



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10

1200 Sixth Avenue
Seattle, Washington 98101



Office of Regional Counsel

Mail Stop: ORC-158
Phone: (206) 553-1037
Fax: (206) 553-0163

The information contained in this communication is intended only for the use of the addressee and may be confidential, may be attorney-client privileged, may constitute attorney work product, and may constitute inside information. Unauthorized use, disclosure or copying is strictly prohibited and may be unlawful. If you have received this communication in error, please contact us as soon as possible at (206) 553-1037.

Please Deliver to: Name: EAB
Dept: EAB
Fax #: 202 - 233 - 0121

From: Courtney Hamamoto
Office of Regional Counsel
206 - 553 - 1477 (phone)

Date: _____

This facsimile transmission consists of 18 pages, including this cover sheet.

REMARKS:
Sent by JAN KESTER 206 - 553 - 1192



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

October 17, 2005

Reply To
Attn Of: ORC-158

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460-0001

Re: Wanapa Energy Center
Permit No.: R10PSD-OR-05-01
Appeal No.: PSD 05-06

Dear Clerk of the Board:

It is our understanding that there may be some delays in the receipt of mail at the Environmental Appeals Board ("EAB") due to security screening. As such, the U.S. Environmental Protection Agency Region 10 ("Region 10") is submitting this response brief via facsimile. The original and five copies of the response brief and attached exhibits are also being sent to the EAB via Federal Express. In addition, all parties to this Petition for Review have been served with these documents. If you have any further questions, please feel free to call.

Sincerely,

Courtney Hamamoto
Assistant Regional Counsel

cc: Ken Thompson, Petitioner

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD

In the Matter of:

)
) PSD Appeal No. 05-06
)

WANAPA ENERGY CENTER,

)
) **EPA REGION 10'S**
) **RESPONSE BRIEF**
)

PSD Permit No. R10PSD-OR-05-01
_____)
)

I. INTRODUCTION

On August 8, 2005, the Director of the Office of Air, Waste and Toxics for the U.S. Environmental Protection Agency, Region 10 ("EPA") issued Prevention of Significant Deterioration ("PSD") Permit No. R10PSD-OR-05-01 ("Permit") to Diamond Wanapa I, L.P. ("Diamond") for the Wanapa Energy Center ("Proposed Project"). See EPA Exhibit ("EPA Ex.") F-1. Ken Thompson ("Petitioner") filed a Petition for Review ("Petition") of this Permit with the Environmental Appeals Board ("EAB") on September 9, 2005. For the reasons discussed below, the EAB should deny review of the Petition.

II. FACTUAL AND PROCEDURAL BACKGROUND

In January 2003, Diamond submitted to EPA an application to construct and operate the Proposed Project. See EPA Ex. A-13; EPA Ex. B-2 at p. 66. Diamond submitted a revised PSD

1 permit application in August 2003. *See* EPA Ex. A-23; EPA Ex. B-2 at p. 8. The permit
2 application was deemed complete on August 27, 2003. EPA Ex. A-24.

3 The Proposed Project is a greenfield combined cycle gas/steam turbine electric
4 generating facility that will be located approximately three miles east of Umatilla, Oregon and
5 five miles north of Hermiston, Oregon on land that is held in trust by the U.S. Government for
6 the benefit of the Confederated Tribes of the Umatilla Indian Reservation. EPA Ex. B-2 at p. 5.
7 The Proposed Project will incorporate two power blocks that will each consist of two F-
8 technology combustion turbines, two heat recovery steam generators equipped with duct burners,
9 and one steam turbine with associated plant equipment. *Id.* at p. 6. The Proposed Project would
10 combust only natural gas. *Id.*

11 The PSD provisions of the Clean Air Act require any person planning the construction or
12 major modification of a major emitting facility in an attainment or unclassifiable area to obtain a
13 PSD permit. *See* 42 U.S.C. § 7475(a)(1).¹ A PSD permit cannot be issued unless the applicant
14 demonstrates compliance with the PSD regulations in 40 C.F.R. § 52.21. *See* 42 U.S.C. § 7475;
15 40 C.F.R. § 52.21. To make such a demonstration, the applicant must perform an analysis of the
16 air quality impacts of the proposed construction project and demonstrate that the new facility will
17 not cause or contribute to an exceedance of any applicable NAAQS or air quality increment. *Id.*
18 If a facility emits a "significant quantity" of a pollutant, the applicant must demonstrate that the
19 facility will comply with emissions limitations that reflect application of the best available
20 control technology ("BACT").² *See* 40 C.F.R. § 52.21(j).

