, or the District's Determination of Compliance that was issued for use in the licensing process, as the EAB has no jurisdiction to rule on state-law issues. As the District pointed out, the fact that the federal PSD Permit was remanded by the EAB could not have invalidated the state-law licensing for the same reasons that the California Supreme Court's upholding of the CEC's licensing decisions could not have validated the Federal PSD permit.[6]

The Petition provides no explanation as to how the District's response could be wrong, and Petitioners' claims regarding the Determination of Compliance therefore fail on procedural grounds as explained in *Prairie State*, *supra*, slip op. at 124. The claims also fail on the merits, because the EAB has made clear in the Remand Order that state-law requirements such as the Determination of Compliance the District issued under District Regulations 2-2 and 2-3 are not an issue that can be raised in a PSD permit appeal. *See* Remand Order, slip. op. at 40 (citing *In re Sutter Power Plant*, 8 E.A.D. 680, 690 (EAB 1999). As the Board held there, issues that "emanate from State of California requirements, not the PSD regulations" are outside the Board's jurisdiction, even where they were adopted in an integrated proceeding for which the PSD portion has been appealed to the EAB. The Board should therefore dismiss these claims for the reasons it expressed during the previous appeal.

IV. Greenhouse Gases Are Not Regulated Under The Clean Air Act At This Time; And Even If They Were, The District Properly Considered Greenhouse Gas Issues and Imposed Greenhouse Gas Permit limits.

The Petition also claims that the District erred in not considering greenhouse gases as part of its BACT analysis. At the outset, this claim must fail because the District addressed comments on this issue extensively over nearly 50 pages in the Responses to Public Comments

[6] In another area of the Petition, Petitioners mis-quote the District's public notice regarding the December 2008 draft permit. They claim in the block quote on page 5 of the Petition that the notice said "*District claims* only the federal PSD Permit has been remanded, and only the federal PSD permit is being re-noticed." Petition 10-05 at 5 (emphasis added). The italicized words were added by Petitioners; the actual notice said "Only the federal PSD Permit has been remanded, and only the federal PSD permit is being re-noticed." *See* Young Decl., Exh. 2.

in which it explained in detail (i) that greenhouse gases are not subject to regulation under the Clean Air Act at this time; and (ii) that even if they were, the District did in fact consider greenhouse gases in the BACT analysis and imposed stringent greenhouse gas emissions limits in the permit. *See* Responses to Public Comments at 18-65. Although the Petition quotes parts of this discussion, the Petition does not explain any way in which the District could have erred in its response. It is not sufficient merely to repeat objections in this manner without explaining how the District's response could be flawed. *See Prairie State*, *supra*, slip. op. at 145.

This claim also fails on its merits because it is indisputable that greenhouse gases are not subject to regulation under the Clean Air Act at this time. EPA has clearly stated this position in the documents cited in the Responses to Public Comments and again most recently in its reconsideration of the December 18, 2008, Johnson Memorandum. *See* Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs; Final Rule, 75 Fed. Reg. 17,004 (April 2, 2010). As EPA explained, "GHGs would not be considered 'subject to regulation' (and no source would be subject to PSD permitting requirements for GHGs) earlier than January 2, 2011." *Id.* at 17019. Since this source is not subject to permitting requirements for greenhouse gases, Petitioners' claim that the District failed to consider greenhouse gases in issuing the permit has no legal basis.[7]

But beyond this legal defect, as a matter of fact the District did consider greenhouse gases in the BACT analysis and imposed stringent greenhouse gas emissions. Petitioners have not cited any area in which the District's BACT determination or BACT limits for greenhouse gases could be found to be incorrect. Thus, even if greenhouse gases were subject to regulation at this time, Petitioners claim would still fail as a factual matter. For all of these reasons, the Board

[7] The Petition also implies that even though consideration of greenhouse gases was not legally required, the Board should grant review on this issue as an important policy consideration. *See* Petition 10-05 at 12. Whether and when greenhouse gases should be regulated certainly is an important policy consideration, but it is one that the EPA Administrator is already addressing. The Board should defer to her considered policy determination that new sources should not be subject to greenhouse gas regulation at this time.

should reject Petitioners' claims regarding greenhouse gases, including both their general claims that the District failed to consider greenhouse gases and their two more specific claims addressed below.

A. The District Properly Considered Comments Regarding Biosequestration of CO_2.

On the subject of greenhouse gases, the Petition also claims that the District did not properly consider bio-sequestration of carbon dioxide as a technology to reduce greenhouse gas emissions. *See* Petition 10-05 at 17-18. Since greenhouse gases are not subject to regulation under the Clean Air Act and not covered by PSD permitting, this claim fails to state a legal basis for review under 40 C.F.R. Section 124.19 for the same reasons that Petitioners' general claims regarding greenhouse gases fail as noted above.

