

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

In re:)	
)	
Russell City Energy Center)	PSD Appeal No. 10-01
)	
PSD Permit No. 15487)	
)	

**RUSSELL CITY ENERGY COMPANY, LLC'S
RESPONSE TO PETITION FOR REVIEW
FILED BY THE CALIFORNIA PILOTS ASSOCIATION**

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I. INTRODUCTION

Permittee Russell City Energy Company, LLC (“RCEC”) hereby submits its Response to the Petition for Review filed by the California Pilots Association (“CalPilots”) (PSD Appeal No. 10-01) (“Petition”). The Petition challenges the decision by the Bay Area Air Quality Management District (the “Air District”) to issue a Prevention of Significant Deterioration (“PSD”) permit to RCEC to construct a new natural gas-fired combined-cycle power plant in Hayward, California.

On April 8, 2010, the Air District and RCEC filed responses requesting summary disposition of the Petition. District’s Response to Petition for Review Requesting Summary Dismissal, PSD Appeal No. 10-01 (Apr. 8, 2010); RCEC’s Response Seeking Summary Disposition, PSD Appeal Nos. 10-01, 10-05, 10-06 & 10-07 (Apr. 8, 2010). On April 14, 2010, the Board denied these requests for summary disposition and requested that the Air District and RCEC address the merits of the Petition. Order Denying Request for Summary Dismissal of CalPilots Petition and Requesting Response on the Merits, PSD Appeal No. 10-01 (Apr. 14, 2010).

In accordance with the Board’s Order, RCEC submits its substantive response and again requests that the Board dismiss the Petition in its entirety. The Petition raises issues outside the Board’s jurisdiction, lacks specificity, and fails to identify any deficiency or error in any permit condition or in the Air District’s Responses to Public Comments that would in any way warrant review. To the contrary, the Air District appropriately addressed all aviation issues during the PSD permitting proceeding, in many cases significantly exceeding the requirements of the federal PSD regulations.

II. BACKGROUND

The Russell City Energy Center will be a 600-MW natural gas-fired, combined-cycle power plant in Hayward, California (the “Project”). The Project cannot commence construction without obtaining a federal PSD permit from the Air District, which issues PSD permits in its jurisdiction pursuant to a delegation agreement with the U.S. Environmental Protection Agency

(“EPA”), Region 9. *See* U.S. EPA - Bay Area Air Quality Management District Agreement for Delegation of Authority to Issue and Modify Prevention of Significant Deterioration Permits Subject to 40 CFR 52.21 (Feb. 4, 2008). The factual and procedural history of the Project up through mid-2008 is well known to the Board because the PSD proceedings were subject to two prior petitions for review (PSD Appeal Nos. 08-01 and 08-07). *See In re Russell City Energy Center*, PSD Appeal No. 08-01 (EAB, July 29, 2008); *In re Russell City Energy Center*, PSD Appeal No. 08-07 (EAB, Nov. 25, 2008) (Order Denying Review).

In the approximately 18 months since the Board remanded the Project’s PSD permit to the Air District, the Air District completed PSD permit proceedings pursuant to 40 C.F.R. part 124 and the Board’s July 29, 2008 Order. On December 8, 2008, the Air District issued a Draft PSD Permit for the Project. Exhibit 1, Statement of Basis for Draft Amended Federal “Prevention of Significant Deterioration” Permit (Dec. 8, 2008) (“Statement of Basis”).¹ The Air District solicited public comments on the Draft PSD Permit and accompanying Statement of Basis and accepted written comments for nine weeks, until February 6, 2009. Exhibit 2, Letter from Brian Bateman, Director of Engineering, Bay Area Air Quality Management District, to Rick Thomas, Vice President of Development (Feb. 4, 2010) at 1 (“February 4, 2010 Letter”). The Air District also held a public hearing at the Hayward City Hall on January 21, 2009. *Id.* Based on the comments received during this first comment period and the Air District’s additional review and analysis, the Air District issued a revised Draft PSD Permit and Additional Statement of Basis on August 3, 2009. Exhibit 3, Additional Statement of Basis, Draft Federal “Prevention of Significant Deterioration” Permit (Aug. 3, 2009) (“Additional Statement of

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

Basis”). The Air District solicited public comments on the revised Draft PSD Permit and accompanying Additional Statement of Basis and accepted written comments for more than six weeks, until September 16, 2009. Exhibit 2, February 4, 2010 Letter, at 2. The Air District held a second public hearing at the Hayward City Hall on September 2, 2009. *Id.* Altogether, since the Board remanded the permit to the Air District, the Air District accepted additional public comments on the Draft PSD Permit for more than 15 weeks during two public comment periods, each with a public hearing conducted pursuant to EPA requirements.