21
22 ¹ An area is designated as being in attainment with a specific National Ambient Air Quality Standard ("NAAQS")
23 if the pollutant concentration in the ambient air within the area meets the limits specified in the NAAQS. 42 U.S.C.
24 § 7407(d)(1)(A). Unclassifiable areas are those areas that cannot be classified on the basis of available information
as meeting NAAQS. *Id.*

25 ² BACT is defined as "an emission limitation based on the maximum degree of reduction of each pollutant subject
to regulation ... emitted from or which results from any major emitting facility ..." 42 U.S.C. § 7479(3); 40 C.F.R.
§ 52.21(b)(12).

1 Typically, state or local permitting authorities implement the PSD program. See 40
2 C.F.R. § 52.21(a)(1). Although EPA has approved Oregon's PSD program, facilities located on
3 tribal land must obtain PSD permits from EPA. Thus, EPA is the entity that issued the Permit to
4 Diamond for the Proposed Project.

5 On November 21, 2004, EPA issued the draft PSD permit for public review and
6 comment. EPA Ex. B-5. The public comment period was extended once at the request of the
7 Umatilla County Board of Commissioners; thus, the public comment period ended on January
8 19, 2005. EPA Ex. B-8 and B-10. EPA held a hearing on the draft PSD permit on January 5,
9 2005. EPA Ex. C-21. After reviewing the comments made during the public comment period,
10 on August 8, 2005, EPA issued the Permit and a Response to Comments document. EPA Ex. F-
11 1 and F-2. Petitioner filed his Petition on September 9, 2005.

12 III. STANDARD OF REVIEW

13 Pursuant to 40 C.F.R. § 124.19(a), the EAB will not ordinarily review a permit decision
14 "unless the decision is based on either a clearly erroneous finding of fact or conclusion of law, or
15 involves an important matter of policy or exercise of discretion that warrants review." *In re*
16 *Campo Landfill Project*, NSR Appeal No. 02-01, slip op. at 5 (EAB, Jan. 14, 2003); *see also In*
17 *re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 (EAB 1999); 40 C.F.R. § 124.19. The
18 preamble to 40 C.F.R. § 124.19 states that the "power of review should be only sparingly
19 exercised, [and] most permit conditions should be finally determined at the Regional level." 45
20 Fed. Reg. 33,290, 33,412 (May 19, 1980).

21 The petitioner has the burden to demonstrate that there is clear error or an important
22 policy consideration that warrants that the permit condition should be reviewed. See *In re BP*
23 *Cherry Point*, 12 E.A.D. --, slip op. at p.11-12 (EAB, June 21, 2005); *In re Three Mountain*
24 *Power, LLC*, 10 E.A.D. 39, 47 (EAB 2001); *In re Steel Dynamics, Inc.*, 9 E.A.D. 740, 743 (EAB
25 2001). It is not enough that the petitioner merely repeat the objections that it made during the

1 comment period. Instead, the petitioner must "both state the objections to the permit that are
2 being raised for review and ... explain why the permit decision maker's previous response to
3 those decisions ... is clearly erroneous or otherwise warrants review." *In re Kawathae*
4 *Cogeneration Project*, 7 E.A.D. 107, 114 (EAB 1997); *see also In re BP Cherry Point*, 12
5 E.A.D. --, slip op. at p.11-12 (EAB, June 21, 2005). Although the EAB will construe petitions
6 filed by persons unrepresented by legal counsel broadly, the EAB expects such petitions "to
7 provide sufficient specificity such that the [EAB] can ascertain what issue is being raised [and]
8 expects the petition to articulate some supportable reason as to why the permitting authority
9 erred or why review is otherwise warranted." *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. at 127.