But even so, the District did consider suggestions raised in comments that carbon emissions could be sequestered in nearby algae-producing ponds (as well as subterraneously in geologic formations, an issue raised in comments but not included in the Petition). *See* Responses to Public Comments at 21-24 (response to Comment III.B.1. – Feasible Control Technologies for Greenhouse Gas Emissions). Although there were no specific technologies cited in the comments, the District investigated the issue and found that research has begun on using "algae bioreactors". But this technology is still in its infancy and is not feasible yet to use as an add-on control technology for a power plant, as the District explained. *See id.* at 24. Petitioners do not provide any reason to question that conclusion, and claim simply that there are extensive salt ponds near the site that could be used for algal sequestration. But the mere existence of available ponds does not mean that algal sequestration is a feasible control technology. Petitioners also note that photosynthesis is not a new technology. Petitioners are correct in this regard because photosynthesis is not a technology at all, it is a biological process. But they are wrong that technology currently exists to use this biological process to sequester carbon dioxide from power plant on a commercial scale. The Petition also cites a web link to an EPA website listing information about a grant awarded for research into a "novel" method for

incorporating algal sequestration into power plant design. *See* Petition 10-05 at 18 n.33. But the award of a research grant to investigate "novel" technologies does not demonstrate that the technology is feasible at this time. To the contrary, this point supports the District's assessment of the state of the technology, not Petitioners'. The Petition therefore provides no substance to support its argument that the District did not adequately consider this technology, even if such a consideration were required here for a PSD permit (which it was not).[8]

B. The District Properly Considered Comments Requesting That The District Require The Applicant To Build A Non-Fossil-Fuel Fired Facility.

The Petition also claims that the District erred in evaluating alternatives that would generate power without using fossil fuels, such as solar, wind or biomass. *See* Petition 10-05 at 18. The Petition claims that the state of the technology is rapidly changing, and that demand for fossil-fuel-fired electrical generation is no longer growing. *See id.* Again, the Petition's concerns with greenhouse gas impacts from burning fossil fuels are not legally relevant in a PSD permit appeal, as greenhouse gases are not subject to regulation under the Clean Air Act at this time. But even so, this claim does not point to any reason how the District could have erred in its analysis of alternative generating methods that do not use fossil fuel.

The District provided its analysis at pages 25-28 of the Responses to Public Comments (Response to Comment III.B.2. – Evaluation of Non-Fossil-Fuel Fired Electrical Generation Alternatives). The District noted that requiring the facility to be redesigned to use one of these alternatives would alter the fundamental scope of the project and change its basic design elements, and would therefore not be appropriate in a BACT analysis under EAB precedents such as *Prairie State*, *supra*, slip op. at 44, *In re Kendall New Century Development*, 11 E.A.D. 40, 50-52 & n. 14 (EAB 2003); *In re Hillman Power Co.*, 10 E.A.D. 673, 691-92 (EAB 2002); *In*

[8] The Petition also claims that bio-sequestration could be used to abate other pollutants such as particulate matter, and could increase the efficiency of the facility. These alleged benefits were never mentioned in any comments regarding bio-sequestration, which addressed bio-sequestration in the context of greenhouse gas control only. But in any event, the technology has not been developed to control anything at this point.

re Knauf Fiber Glass, GmbH, 8 E.A.D. 121, 136 (EAB 1999); after remand, 9 E.A.D. 1, 31-33 (EAB 2000); *In re SEI Birchwood, Inc.*, 5 E.A.D. 25, 29-30 n.8 (EAB 1994); *In re Hawaii Commercial & Sugar Co.*, 4 E.A.D. 95, 99-100 (EAB 1992); *In re Old Dominion Elec. Coop.*, 3 E.A.D. 779, 793 n. 38 (Adm'r 1992), as well as EPA's NSR Workshop Manual. *See* Responses to Public Comments at 27 & n.66. These principles apply here regardless of how rapidly alternative technologies are developing, and the Petition provides no reason to conclude that the District could require this source to be redesigned to use an alternative technology under the PSD BACT requirement. The District also examined the Energy Commission's consideration of such alternatives and noted that even if it could consider requiring them as BACT it would decline to do so here because none of them could be successfully used to meet this project's objectives of providing a steady and reliable source of power within the Bay Area. *See* Responses to Public Comments at 25-27. The Petition has not explained how this conclusion may be incorrect. Although the Petition asserts that alternative technologies are rapidly evolving, it does not claim that any such technologies could be successfully used here to satisfy the purposes for which this project is designed. The Petition therefore presents no grounds on which to grant review of the District's analysis on this issue, even if such an analysis were required for a PSD permit.

V. The District Did Not Err In Not Requiring Calpine to Build A Less-Efficient Simple-Cycle Facility

The Petition also criticizes the District's conclusion that it would not require Calpine to build a simple-cycle peaking facility instead of a more efficient combined-cycle facility. *See* Petition 10-05 at 16-17. The Petition claims that the Energy Commission has stated that California needs new very-efficient natural-gas fired power plants to support the state's move to a more renewable-based system, and that the Commission has stated that such facilities will typically have fast-start capability, will be highly efficient, and will be able to "ramp" up and down quickly to support fluctuating generation from wind and solar facilities. *See id.* at 17. The Petition claims that this facility does not satisfy these criteria, and implying that the facility should be redesigned as a simple-cycle facility instead in order to meet the Commission's goals.