On February 3, 2010, the Air District issued the Final PSD Permit for the Project. Exhibit 4, Prevention of Significant Deterioration Permit Issued Pursuant to the Requirements of 40 CFR § 52.21 (Feb. 3, 2010) (“Final PSD Permit”). It also issued a 235-page Responses to Public Comments that responds to comments received during both public comment periods. Exhibit 5, Responses to Public Comments, Federal “Prevention of Significant Deterioration” Permit (Feb. 2010) (“Responses to Public Comments”).

Petitions for review of the Final PSD Permit were filed by the following 10 parties: (1) CalPilots (PSD Appeal No. 10-01); (2) Chabot-Las Positas Community College District (PSD Appeal No. 10-02); (3) Citizens Against Pollution (PSD Appeal No. 10-03); (4) Robert Sarvey (PSD Appeal No. 10-04); (5) CALifornians for Renewable Energy, Inc., Bob Sarvey, and Rob Simpson (PSD Appeal No. 10-05); Juanita Gutierrez (PSD Appeal No. 10-06); (7) Karen D. Kramer (PSD Appeal No. 10-07); (8) Hayward Area Recreation and Park District (PSD Appeal No. 10-08); (9) Minane Jameson (PSD Appeal No. 10-09); and (10) Idojine J. Miller (PSD Appeal No. 10-10). For the reasons discussed below, the CalPilots Petition should be dismissed in its entirety.

III. DISCUSSION

A. Standard of Review

The Board will grant review of a PSD permitting decision only if it involves a “finding of fact or conclusion of law which is clearly erroneous,” or “an exercise of discretion or an important policy consideration which the [Board] should, in its discretion, review.” 40 C.F.R.

§ 124.19(a)(1)-(2). The Board has noted repeatedly that its “power of review should be only sparingly exercised” and that “most permit conditions should be finally determined at the [permitting authority] level.” *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 6-7 (EAB 2000) (“*Knauf I*”) (quoting 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)).

In determining whether to grant review of a petition, the Board “first looks to whether the petition meets the threshold procedural requirements of the permit appeal regulations.” *Knauf II*, 9 E.A.D. at 5 (citing 40 C.F.R. § 124.19; *In re Sutter Power Plant*, 8 E.A.D. 680, 685 (EAB 1999)). The threshold procedural requirements include timeliness, standing, and preservation of an issue for review. *Knauf II*, 9 E.A.D. at 5. The Board “strictly construes threshold procedural requirements, like the filing of a thorough, adequate, and timely petition.” *In re Town of Marshfield, Massachusetts*, NPDES Appeal No. 07-03, slip op. at 4 (EAB, Mar. 27, 2007) (Order Denying Review). Petitions for review “must meet a minimum standard of specificity.” U.S. Environmental Protection Agency, *The Environmental Appeals Board Practice Manual* 33 (June 2004) (“EAB Practice Manual”). Petitioners “must not only state their objections to a permit but must also explain why the permitting authority’s response to those objections (for example in a response to comments document) is clearly erroneous or otherwise warrants review.” *In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04, slip op. at 87-88 (EAB, Sept. 27, 2006). To do so, “the petitioner must address the permit issuer’s responses to relevant comments made during the process of permit development; the petitioner may not simply reiterate comments made during the public comment period, but must substantively confront the permit issuer’s subsequent explanations.” *Id.* at 88. Failure by a petitioner to do so will result in a denial of review. *In re Zion Energy, L.L.C.*, 9 E.A.D. 701, 705 (EAB 2001). Although the Board “tries to construe petitions filed by persons unrepresented by legal counsel broadly,” such petitions must still “provide sufficient specificity such that the Board can ascertain what issue is being raised” and “articulate some supportable reason as to why the permitting authority erred or why review is otherwise warranted.” *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 127 (EAB 1999) (“*Knauf I*”).