10 Furthermore, issues and arguments raised by a petitioner that are not raised during the
11 public comment period will not be considered preserved for review without a demonstration that
12 they were not reasonably ascertainable at the time. *See In re BP Cherry Point*, 12 E.A.D. --, slip
13 op. at p.14-15 (EAB, June 21, 2005); *In re AES Puerto Rico, L.P.*, 8 E.A.D. 324, 335 (EAB
14 1999); *In re Masonite Corp.*, 5 E.A.D. 55, 585 (EAB 1994); *In re SEI Birchwood, Inc.*, 5 E.A.D.
15 25, 29 (EAB 1994); *see also* 40 C.F.R. §§ 124.13 and 124.19(a) ("Petitioners must demonstrate
16 that any issues raised [on review] were raised during the public comment period ... to the extent
17 required by these requirements."). Issues must be raised during the public comment period to
18 "ensure that the permit issuer has an opportunity to adjust its permit decision or to provide an
19 explanation of why no adjustment is necessary." *In re AES Puerto Rico, L.P.*, 8 E.A.D. at 335;
20 *see also In re BP Cherry Point*, 12 E.A.D. --, slip op. at 14-15 (EAB, June 21, 2005). If an issue
21 was not properly preserved for review, the EAB will generally deny review of the issue. *Id.*

22 IV. ARGUMENT

23 Petitioner raises nine main issues on appeal: (1) EPA failed to address the human health
24 and environmental effects to "majority and minority populations;" (2) EPA has unfairly and
25 improperly treated emissions from non-road diesel engines differently than emissions from the

1 Proposed Project; (3) EPA failed to conduct a cumulative impacts analysis; (4) EPA improperly
2 used emission reductions in non-road diesel engines to offset emissions from the Proposed
3 Project; (5) EPA erred in using meteorological data from Walla Walla and Spokane; (6) EPA
4 should have treated the airshed around the Proposed Project the same as a Class I or Class II
5 wilderness or scenic area; (7) EPA did not consider a Bonneville Power Administration ("BPA")
6 map that shows air quality impacts from all power plants in the area around the Proposed Project;
7 (8) EPA erred in establishing the Permit's volatile organic compound ("VOC") emissions limit;
8 and, (9) EPA failed to include permit conditions for non-road diesel engines that will be used
9 during construction of the Proposed Project. Petitioner has failed to demonstrate clear error in a
10 finding of fact or conclusion of law and has failed to raise any important policy considerations.
11 Moreover, some of the issues raised by Petitioner were not raised during the public comment
12 period, and thus, were not preserved for review. Therefore, the EAB should dismiss the Petition.

13 A. EPA Did Address The Human Health and Environmental Effects To Both
14 "Majority and Minority Populations" In Determining Whether To Issue The
15 Permit.

16 Fact #1 in the Permit states that the Proposed Project:

17 will be located in the vicinity of minority populations, and EPA is responsible for
18 addressing environmental justice within these communities pursuant to Executive
19 Order 12898. EPA is required to identify and address disproportionately high and
20 adverse human health and environmental effects, if any, on minority populations
21 due to this PSD permit approval.

22 EPA Ex. F-1 at Fact #1. Petitioner argues that Fact #1 provides evidence that EPA failed to
23 address the human health and environmental effects of the Proposed Project to both "majority
24 and minority populations." Petition at p. 1. Petitioner requests that the EAB require EPA to treat
25 all individuals the same.

26 First, during the public comment period, neither Petitioner nor any other commenter
27 argued that EPA gave preferential treatment to minority populations when it analyzed the human

1 health and environmental effects of the Proposed Project. See EPA Ex. C-1 to C-21. Further,
2 Petitioner failed to explain why this issue was not reasonably ascertainable during the public
3 comment period. See Petition at p. 1. As such, this argument was not preserved for review.

4 Moreover, even if this issue were reviewable, Petitioner misconstrues the statements set
5 forth in Fact #1. Executive Order 12898 was issued to address environmental justice concerns
6 associated with federal agency actions. See EPA Ex. A-1. The Executive Order directs federal
7 agencies, including EPA, to identify and address disproportionately high and adverse human
8 health or environmental effects of regulatory programs, policies, and activities on minority
9 populations and low-income populations. *Id.* at Section 1-101. As such, in issuing PSD permits,
10 such as the current Permit, EPA is to consider environmental justice issues on a case-by-case
11 basis. See EPA Ex. A-2 at p. 11.