As a threshold matter, this facility will be a new, very efficient gas-fired power plant that the Commission notes will be essential in supporting a move to a more renewable-based system. And Petitioners have not explained how this plant will necessarily be inconsistent with the Commission's observation about what typical plants will utilize, as a general observation about typical plants does not necessarily imply that every plant will utilize every feature mentioned. Moreover, the Commission has issued a license for this project, and so it is doubtful that the Commission disapproves of the project as currently designed, as the Petition seems to imply. Petitioners' contentions therefore have a very weak factual basis.

But in any event, even if the project did fail to satisfy the Commission's criteria for new facilities, and even if the Commission did believe that the project should be redesigned notwithstanding its decision to license it as proposed, the District could not impose such a re-design of the source under a BACT analysis. The Board has held that under the "redefining the source" doctrine noted above, BACT does not require that a facility designed as a simple-cycle peaker plant must be redesigned as a combined-cycle facility. *See Kendall New Century Development*, 11 E.A.D. at 50-52 & n. 14. The same principle applies here in reverse. BACT would not allow this combined-cycle plant to be redesigned as a simple-cycle peaker plant, especially given that it will be more efficient and less-polluting as a combined-cycle operation.

VI. The District Adequately Considered The Potential Impacts From Using Recycled Wastewater

The Petition also asserts that the District failed to consider the potential impacts from using recycled water from the City of Hayward's wastewater treatment plant. In particular, the Petition claims that the District did not consider the impacts from using recycled wastewater on freshwater marshes near the project site. *See* Petition 10-05 at 19. The Petition does not identify any such potential impacts, it simply claims that the District failed to study potential impacts. The Petition also claims that the District was wrong in concluding that the Energy Commission found the ability to use recycled wastewater to be a project objective when it licensed the facility. *Id.* at 18.

First of all, the District did evaluate potential impacts from using recycled wastewater in the facility's cooling system in the Responses to Public Comments. The facility's Zero Liquid Discharge system does not involve any wastewater discharges, so there were no potential impacts related to water pollution to evaluate. In fact, regarding water pollution issues, the District found that elimination of wastewater discharges by recycling the treated wastewater from the City of Hayward's wastewater treatment plant was an environmental benefit of the project. *See* Responses to Public Comments at 87-88. The District also responded to comments that the elimination of wastewater discharges to San Francisco Bay could have adverse impacts, finding that the amount of wastewater that is currently discharged but would be recycled by the facility is minimal compared to overall water levels. The District concluded that its elimination would therefore have an insignificant impact. *See id*. at 88 n.188. The District also considered the potential air pollution impacts from the exhaust of the evaporated cooling water, and in particular its particulate matter impacts. The District provided a BACT limit in accordance with 40 C.F.R. Section 52.21(j), *see id.* at 86-89, as well as an air quality impact analysis in accordance with 40 C.F.R. Section 52.21(k) and a soils and vegetation impact analysis in accordance with 40 C.F.R. Section 52.21(o), *see id.* at 141-69 (cooling tower emissions were included as part of the analysis of the facility as a whole). The District also considered the potential implications of using recycled water with respect to Legionnaire's disease, and found that there would not be any significant impacts in this area either. *See id.* at 186-87.

The Petition's claims that there could be impacts that the District did not consider and properly respond to completely ignore these responses, and they fail to identify any way in which the use of recycled water could have any significant environmental impact that the District failed to evaluate with respect to any environmental resource – including impacts on adjacent marsh lands. The claims should therefore be dismissed for failing to identify how the District's responses were inadequate. *See Prairie State, supra*, slip op. at 145 and cases cited therein. Moreover, if Petitioners do have assertions that there could be some area in which there could be a potential impact that the District has not evaluated, not only have they failed to explain it with

sufficient specificity in the Petition, they failed to raise it in comments and so should be barred from asserting it on appeal. *See* Remand Order at 20-21. For all of these reasons, Petitioners' claims in this area should be dismissed.

With respect to the claim that the ability to use recycled wastewater was not something that the Energy Commission cited as an objective when initially licensing the facility, *see* Petition 10-05 at 18, Petitioners cite no support for this claim. But it is irrelevant in any event because it is now part of the project design, as they concede. The District has based its permitting analyses – including its BACT determinations – on the facts as they exist today, and Petitioners have offered no reason why that is incorrect.