The Board will also assess whether the issues raised in petitions for review are subject to the Board's jurisdiction. *Zion Energy*, 9 E.A.D. at 706; *Sutter*, 8 E.A.D. at 688. The Board's jurisdiction to review PSD permits extends only to those issues relating to permit conditions that implement the federal PSD program. *In re Hawaii Elec. Light Co.*, 10 E.A.D. 219, 238 (EAB 2001) ("*HELCO*"). As the Board has explained, "[t]he PSD review process is not an open forum for consideration of every environmental aspect of a proposed project, or even every issue that bears on air quality. In fact, certain issues are expressly excluded from the PSD permitting process." *Knauf I*, 8 E.A.D. at 127. If an issue is not governed by the PSD regulations, the Board lacks jurisdiction over it and will deny review. *Id.*

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

B. The Petition Should Be Denied in its Entirety

On March 22, 2010, CalPilots filed a letter with the Board, requesting that "you do not approve the P_S_D Permit."² Petition at 2. CalPilots makes two specific requests: (1) that "the P_S_D Permit be remanded back to the [Air District] for further comment by the [Federal Aviation Administration ("FAA")] and others" (*id.* at 2); and (2) that a "Risk Analysis for Mobile Sensitive Receptors (Pilots and Passengers)" be conducted to address specified concerns.³ *Id.* at 5. The letter states that it is "based on but not limited to 40CFR Part 52.21

² Letter from Andy Wilson, CalPilots Director-at-Large to Clerk of the Board, Environmental Appeals Board (Mar. 18, 2010). CalPilots' letter is dated March 18, 2010, but it was not electronically filed with the Board until March 22, 2010. *See* Docket No. 1.

³ The Petition also "refers to and incorporates" the comments of Citizens Against Pollution and Chabot-
(Footnote Continued on Next Page.)

(12),” referencing the definition of Best Available Control Technology (“BACT”). *Id.* at 8.

The Petition should be dismissed in its entirety because it raises issues outside the Board’s jurisdiction, lacks specificity, and fails to identify any deficiencies in the Air District’s responses to comments on the issues it raises. Moreover, the Air District appropriately addressed all aviation issues during the PSD permitting proceeding and had a rational basis for its conclusion regarding Selective Catalytic Reduction (“SCR”) technology.

1. The Air District Appropriately Addressed All Aviation Issues

The Air District addressed multiple aviation issues throughout the PSD permitting process for the Project. In response to comments received during the first comment period, the Air District conducted an additional health risk assessment to evaluate potential health risks to pilots and passengers flying in the vicinity of the Project. Exhibit 3, Additional Statement of Basis at 94. It used an air dispersion model to determine emissions impact above ground level (*i.e.*, using a “flagpole receptor”⁴) at the maximum potential emission rates of hazardous air pollutants, including ammonia. *Id.* The Air District found that the modeled exposure would not cause any acute adverse health effects, even under the conservative assumptions used:

The proposed project will have two stacks each having a height of 150 feet above ground level. The acute hazard index was calculated to be 0.52. A value below 1.0 means that the exposure would not cause any acute adverse health effects. The location of the maximum acute hazard index is very close to the RCEC stacks and is based on [a] one-hour exposure level. This is most likely a conservative assumption, as it is unlikely that that [*sic*] pilots and/or passengers would remain at this location in the airspace for a continuous hour and be exposed to the full extent assumed in the District’s analysis.

Id. at 95 (footnote omitted); *see also* Exhibit 5, Responses to Public Comments at 59, 188-89,

(Footnote Continued from Previous Page.)

Las Positas Community College District. Petition at 1-2. RCEC submitted its response to these petitions on April 23, 2010.

⁴ “Flagpole receptor” is “defined where persons (pilots and passengers) may be exposed to concentrations above ground level (flight area) of a particular compound or substance. The locations are not necessarily a residence or a location where people actually exist; it may be any offsite [location] above ground level where a person could potentially be present.” Exhibit 3, Additional Statement of Basis at 94.

227 n.393.

One of the purposes of this additional health risk assessment was to assess the potential for ancillary environmental impacts associated with ammonia slip emissions from Selective Catalytic Reduction (“SCR”) as a control technology for nitrogen dioxide (“NO₂”) and nitrogen oxides (“NO_x”). Exhibit 5, Responses to Public Comments at 59. Based on the results of the additional health risk assessment, the Air District concluded that “there will not be any significant ancillary environmental impacts regarding health risks from ammonia slip emissions that would rule out selection of SCR as the BACT control technology.” *Id.*