12 In the Technical Support Document ("TSD"), EPA discussed how it addressed the
13 environmental justice provision during the permitting process for the Proposed Project.
14 Specifically, the TSD explained that the Proposed Project:

15 is being constructed near high minority and low-income populations.... EPA
16 conducted a series of meetings ... to educate the public with respect to [the
17 Proposed Project] and EPA's review of the air quality impacts. No
18 environmental justice issues were raised by the public. EPA seeks further input
19 to determine if [the Proposed Project] will have a disproportionately high or
20 adverse human health or environmental impact on minority or low-income
21 populations in the area surrounding the facility.

22 EPA Ex. B-2 at p. 64-65. To show that EPA fulfilled its environmental justice obligation, EPA
23 included Fact #1 in the Permit. See EPA Ex. F-1 at Fact #1.

24 Furthermore, during the permitting process, EPA analyzed the human health and
25 environmental effects of the Proposed Project on the general public which includes both
"minority and majority" populations. See EPA Ex. F-2 at p. 13-16. As discussed in the
Response to Comments, the analysis concluded that the Proposed Project will not have an

1 adverse impact upon public health. *Id.* Petitioner has misconstrued the statements in Fact #1 and
2 has failed to show that Fact #1 is clearly erroneous or otherwise warrants review. Therefore, the
3 EAB should deny review of this issue.

4 **B. EPA Cannot Treat Emissions From The Proposed Project The Same As Emissions**
5 **From Non-Road Diesel Engines.**

6 Although it is difficult to determine Petitioner's precise argument, Petitioner appears to
7 be saying that EPA failed to treat emissions from the Proposed Project the same as emissions
8 from non-road diesel engines. *See* Petition at p. 3-7. Specifically, Petitioner states that "[a]s
9 long as the [Proposed Project] is in an EPA air quality attainment area and the individual facility
10 does not exceed ... NAAQs, then [] EPA and applicants can conclude that there are no
11 significant human, crop, or animal impacts." *Id.* at p. 3. Petitioner appears to be arguing that it
12 is improper and unfair for EPA to make this determination when EPA has found that emissions
13 from non-road diesel engines cause human health impacts. Essentially, Petitioner believes that
14 EPA should treat stationary sources, such as the Proposed Project, the same as mobile sources,
15 such as non-road diesel engines.

16 First, Petitioner made this identical argument during the public comment period. *See*
17 EPA Ex. C-1 at p. 5-14. In *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107 (EAB 1997), the
18 EAB explained that it is not enough that the petitioner merely repeat the objections made during
19 the public comment period. Instead, the Petitioner must "both state the objections to the permit
20 ... and ... explain why the permit decision maker's previous response to those decisions ... is
21 clearly erroneous or otherwise warrants review." *Id.* at 114. Petitioner has merely repeated the
22 objections he made during the public comment period without explaining why EPA's response
23 was clearly erroneous or otherwise warrants review.

24 In fact, in the Response to Comments, EPA explained:

25 The CAA [Clean Air Act] regulates stationary sources [such as the Proposed
Project] and mobile sources [such as nonroad diesel engines] differently, and

1 EPA is required to follow the PSD permitting process for [the Proposed Project]
2 under the CAA.

3 EPA Ex. F-2 at p. 26. Moreover, EPA included a lengthy discussion concerning the analysis of
4 human health impacts undertaken during the permitting process. *Id.* at p. 13-16.

5 Furthermore, to the extent that Petitioner is challenging the NAAQS or the non-road
6 diesel engine rule, this permit appeal is not the appropriate forum. *See In re Tondu Energy*
7 *Company*, 9 E.A.D. 710, 715 (EAB 2001).

8 In sum, Petitioner has failed to show that EPA's permit decision was based on a clearly
9 erroneous finding of fact or conclusion of law or otherwise warrants review. Therefore, the EAB
10 should deny review of this issue.

11 **C. EPA Failed To Conduct A Cumulative Impacts Analysis Before Issuing the Permit.**

12 Petitioner appears to be arguing that the ambient air quality impact analysis failed to take
13 into account all stationary and mobile sources and, therefore, that EPA had failed to conduct a
14 complete cumulative impact analysis. *See* Petition at p. 2, 7-8.