VII. The District Clearly Identified the Project Location

Petitioners also assert that the name "Russell City Energy Center" misled the public about the project's location. *See* Petition 10-05 at 19. The District responded to this point as well in the Response to Comments, at page 203 footnote 377. There, the District explained that it disagreed that there was any way that members of the public could have been misled about the location of the facility given all of the specific information that the District had provided about the site. The Petition simply repeats this response and does not provide any reason why it could have been wrong, nor how members of the public could have been misled by the name "Russell City" given that the District clearly published the facility's street address and the intersection at which it will be located. This claim should therefore be dismissed for failing to identify a defect in the District's response under *Prairie State, supra*, slip op. at 145. It should also be dismissed because the District clearly identified the project location as 3862 Depot Road, near the corner of Depot Road and Cabot Boulevard, in Hayward CA," *see* Young Decl., Exh. 2 & 3, and there is no way that the public could have interpreted this location as being anywhere else.

VIII. The District Did Not Mislead the Public In Explaining The Distinctions Between The State and Federal Permitting Process.

The Petition also asserts that the District misstated the scope of the EAB Remand Order and the available avenues for appeal of the state-law permits for this facility issued in 2007 vis-à-

vis appeal avenues for the PSD permit. *See* Petition 10-05 at 19-21. The Petition asserts that the District's discussions of these issues "belittled the gravity of the EAB decision", and that the District thus "limit[ed] informed participation". *Id.* at 21. Petitioners note that they are not asserting any claim that the District violated any applicable legal disclosure requirements, *id.* at 20, but simply assert that the District has in general been misleading in its statements on this issue.

First of all, these claims should be dismissed because, as Petitioners point out, they are not claiming that the District violated any applicable legal requirements. But Petitioners are also factually wrong, because the District's discussions of these issues actually helped the public become more informed about the process, not less informed. The District was simply explaining that the Remand Order reopened federal PSD issues for further proceedings, but not state-law issues. By providing this information, the District was helping members of the public who may not have fully appreciated this distinction to target their participation and comments to the PSD issues that the District was considering. In this regard, the District was simply following the Board's lead, as the Board similarly pointed out in the Remand Order that "in order to promote administrative efficiency and prevent unnecessary expense of legal resources, the Board considers it advisable to alert potential parties of several issues raised in Mr. Simpson's appeal that are clearly beyond the Board's jurisdiction." *See* Remand Order, slip op. at 39-40. The Petition is incorrect that the District "belittled the gravity" of the Remand Order in doing so.[9]

IX. The District Was Not Required to Indentify The Specific Turbines That Will Be Used at the Facility.

The Petition also claims that the facility may use overhauled or remanufactured turbines, and that the District's BACT determinations were flawed because they were based on the emissions performance of new equipment, not the equipment the facility will actually use. *See*

[9] Note also that the Petition's claims that informed public participation was somehow hindered in this case is belied by the sheer volume of highly informed and well-considered comments the District received from members of the public.

Petition 10-05 at 22-23. The Petition bases this claim on an assertion – citing no evidentiary support – that "[a] Calpine representative informed me that they would be utilizing equipment that had been removed from another facility." *Id.* at 23.

The District responded to comments on this issue on pages 15-16 of the Responses to Public Comments. The District explained that it had no information on whether the facility would use brand new turbines or turbines that had been overhauled or remanufactured, but explained that the issue was irrelevant since the facility will have to comply with BACT emissions limits that were based on the most current state-of-the-art technology no matter what equipment is used. *See* Responses to Public Comments at 16.

The Petition has not addressed this response or explained how it could be mistaken, and these arguments should therefore be dismissed. *See Prairie State*, *supra*, slip op. at 145. Moreover, the arguments should also be dismissed on their merits because the District was correct that the specific equipment used is not relevant, as the same stringent BACT limits will apply no matter what. Petitioners are concerned that overhauled or remanufactured turbines may have "pollution characteristics" that may be different than the original manufacturer's specifications, Petition at 23, but if that is the case – and the "pollution characteristics" result in emissions that will not comply with the permit limits – then the facility will not be able to use that equipment. What is important is the assumptions that the District used in its BACT analysis, and there the District looked at the most stringent limits that can be achieved by new equipment using the best current technologies.

X. The District Committed No Errors With Respect to Considering the Impacts of Nearby Roadways.

The Petition also asserts that "[t]he modeling for the air quality impacts do not include impacts of nearby roadways." Petition 10-05 at 23. This single sentence is the sum total of argument that the Petition provides on this topic. It completely ignores the District's detailed consideration of nearby roadway impact, which the District did as part of its full impacts analysis for $PM_{2.5}$ impacts. As the District explained in the Additional Statement of Basis, in conducting

this analysis the District evaluated nearby roadway sources that could cause a significant concentration gradient at points where the facility's impacts could be above the $PM_{2.5}$ Significant Impact Levels ("SILs"), and modeled the contributions to ambient $PM_{2.5}$ concentrations from Highway 92, which is located approximately 1 km south of the facility. *See* Additional Statement of Basis at 87. As then District explained further in its response to comments on this issue, the District considered whether it should include other roadway sources in its analysis, but concluded that they did not need to be included because they would not cause a significant concentration gradient at any location where the facility's contribution would be above the SIL, which is consistent with EPA guidance on how to conduct multi-source modeling for PSD permits. *See* Responses to Public Comments at 158-59. The Petition's single sentence on this issue fails to identify any way in which the District's response could be faulty, and should be dismissed for that reason. *See Prairie State*, *supra*, slip op. at 145. Furthermore, this argument fails on the merits, as the District explained extensively in its Response to Petition No. 10-02 filed by Chabot-Las Positas Community College on this issue. Given the complete lack of detail in this Petition on this issue, the District is not briefing the merits of this issue in full detail, beyond referring the Board to the District's Response in Petition 10-02.