During the second comment period, the Air District responded to multiple comments concerning aviation issues. First, in response to a comment that aircraft could be exposed to facility exhaust for extended periods of time if they had to circle the airport or if they repeat takeoffs, landings, or other maneuvers for practice or training purposes, the Air District explained that, even “with repeated passes through the facility’s exhaust stream, the aircraft would still not be within the stream continuously and so the exposure assumptions would still be overly conservative.” *Id.* at 188. Moreover, according to the Air District’s conclusions, “even if for some reason an aircraft did remain directly within the exhaust stream for a continuous hour, the acute hazard index was well below 1.0, demonstrating that even continuous exposure during that time would not cause any risk of adverse health effects.” *Id.*

Second, the Air District specifically responded to a comment alleging that its health risk assessment should use a lower exposure threshold for aircraft pilots, crews, and passengers than for the general population, given the nature of aircraft operation. *Id.* at 188-89. According to the Air District’s response to this suggestion, “[t]he Reference Exposure Levels on which the Health Risk Assessment analysis is based are already designed to take into account sensitive populations (with an appropriate margin of safety), and there is no reason to conclude that pilots, aircrews, or passengers would experience a risk of adverse health effects where the hazard index is well below 1.0.” *Id.* at 189.

Third, the Air District received comments expressing concern about the potential for

thermal plumes and pollutant emissions from the facility to impact aircraft and aircrews and passengers. *Id.* at 226. The comments claimed that these concerns will limit airspace use around the facility and that California Energy Commission (“CEC”) staff recommended against approving the proposed facility based on aircraft hazard concerns. *Id.* at 226-27. In response, the Air District explained that the CEC had examined aviation hazards in detail and found that the impact from potential aviation hazards and the restrictions on airspace as a result of the Project would be less than significant:

[T]he potential for aviation hazards was examined in detail by the Energy Commission during the licensing proceedings for the facility. The Commission reviewed a sophisticated analysis of vertical plume velocities and a 2006 FAA study entitled “Safety Risk Analysis of Aircraft Overflight of Industrial Exhaust Plumes”, and concluded that the FAA would characterize this risk as extremely remote and within acceptable ranges. *The Energy Commission therefore found that the impact from potential aviation hazards would be less than significant. The Energy Commission similarly found that restrictions on airspace as a result of the facility would be less than significant.* While it may be true that CEC staff recommended against the project because of aviation issues, the Commission disagreed and concluded that these were not significant concerns because they could be mitigated, as recommended by the FAA, by pilot notification, among other reasons. This considered analysis by the Energy Commission is how such issues are addressed, not through the Federal PSD program.

Id. at 227 (footnote omitted; emphasis added). The Air District also described the limits of the federal PSD program to address aviation issues:

The Federal PSD Program is designed to address certain air quality issues, not to address safety issues such as potential hazards to aviation and aircraft operations. Safety issues such as these are obviously a very important public concern and there are comprehensive regulatory requirements in place to address them, but the Federal PSD Permit is not the mechanism to do so. Such concerns could potentially have an impact in a Federal PSD BACT analysis if there was a choice between alternative control technologies that had greater or lesser safety impacts, but that is not the case here. None of the comments has provided any information to suggest that different control technologies should be used or that permit conditions should be changed based on the potential for aviation hazards.

Id. (footnote omitted).

Similarly, the Air District received comments claiming that the facility would not be compatible with local airport operations, including Oakland International Airport and in particular Hayward Executive Airport. *Id.* The comments cited commitments made by the City of Hayward to remove and mitigate airport hazards and to ensure compatible land uses around

the airport; requested that the FAA evaluate the economic impacts of the facility on the Hayward Executive Airport and other airports in the region; and suggested that the FAA, CEC, and California Department of Transportation should develop guidelines for assessing power plant siting near airports, rather than addressing the issue on a project-by-project basis. *Id.* In response, the Air District explained that the federal PSD program is not designed to address these issues:

The Federal PSD Program is designed to address certain air quality issues, not to address issues regarding the compatibility of different land uses. Those types of issues are considered by the Energy Commission in its siting decisions were [*sic*] it determines the location of and need for new power generation facilities. The Air District would support the development of guidelines for power plant siting near airports to help in siting decisions, but such issues are not related to Federal PSD permitting.

Id. at 228.

As discussed below, the Petition repeats verbatim the same comments CalPilots submitted during the first public comment period,⁵ without evincing any recognition whatsoever that the Air District undertook all of this substantial additional analysis in response to those comments and presented the results of that analysis in both the Additional Statement of Basis and the Responses to Public Comments.