15 First, Petitioner made this exact argument during the public comment period. *See* EPA
16 Ex. C-1 at 5-6; *see also* EPA Ex. C-9 (comment submitted by the Oregon Wheat Growers
17 League). Petitioner has merely repeated the objection he made during the public comment
18 period without explaining why EPA's response was clearly erroneous or otherwise warrants
19 review.

20 Moreover, EPA did conduct the required cumulative impacts analysis that took into
21 consideration both stationary and mobile sources. The TSD contains a lengthy discussion that
22 explains how the ambient air quality impact analysis was conducted, including a discussion of
23 both stationary and mobile sources. *See* EPA Ex. B-2 at p. 39. In response to this comment,
24 EPA explained:

25 40 C.F.R. § 52.21(m) states that an ambient air quality [impact] analysis
[AAQIA] is required for each air pollutant emitted in excess of EPA's significant

1 emission rate thresholds.... In this case, an AAQIA is required for carbon
2 monoxide (CO), nitrogen dioxide (NO₂), O₃ [ozone], PM₁₀, and sulfur dioxide
3 (SO₂).... If it is determined that emissions from the new source will not have a
4 significant impact, no further analysis is required....

5 The AAQIA indicated that only NO₂ and PM₁₀ exceeded their respective
6 significant impact levels. See TSD at p. 43, Table 5-6. Therefore, a cumulative,
7 or second part, full AAQIA was performed for these two air pollutants to
8 determine compliance with NAAQS and Class II area air quality increments.
9 Subsection 5.2.6 of the TSD provided a description of the nearby point source
10 emissions inventory development. Mobile source emissions were determined to
11 be insignificant and were assumed to be included in the measured background
12 concentrations as well as fugitive dust emission and agricultural activities....

13 In sum, EPA has adequately accounted for all sources contributing to air pollution
14 in the AAQIA. Further, the AAQIA properly contained a cumulative impacts
15 analysis as required under the CAA and implementing regulations....

16 EPA Ex. F-2 at p. 12-13. Petitioner has failed to explain how EPA's response or permitting
17 decision was clearly erroneous or otherwise warrants review. Thus, the EAB should deny review
18 of this issue.

19 **D. EPA Has Not Used An "Emissions Offset" In Determining Whether To Issue The**
20 **Permit.**

21 Petitioner appears to contend that by restricting emissions from non-road diesel engines
22 by promulgating the Non-Road Diesel Engine Rule, 69 Fed. Reg. 38958 (June 29, 2004), EPA
23 created an "emissions offset" whereby the reduction in emissions from non-road diesel engines is
24 used to allow greater emissions from electric generating facilities, such as the Proposed Project.
25 See Petition at p. 9-11. At the heart of Petitioner's argument is the contention that EPA is
unfairly imposing stricter regulations on non-road diesel engines than electric generating
facilities.

As explained in the Response to Comments, the Clean Air Act regulates stationary
sources and mobile sources differently. See EPA Ex. F-2 at p. 26. For stationary sources, such
as the Proposed Project, EPA is required to follow the PSD permitting process. *Id.* EPA cannot
change the way that stationary sources and mobile sources are treated under the Clean Air Act;

1 only Congress has the ability to change these statutory requirements. Furthermore, to the extent
2 that Petitioner is attempting to challenge the Non-Road Diesel Engine Rule, this permit appeal is
3 not the proper forum for such a challenge. *See In re Tondu Energy Company*, 9 E.A.D. 710, 715
4 (EAB 2001).

5 Although Petitioner argues that EPA has used an "emissions offset" to permit the
6 Proposed Project, Petitioner has not provided any evidence that there has been a reduction in
7 non-road diesel engine emissions in the area around the Proposed Project. Further, even if there
8 has been a decrease in emissions from non-road diesel engines, EPA did not take into account
9 any emission decreases or credits. *See EPA Ex. B-2* at p. 39 ("It should be noted that increment
10 expansion (omission decreases) were not included in the analysis"); *EPA Ex. F-2* at p. 13 ("It
11 should be pointed out that concentrations predicted for the air quality increment analysis are
12 conservative (bias towards over prediction) because allowable emission rates (rather than actual
13 emissions increases from the baseline) were modeled and emission decreases or credits were not
14 considered."). Therefore, even if an "emissions offset" was created as a result of the Non-Road
15 Diesel Engine Rule, EPA did not use this "offset" to allow greater emissions from the Proposed
16 Project.