XI. The District Properly Relied On Data from Nearby Monitoring Stations

The Petition also seems to assert that the District's analysis was flawed because the data the District used from atmospheric monitoring stations may not have been representative of the project's location (although it is far from specific in exactly what it is asserting). *See* Petition 10-05 at 23-24.

The District addressed issues concerning the representativeness of the monitoring data it used in the Responses to Public Comments in Section XIII discussing PSD Air Quality Impact Analysis issues. With respect to the meteorological data that the District used in its analyses, the District explained that the data came from the Automated Surface Observing System ("ASOS") at the Oakland International Airport. The site is located 20.8 kilometers to the northwest of the

RCEC. The District explained how it used AERSURFACE (version 08009) to determine surface characteristics in accordance with EPA's January 2008 "AERMOD Implementation Guide" at both the Oakland Airport and the Russell City Energy Center project location. The District determined that the Oakland meteorological surface data is representative of conditions at the Russell City Energy Center project site, based upon the requirements for representativeness set forth in the EPA's Guideline on Air Quality Models in 40 C.F.R. Part 51, Appendix W, Section 8.3. The Guideline states the following conditions should be considered when determining if weather data is representative: (1) the proximity of the meteorological monitoring site to the area under consideration; (2) the complexity of the terrain; (3) the exposure of the meteorological monitoring site; and (4) the period of time during which data are collected. The District explained that the Oakland Airport data satisfies all four of these criteria for representativeness and is appropriate for modeling the proposed project. It explained that both the Oakland Airport and the proposed project location are along the East Bay shoreline with similar predominant upwind fetches. It explained that the AERSURFACE analysis showed that both sites had similar land use characteristics, and that both sites are located on simple terrain in similar proximity to the complex terrain to the east. The District also explained that the Oakland Airport site is a permanent National Weather Service/Federal Aviation Administration weather installation that operates 24 hours per day. And it also explained that the data was current, as the most recent five years of data at the time (2003-2007) were used in the modeling. Based upon this comparison, the District concluded that the Oakland ASOS data is representative of the proposed project location and met all USEPA data completeness requirements.

The Petition now makes its vague assertions that the modeling may have been flawed based on concerns about the location of monitoring stations. But it provides no reasoning as to how the District's careful analysis on this issue could have been incorrect. As such, the Board should dismiss it with respect to this argument for failing to address the District's response. As the Board has made clear, it is not sufficient merely to repeat objections in this manner without explaining how the District's response could be flawed. *See Prairie State*, *supra*, slip. op. at 145.

With respect to background ambient air quality data, the District used such data only in its $PM_{2.5}$ source impact analysis. The District found that the project would cause impacts above the annual SIL for $PM_{2.5}$ (as well as for the 24-hour SIL for $PM_{2.5}$ which the District was not required to evaluate but did anyway), and therefore was required to conduct a full impact analysis for this pollutant that takes into account the facility's impact combined with background $PM_{2.5}$ concentrations and the contributions of other sources. The District did so, and used data from its Fremont-Chapel Way monitoring station as a measurement of background concentrations. As the District explained in responses to comments addressing this point, that data is representative of the background air quality at the project location based upon the criteria EPA has established for assessing representativeness. The District explained that EPA provides for monitoring data of this type to be used if it is sufficiently representative based on three factors: (i) monitor location, (ii) the quality of the data, and (iii) the currentness of the data. *See* NSR Workshop Manual, Section III.A., p. C.19. The Fremont-Chapel Way data is representative under all three of these criteria. As the District explained, (i) the Fremont-Chapel Way monitoring station is located approximately 18 km southeast of the project in an area within the same air basin and with the same general geography and level of development; (ii) the data from the Fremont-Chapel Way monitoring station is complete and of high quality; and (iii) the data was current as it was the most recent available at the time of the analysis (2006-2008). Based on this analysis, the District concluded that the Fremont-Chapel Way monitoring data is representative and appropriate for use in assessing the impacts from the proposed facility. To the extent that the Petition's vague assertions about a lack of representativeness of the monitoring data were intended to challenge this determination, this claim would also fail for simply restating the comment. *See Prairie State*, *supra*, slip. op. at 145. The Petition provides no grounds for concluding that the Fremont-Chapel Way monitoring data are insufficiently representative.