2. The Petition Raises Issues Outside the Board's Jurisdiction

The Board's jurisdiction to review PSD permits extends only to those issues relating to permit conditions that implement the federal PSD program. *HELCO*, 10 E.A.D. at 238. As the Board has emphasized, "[t]he PSD review process is not an open forum for consideration of

⁵ Except for minor formatting and pagination changes, the text of the Petition is, from the second full paragraph of page 3 through its conclusion on page 8, nearly identical to the text appearing on pages 2-6 of the letter CalPilots submitted to the Air District during the first public comment period. *See* Exhibit 27, Letter from Carol Ford, Vice-President, California Pilots Association, Jay White, General Counsel, California Pilots Association and Andy Wilson, to Weymen [*sic*] P. Lee, P.E. (Feb. 6, 2009). CalPilots also submitted comments during the second comment period, to which the Air District responded, as described above. *See* Exhibit 28, Letter from Jay White, General Counsel to Waymen [*sic*] P. Lee, P.E. (Sept. 16, 2009).

every environmental aspect of a proposed project, or even every issue that bears on air quality.” *Knauf I*, 8 E.A.D. at 127. With respect to aviation issues in particular, as the Air District explained in responding to public comments, “[t]he Federal PSD Program is designed to address certain air quality issues, not to address safety issues such as potential hazards to aviation and aircraft operations.” Exhibit 5, Responses to Public Comments at 227.

In its petition, CalPilots raises issues related to local airport operations, airspace use, and commitments made by the City of Hayward to remove and mitigate airport hazards and to ensure compatible land uses around the Hayward Executive Airport. Petition at 3-5. All of these issues are outside the Board’s jurisdiction. As the Air District explained, “[t]he Federal PSD Program is designed to address certain air quality issues, not to address issues regarding the compatibility of different land uses.” Exhibit 5, Responses to Public Comments at 228. In particular, “[t]hose types of issues are considered by the Energy Commission in its siting decisions were [sic] it determines the location of and need for new power generation facilities.” *Id. Cf. In re Dominion Energy Brayton Point*, PSD Appeal No. 09-01, slip op. at 4 (EAB, May 13, 2009) (alleged interference of cooling towers with AM radio transmission outside the Board’s jurisdiction). Because the Board lacks jurisdiction over these issues, it should deny review. *See Zion Energy*, 9 E.A.D. at 706; *Sutter*, 8 E.A.D. at 688.

The remainder of the Petition addresses specific issues that CalPilots believes should be addressed in a “Risk Analysis for Mobile Sensitive Receptors (Pilots and Passengers).” Petition at 5-8. These specific issues, including the potential effect of the oxygen content of the plume on aircraft engine performance (*id.* at 6), the potential impact of hazardous material releases from the Project and the Hayward Wastewater Treatment Plant (*id.* at 7), the possibility of visual and thermal plumes (*id.* at 7-8), and the suggested FAA economic impact study of the Hayward Executive Airport over the life of the Project (*id.* at 8), are all non-PSD issues. *See, e.g., Zion Energy*, 9 E.A.D. at 706 (emissions of hazardous air pollutants are outside purview of federal PSD program); *Knauf I*, 8 E.A.D. at 162-64, 172 (control of hazardous air pollutants and unregulated pollutants and opacity limits are outside purview of federal PSD program).

Although CalPilots alleges at the end of its petition that “[o]ur comments are based on but not limited to 40CFR Part 52.21 (12)” (Petition at 8), CalPilots fails to show any connection between its requested analysis and the federal PSD program. A mere reference to the federal regulations does not create Board jurisdiction over aviation-related issues.

The only aspect of CalPilots’ requested analysis that is even conceivably related to the federal PSD program is the request that “[s]pecial attention should be given to the affect [*sic*] of the ammonia and or ammonia slip on all phases of commissioning and startups will have on mobile sensitive receptors in open cockpit and aircraft without air filtering cabin heating, ventilating and defrosting systems” Petition at 6. As discussed above, the Air District evaluated the impacts of ammonia emissions on air crews and passengers as an ancillary impact associated with selection of SCR as a BACT control technology for NO₂ and NO_x. Exhibit 5, Responses to Public Comments at 59, 188-89, 227 n.393. Thus, to the extent that alleged health impacts to pilots and passengers might be attributable to choice of a particular control technology as part of the BACT analysis, the Air District conducted an evaluation that demonstrated that no significant impacts would result. Moreover, as discussed below, CalPilots’ request for “special attention” lacks specificity, fails to demonstrate that the Air District’s responses to comments were clearly erroneous or otherwise warrant review, and fails to meet a petitioner’s heavy burden with respect to technical issues.