17 In sum, Petitioner has failed to show how EPA's actions were clearly erroneous or
18 otherwise warrant review; thus, the EAB should deny review of this issue.

19 **E. EPA Did Not Err In Using The Meteorological Data From Walla Walla And**
20 **Spokane.**

21 Petitioner next argues that EPA erred in using the meteorological data from Walla Walla,
22 Washington and Spokane, Washington because this data is not representative of weather
23 condition in the area of the Proposed Project. *See Petition* at p. 11, 14.

24 In response to this same argument made during the public comment period, EPA
25 provided a lengthy discussion concerning the use of the meteorological data from Walla Walla

1 and Spokane. See EPA Ex. F-2 at p. 10-11. This long discussion concludes by stating that
2 "based on its technical expertise and best professional judgment, EPA has determined that the
3 meteorological data from ... Walla Walla and Spokane is adequately representative of the project
4 location." *Id.* at p. 11. Petitioner has failed to explain why this discussion and conclusion in the
5 Response to Comments are clearly erroneous or otherwise warrants review. Therefore, the EAB
6 should deny review of this issue.

7 **F. EPA Has Properly Evaluated The Area As A Class II Area For Purposes of PSD**
8 **Permitting.**

9 Petitioner contends that EPA should treat the impact area of the Proposed Project as if it
10 were a Class I or II wilderness or scenic area. See Petition at p. 11. In Petitioner's view, EPA's
11 failure to accord the area such treatment, allows Umatilla County's airshed to be used as an "air
12 pollutant dumping airshed." *Id.*

13 Petitioner made this exact argument during the public comment period. See EPA Ex. C-1
14 at p. 15. In response to this comment, EPA explained:

15 The area around [the Proposed Project], like most other areas within the United
16 States, is classified as a Class II area. EPA has reviewed [the Proposed Project's]
17 impacts upon the surrounding area consistent with PSD requirements for Class II
18 areas.

19 EPA Ex. F-2 at p. 28-29. Instead of explaining why EPA's response or permitting decision are
20 clearly erroneous or otherwise warrant review, Petitioner has merely reiterated the same
21 argument he made during the public comment period.

22 Even if Petitioner had demonstrated that EPA's response or permitting decision were
23 clearly erroneous or otherwise warrant review, this argument would fail. EPA does not have the
24 authority to treat the area of the Proposed Project as a Class I area. Further, contrary to
25 Petitioner's statement, the area of the Proposed Project is classified as a Class II area. 40 C.F.R.
§ 52.21(e) states:

1 (1) All of the following areas which were in existence on August 7, 1977 shall be
2 Class I areas and may not be redesignated: (i) International parks, (ii) National
3 wilderness areas which exceed 5,000 acres in size, (iii) National memorial parks
4 which exceed 5,000 acres in size, and (iv) National parks which exceed 6,000
5 acres in size.

6 (2) Areas which were redesignated as Class I under regulations promulgated
7 before August 7, 1977, shall remain Class I, but may be redesignated as provided
8 in this section.

9 (3) Any other area, unless otherwise specified in the legislation creating such an
10 area, is initially designated Class II.

11 40 C.F.R. § 52.21(e). The only designated Class I areas in Oregon are Mt. Hood Wilderness,
12 Eagle Cap Wilderness, Hells Canyon Wilderness, Mt. Jefferson Wilderness, Mt. Washington
13 Wilderness, Three Sisters Wilderness, Strawberry Mountain Wilderness, Diamond Peak
14 Wilderness, Crater Lake National Park, Kalmiopsis Wilderness, Mountain Lake Wilderness, and
15 Gearhart Mountain Wilderness. See 40 C.F.R. § 81.425. As such, Umatilla County is a Class II
16 area for purposes of the PSD permitting process.

17 Petitioner has failed to provide any evidence or explanation as to why EPA's actions were
18 clearly erroneous or otherwise warrant review. Therefore, the EAB should deny review of this
19 issue.