XII. The District Clearly and Extensively Responded to All Comments It Received.

Petitioners also fault the District's Responses to Public Comments. They claim that they cannot discern which comments each response is responding to. *See* Petition 10-05 at 13-14. They also claim that two other commenters have been unsatisfied with the District's responses. *See id.* at 24.

These claims provide no basis for granting review. It is perfectly clear from the Responses to Public Comments document what each comment is responding to, as the comments are described in detail in a paragraph (or sometimes multiple paragraphs) before each response is provided. Moreover, the responses are organized by issue-area, and have descriptive paragraph headings that are listed in the 7-page Table of Contents at the beginning for easy reference. The District provided these aids so that it would be easy for members of the public who commented to look up the section or sections of the document where the District responded to the issues they were interested in. Thus far from being impossible for members of the public to discern how the District responded to each comment they submitted, the District actually made it quite easy. This more than satisfied the requirement in 40 C.F.R. Section 124.17(a)(2) that the District "[b]riefly describe and respond to all significant comments." As the Board has made clear, this provision does not require the District to identify each individual comment it is responding to or to respond in an individualized manner. *See Dominion Energy Brayton Point*, 12 E.A.D. at 578 (citing *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 583 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3d Cir. 1988)). The District was therefore fully justified in grouping similar comments received from different commenters on the same topic together in this way, and then responding to all of the similar comments with one comprehensive response.[10]

[10] *Dominion Energy Brayton Point* also notes that the agency's response does not need to be of the same level of detail as the comments received. It is notable here that the District went into considerably more detail than most of the comments submitted by these Petitioners.

With respect to dissatisfaction by other commenters with the District's response, those commenters have not filed petitions seeking to appeal the permit based on their concerns, and so any dissatisfaction on their part that Petitioners assert here cannot provide grounds for review. Moreover, looking at the concerns noted in Exhibit 5 to the Petition, they would not provide any grounds for review in any event. One concern challenges the District's air quality modeling for allegedly not taking into account the effects of water vapor that will evaporate from the facility's Zero Liquid Discharge system. But this concern was never raised in comments in either of the comment periods, and so the commenter would not be able to raise it in a Petition for Review. The other concern is for potential impacts to endangered species. But even if this concern had been raised in a Petition for Review, Endangered Species Act concerns are not properly raised in a PSD permit appeal under 40 C.F.R. Section 124.19, as explained below in section XV. For both of these reasons, the Petition here provides no grounds for granting review based on the concerns of other commenters that Petitioners cite.

XIII. The District Properly Notified The Public Of This Permitting Action, And Did Not Err In Failing Send Notice To Barbara George.

The Petition also cites a declaration signed by a Barbara George which claims that Ms. George did not receive notice of the draft permit. *See* Petition 10-05 at 24 & Exh. 6. Ms. George claims that she participated in the Energy Commission's licensing proceeding for the Russell City Energy Center when the facility was first permitted back in 2002, as well as other power plant applications that she does not specifically name, but she does not claim to have participated in the Energy Commission's amendment proceedings in 2007. *Id.*, Exh. 6. Ms. George offers that if the District had mailed her a notice she "may" have participated by submitting comments. *Id.*

This declaration provides no reason to conclude that the District failed to satisfy the noticing requirements of 40 C.F.R. Section 124.10. The District was required under Section 124(c) to mail notice only to those persons on a mailing list that it developed in accordance with Section 124(c)(1)(ix). Under that provision, the District was required to solicit interested parties

for the mailing list from participants in past permit proceedings. The District did so, and reviewed all of its files from all of its Title V permit proceedings, all Major New Source Review ("NSR") permit proceedings, and all PSD permit proceedings going back to at least 1999, as well as additional significant proceedings from before then. *See* Young Declaration at ¶ 9. This comprehensive search more than satisfied this requirement, and generated a very comprehensive mailing list including approximately 1,900 members of the public who had participated in prior proceedings or were otherwise identified as potentially interested in PSD permits. *See id.* at ¶ 11. Furthermore, the District also went beyond its own permit proceedings and added additional names from Energy Commission mailing lists that the District had in its files. These mailing lists included the lists from the Energy Commission licensing proceedings for the 2007 Russell City Energy Center proceeding, the Eastshore Energy Center proceeding, the Gateway Generating Station proceeding, and the Delta Energy Center proceeding. *See id.* at ¶ 9. This comprehensive review of prior permit proceedings and Energy Commission licensing cases easily satisfied even the most expansive reading of the requirement to solicit persons for the mailing list from past permit proceedings in the area.

The fact that Ms. George was apparently not identified for the mailing list by the District's efforts does not change this conclusion. She does not claim ever to have participated in District permits, and so the District cannot be faulted for not having included here when it solicited names for the list from past permit proceedings under 40 C.F.R. Section 124.10(c)(1)(ix)(B). Ms. George does claim to have participated in some energy commission licensing proceedings, although apparently none of the proceedings for which the District had a mailing list in its files from which it created its PSD notice mailing list. Petitioners cannot claim that the District clearly erred in failing to include additional Energy Commission mailing lists that it did not have in its files, or that the District abused its discretion in not trying to obtain additional lists from the Commission. Section 124.10(c)(1)(ix) contains no requirement that an agency to look to mailing lists from a different agency's licensing proceedings. This is especially true here, where Energy Commission mailing lists are "not tailored in any way to

criteria for proper notice of PSD permitting specified at Section 124.10 . . . ," as the Board noted in the Remand Order in criticizing the District for relying on the Energy Commission's outreach efforts. Remand Order, 14 E.A.D. __, slip op. at 35. There certainly can be no harm from using such lists, where they are in the District's possession, as a way of adding even more potentially interested parties and making the District's public outreach even more robust. But under the circumstances there can be no legal requirement under Section 124.10(c)(1)(ix)(B) to canvass all of the Energy Commission's licensing cases for additional names. The District therefore cannot be found to have abused its discretion in determining what prior permitting proceedings to consider for its lists, or in deciding not to obtain additional Energy Commission mailing lists that may have included Ms. George's name.

Moreover, Ms. George's declaration does not show any prejudice to her from the District not having obtained additional CEC lists that could have included her, such as the original 2002 Russell City licensing proceeding. She has not shown that she would have received notice of the current proceeding if the District had reviewed the 2002 CEC participant list, as she notes that she has moved since then. If the District had added the names and addresses from the 2002 CEC participant list, it would have mailed the list to her 2002 address and she has not demonstrated that she even would have received it. Furthermore, Ms. George does not claim that she necessarily would have participated if she had received notice, but instead states only that she "may" have participated in the comment process. And she has also not shown that her lack of participation has resulted in any defect in outcome of the process.[11] She has not has not claimed that there was anything wrong with the District's analysis, that there was any issue on which she would have submitted comments, or that there is any issue on which she contends that the Board

[11] Notably, this situation contrasts with the situation the Board addressed in the Remand Order, where Petitioner Rob Simpson claimed that he was prejudiced by not having received notice. He claimed that there were substantive defects with the permit that he wanted the Board to review, and claimed that if he had received notice he would have filed comments on these issues which would have preserved them for review.

should grant review.[12] And the parties that have filed the Petition here – CARE, Mr. Simpson, and Mr. Sarvey – clearly cannot have suffered any prejudice from Ms. George's not having received notice. They have not claimed that the District failed to provide them with proper notice, and clearly they did in fact receive it because they submitted comments.

Thus even if the District's failure to review the Energy Commission's files from its 2002 proceeding and include Ms. George's name on its interested-party mailing list was technically a violation of the requirements of Section 124.10(c) – which it was not, as explained above – it still could not provide a basis for granting review because it has not prejudicially impacted the permit process. The Board has made clear that a petitioner has to establish that it has been prejudiced by a violation of the Section 124.10 notice requirements in order to challenge a permit on this ground. *See In re J&L Specialty Products Corp.*, 5 E.A.D. 31 (EAB 1994). In that case, the petitioner presented the exact same argument as Petitioners assert here – that the permitting agency had failed to mail notice to certain entities that they claimed were entitled to it under Section 124.10(c). The Board dismissed the claim without even considering whether a violation of Section 124.10(c) had in fact occurred because the petitioner had not shown any prejudice from the alleged violations. As the Board stated:

> Assuming that these technical violations of § 124.10 occurred, as J&L maintains, J&L fails to explain how it has been harmed by the Region's error, for example, by discussing how the error relates to any condition of the permit, or how the permit may have been different had the notice been mailed to such parties. Absent any alleged harm to J&L, we fail to see how J&L would have standing to complain about someone else allegedly not being mailed notice of the draft permit. Under these circumstances, we do not feel compelled to remand this entire permit to start all over again at the public notice phase, as J&L suggests. . . . Because J&L has failed to demonstrate how the Region's alleged technical violations of § 124.10 affected these proceedings, or that it was in any way prejudiced by these alleged violations, we conclude that such violations, even if they occurred, were harmless, and do not invalidate the permit issuance.

[12] It is notable that Ms. George clearly had notice of this permit proceeding by the time of the appeal deadline, but she declined to file a petition herself seeking to raise any concerns about the permit.

Id. at 79. This case presents the identical circumstances, with Petitioners alleging a technical violation of Section 124.10(c), but not showing how they have been prejudiced in any way by the alleged violation or how the outcome of the permitting process would have been any different had it not occurred. The Board should therefore dismiss this claim for the same reasons as in *J&L Specialty Products*.[13]

XIV. The Petition's Complaints About the California Power Plant Licensing Process In General Are Irrelevant To This Specific Permit

The Petition also asserts broad claims that the system of licensing power plants in California circumvents the Clean Air Act and the PSD program. *See* Petition 10-05 at 24-26. It claims that "[t]he Warren-Alquist Act integrates itself between the Air Districts and their compliance with the Clean Air Act." *Id.* at 25. It cites as evidence for these claims allegations concerning other permit appeals before the EAB and other California air districts. It requests the opportunity to brief the Board on these issues.