20 **G. EPA Did Consider The BPA Map Cited By The Petitioner During The PSD**
21 **Permitting Process.**

22 Petitioner contends that he discovered a BPA map that shows there will be significant
23 cumulative air quality impacts in the area of the Proposed Project. According to Petitioner, EPA
24 failed to consider this map during the PSD permitting process. See Petition at p. 11-12.

25 Petitioner appears to argue that this map would have changed EPA's permitting decision.

First, Petitioner failed to raise this issue during the public comment period and has failed
to explain why this argument was not reasonably ascertainable during the comment period. See
EPA Ex. C-1. In fact, the BPA document that contains the map was part of the administrative

1 record that was available for public review during the public comment period. EPA Ex. A-3.
2 Thus, Petitioner failed to preserve this issue for review.

3 Moreover, even if Petitioner had preserved this issue for review, Petitioner has failed to
4 explain how it would affect EPA's permitting decision and why that permitting decision was
5 clearly erroneous or otherwise warrants review. BPA prepared the map as part of a study to
6 determine downwind impacts of any proposed natural gas-fired power plant, including the
7 Proposed Project. See EPA Ex. A-3. The BPA study looked at two scenarios: (1) a scenario
8 where 45 natural gas-fired power plants would be constructed and operated and (2) a scenario
9 where 28 natural gas-fired power plants would be constructed and operated simultaneously. *Id.*
10 at p. 1. Only about half of the power plants have been permitted and many of these permits have
11 expired. Further, the majority of the power plants have not even been constructed. As such, the
12 BPA study overestimates current impacts from *existing* power plants and does not provide
13 evidence that the cumulative impacts from the Proposed Project together with *existing* stationary
14 sources would cause an exceedance of the NAAQS. Moreover, it should be noted that the BPA
15 study concludes that NAAQS will not be exceeded, even if all the proposed natural gas-fired
16 power plants were constructed and operated alongside the exiting plants. *Id.* at p. 4. Therefore,
17 Petitioner has failed to provide evidence that shows why EPA's permitting decision was clearly
18 erroneous or otherwise warrants review and the EAB should deny review of this issue.

19 **H. Petitioner Has Failed to Establish that the Volatile Organic Compound Emissions**
20 **Limit in the Permit is Clearly Erroneous or Otherwise Warrants Review.**

21 Petitioner argues that the Proposed Project will not be able to operate with a volatile
22 organic compound ("VOC") emissions limit of 99 tons per year ("tpy"). Specifically, Petitioner
23 has included a calculation in his Petition that indicates that if the Proposed Project were to
24 operate 365 days a year, then VOC emissions would equal approximately 345 tpy. See Petition
25 at p. 12. According to Petitioner, "what competent business is going to spend \$300 million on a

1 carbon based [] power plant and only operate the facility for 28.6% of the year?" Petition at p.
2 13.

3 First, this argument was never raised during the public comment period by either the
4 Petitioner or any other individual who participated in the public comment period. See EPA Ex.
5 C-1 to C-21. Petitioner has failed to explain why this issue was not reasonably ascertainable
6 during the public comment period. See Petition at p. 12-13. As such, this argument was not
7 preserved for review.

8 Further, Finding #3 in the Permit states:

9 Diamond has requested that EPA limit [the Proposed Project's] annual VOC
10 emissions to less than 100 tpy, thereby exempting [the Proposed Project] from the
11 requirement to conduct ambient O₃ monitoring. Without the requested limit, [the
12 Proposed Project's] potential to emit VOC is 345 tpy assuming each CT and DB
[combustion turbine and duct burner] is operated at maximum firing rate for each
hour of the year.

13 EPA Ex. F-1 at Finding #3. Thus, EPA was aware that the Proposed Project had the potential to
14 emit 345 tpy of VOC. Diamond, however, requested that EPA limit VOC emissions to less than
15 100 tpy. *Id.* Accordingly, EPA established a VOC limit of 99 tpy.³ *Id.* at Condition 15.1.

16 The amount of time that the Proposed Project remains in operation per year is a business
17 decision that will be made by Diamond, not a permitting decision made by EPA. If the Proposed
18 Project exceeds this emission limit, then Diamond will be in violation of a condition of the
19 Permit and may be subject to an enforcement action.