The Board should decline this request. These claims do not involve any allegations about the current PSD permit that is at issue in this proceeding, and therefore the Board would have no jurisdiction to consider them in this PSD permit appeal.[14] Moreover, these types of broad issues concerning a state's implementation of the Clean Air Act generally are not appropriate for resolution in adjudications of individual permits, but rather in a comprehensive by EPA Region 9 as the EPA regional office with oversight responsibilities for California. If Petitioners believe that California permitting agencies are not properly implementing the Clean Air Act, they should

[13]The Board distinguished *J&L Specialty Products* in the Remand Order in this case based on the scope of the District's failure to provide notice to other potentially interested parties, which involved "fundamental defects in the integrity of the notice process as a whole". Remand Order, slip op. at 33. There are no such circumstances here, and no reason not to follow the rule in *J&L Specialty Products*. The District has remedied the earlier fundamental defects and has provided a substantial amount of public notice going over and above what is minimally required.

[14] The one issue related to this facility that Petitioners cite in this portion of their brief is in a reference to "the State law portions of this permit." Petition 10-05 at 25. As noted above in Section III, the state-law permit for this facility are not part of an appeal of a PSD permit, as the Board explained in the Remand Order.

direct their concerns to Region 9 – or to the Administrator if they are dissatisfied with Region 9's response – and not to the Environmental Appeals Board in a Section 124.19 permit appeal.

XV. Petitioners' Concerns About Endangered Species Act Consultation Are Not Properly Raised In An Appeal Under 40 C.F.R. Section 124.19; And They Have No Merit In Any Event.

The Petition also challenges the Fish & Wildlife Service's determination that the facility will not likely adversely affect any endangered species or their critical habitats. *See* Petition 10-05 at 26. The Board should reject this claim because, as it observed in the Remand Order, it does not have jurisdiction to consider Endangered Species Act consultation claims in a PSD appeal under 40 C.F.R. Section 124.19. *See* Remand Order, 14 E.A.D. __, slip. op. at 40-41 (citing *In re Indeck-Elwood*, 13 E.A.D. __ (EAB Sept. 27, 2006), slip op. at 118-19 & nn.162-63. The Petition provides no reason why this principle would not apply in the current appeal.

Moreover, even if this were the proper forum to raise such issues, the Petition does not provide any evidence on which to conclude that the District could have erred in any event. The Petition claims that the District failed to provide accurate information to the Fish & Wildlife Service regarding the project, but it does not identify any such information. The Petition claims that the District did not disclose the true location of the facility, but that is incorrect as is evident from a review of the District's notices and other permitting documents discussed above. The Petition also claims that the District did not properly inform the Fish & Wildlife Service about redirection of wastewater discharges and rerouting of aircraft, but it does not provide any evidence of any specific information that the District was required to provide but did not. Thus even if the Board could entertain these claims in a PSD permit appeal, it should dismiss them because the Petition has not identified any specific requirement with respect to Endangered Species Act consultation that the District failed to satisfy.

XVI. The District Properly Evaluated Environmental Justice Considerations.

The Petition also makes a vague assertion that "there are also important environmental justice issues of impacts on low income and minority households". *See* Petition 10-05 at 26.

The Petition does not address the District's analysis of environmental justice concerns, and it does not claim (explicitly at least) that the District erred in concluding that there would be no significant impacts on any environmental justice communities from this facility. Indeed, the only support it cites for its concerns about environmental justice issues comes from a brief in an Energy Commission siting case for a different project. *See* Petition 10-05 at 26 n.35. The Petition therefore fails for not stating with specificity any grounds for review.

Moreover, the Petition would also fail for not having explained how the District's responses to comments on environmental justice issues could have been inadequate or incorrect in any way. The District provided detailed responses on a number of comments that were submitted concerning environmental justice issues in Section XV of the Responses to Public Comments, *see* Responses to Public Comments at 192-94, and the Petition completely fails to address these responses or attempt to explain how the District could have erred in any way. The Petition should therefore be dismissed on this issue for this reason as well. *See Prairie State*, *supra*, slip op. at 145 and cases cited therein. The District adequately considered environmental justice issues in this case.

CONCLUSION

For the foregoing reasons, the Petition for Review in PSD Appeal No. 10-05 should be DISMISSED in its entirety.

Dated: April 29, 2010

Respectfully Submitted

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BAY AREA AIR QUALITY
MANAGEMENT DISTRICT

_____/s/_____
By: Alexander G. Crockett Esq.
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PROOF OF SERVICE

I, Vanessa Hodgson, 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, **"RESPONSE TO PETITION FOR REVIEW 10-05",** by placing copies of it in sealed envelopes, with First Class postage thereon fully paid, and depositing said envelopes in the United States Mail at San Francisco, California, addressed to the persons set forth below:

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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 April 29, 2010, at San Francisco, California.

/s/
Vanessa Hodgson