20
21
22
23 ³ Although the Permit does not explicitly restrict the Proposed Project from operating 365 days per year, Condition
24 15.2 of the Permit requires the Proposed Project to demonstrate compliance with the VOC emissions limit by
25 calculating emissions using the emissions factors set forth in Condition 15.3. Alternatively, the company could
propose different emissions factors to EPA for approval after conducting specified stack testing pursuant to
Condition 15.4. See EPA Ex. F-1 at Condition 15. Thus, using best professional judgment, EPA determined that a
limit on the hours of operation was not required to be included in the Permit. It should be noted that the emissions
factors along with Condition 15 were never commented on during the public comment period.

1 In sum, Petitioner has failed to explain why EPA's decision to establish a VOC limit of
2 99 tpy was clearly erroneous or otherwise warrants review. Thus, the EAB should deny review
3 of this issue.

4 **I. EPA Cannot Include Conditions Limiting Emissions From Non-Road Diesel Engines**
5 **In The PSD Permit For The Facility.**

6 Petitioner contends that EPA should impose conditions in the Permit on non-road diesel
7 engine vehicles used during construction of the Proposed Project. See Petition at p. 13, 15.

8 This argument was never raised during the public comment period by either the Petitioner
9 or any other individual who participated in the public comment process. See EPA Ex. C-1 to
10 C.21. Petitioner has failed to explain why this issue was not reasonably ascertainable during the
11 public comment period. See Petition at p. 13, 15. As such, this argument was not preserved for
12 review and the EAB should deny review of this issue.

13 Moreover, even if Petitioner had preserved this argument for review, Petitioner's
14 argument fails. Under the PSD permitting program, any person planning the construction of any
15 major emitting facility is required to apply for and receive a PSD permit before beginning
16 construction. See 42 U.S.C. § 7475(a)(1). A "major emitting facility" is defined as "any of the
17 following stationary sources...." 42 U.S.C. § 7479(1). The Clean Air Act defines "stationary
18 source" as "any source of an air pollutant except those emissions resulting directly from ... a
19 non-road engine or non-road vehicle." 42 U.S.C. § 7602(z). Thus, the Clean Air Act expressly
20 excludes emissions from non-road engines and non-road vehicles from regulation within a PSD
21 permit. See *In re: Cardinal FG Company*, PSD Appeal No. 04-04, slip op. at 24 (EAB March
22 22, 2005). As such, EPA could not impose conditions in the Permit on non-road diesel engine
23 vehicles that will be used during construction of the Proposed Project.

1 In addition, the Environmental Impact Statement ("EIS") prepared by the Bureau of
2 Indian Affairs ("BIA") contained a lengthy discussion on emissions from construction equipment
3 at the Proposed Project. The EIS states:

4 Construction emissions include exhaust from diesel engines. The total emissions
5 from this equipment is expected to be very small in comparison to the total
6 vehicular traffic in the region. To reduce combustion emissions, idling of
7 construction equipment would be minimized (shut off when not operating) and
8 engine tune-ups would be required for any equipment that is maintained on site
9 for more than 60 days.

10 EPA Ex. G-2 at 3.5-15. Thus, even though EPA does not have the authority to include
11 conditions on non-road diesel engines in the Permit, contrary to Petitioner's belief, conditions
12 have been placed on non-road diesel engines that will be used during construction of the
13 Proposed Project.

14 In sum, Petitioner has failed to explain why EPA's permitting decision was clearly
15 erroneous or otherwise warrants review. As such, the EAB should deny review of this issue.

16 V. CONCLUSION

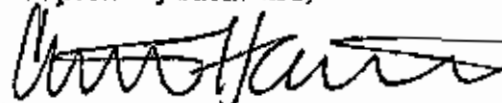
17 Petitioner has failed to demonstrate that EPA committed clear error and has failed to raise
18 any important policy considerations on any of the grounds raised in the Petition for Review.

19 Moreover, some of the issues that Petitioner has raised were not preserved for review.

20 Accordingly, for the foregoing reasons, EPA respectfully requests the EAB to deny the Petition
21 for Review.

22 DATED: October 17, 2005

23 Respectfully submitted,



24 Courtney Hamamoto
25 Assistant Regional Counsel
EPA Region 10
1200 Sixth Avenue, ORC-158
Seattle, WA 98101
Tel: 206-553-1477
Fax: 206-553-0163