In sum, the Petition should be dismissed because the issues raised are outside the Board’s jurisdiction.

3. The Petition Lacks Specificity

In addition to its jurisdictional problems, the Petition fails to articulate any specific objections to any condition of the Final PSD Permit. Indeed, it does not provide a single citation to a permit term or condition that it contends is based on a clearly erroneous finding of fact or conclusion of law or that the Board, in its discretion, should review. *See* 40 C.F.R. § 124.19(a). In particular, CalPilots does not specify any permit condition that relates to its request for a mobile sensitive receptor risk analysis. Nor does CalPilots object to the selection of SCR

technology in the BACT analysis or the Air District's conclusion that "there will not be any significant ancillary environmental impacts regarding health risks from ammonia slip emissions that would rule out selection of SCR as the BACT control technology." Exhibit 5, Responses to Public Comments at 59.

CalPilots' allegation that RCEC's PSD permit must be remanded back to the Air District for further comment by the FAA and others ignores the fact that the Air District accepted public comments on the Draft PSD Permit for more than 15 weeks and held two public hearings, far beyond the minimum requirements of the PSD regulations. *See* 40 C.F.R. § 124.12. There is simply no basis in the PSD regulations for remanding a permit for additional consideration of issues that will reportedly be addressed by a forthcoming FAA plume safety study, which, according to the Petition, is scheduled for completion of data gathering and research by June 2010, with "a hypothesis, conclusion and recommendations" available "sometime after June of 2010." Petition at 2. Moreover, the Petition fails to allege any relationship between the results of the pending FAA study and any condition of the PSD permit.

In sum, the Petition does not meet the Board's "minimum standard of specificity." EAB Practice Manual at 33. It does not identify the permit conditions at issue or state why any permit conditions warrant review. *See In re Beeland Group, LLC*, UIC Appeal Nos. 08-01 & 08-03, slip op. at 4 (EAB, May 23, 2008) ("Although the Board will construe a *pro se* petition broadly, it nonetheless must clearly identify the permit conditions at issue and state why those provisions warrant review.").

4. The Petition Fails To Demonstrate that the Air District's Responses to Comments Were Clearly Erroneous or Otherwise Warrant Review

In addition to stating specific objections to a permit condition, petitioners must "explain why the permitting authority's response to those objections (for example in a response to comments document) is clearly erroneous or otherwise warrants review." *Indeck-Elwood*, slip op. at 87-88. To do so, "the petitioner must address the permit issuer's responses to relevant comments made during the process of permit development; the petitioner may not simply

reiterate comments made during the public comment period, but must substantively confront the permit issuer's subsequent explanations." *Id.* at 88. CalPilots completely fails to confront the Air District's explanations – or even to mention them.

One of CalPilots' primary contentions is to "request that a complete study be made for short term and long term impact health analysis" to assess the impacts of the Project's emissions on the health of pilots and passengers. Petition at 5 ("1. Request Risk Analysis for Mobile Sensitive Receptors (Pilots and Passengers)"). In response to CalPilots' prior comments which sought just such an analysis, the Air District performed a health risk analysis for airborne receptors, which demonstrated that "there will not be any significant ancillary environmental impacts with respect to ammonia or other toxics exposures to aircrews or passengers that would rule out the selection of SCR as the BACT control technology." Exhibit 5, Responses to Public Comments at 59. This additional evaluation was based on very conservative exposure assumptions that a pilot or passenger would remain at the particular location within the airspace where the maximum modeled impact was predicted to occur for a complete hour. *Id.* at 188.

Further, in response to a comment received during the second comment period that suggested that aircraft could be exposed to facility exhaust for extended periods of time if they had to circle the airport or perform repeated takeoffs, landings, or other maneuvers for practice or training purposes, the Air District explained that, even with repeated passes through the facility's exhaust stream, "the aircraft would still not be within the stream continuously and so the exposure assumptions would still be overly conservative." *Id.* Moreover, according to the Air District's conclusions, "even if for some reason an aircraft did remain directly within the exhaust stream for a continuous hour, the acute hazard index was well below 1.0, demonstrating that even continuous exposure during that time would not cause any risk of adverse health effects." *Id.*

In addition, the Air District specifically responded to a comment alleging that its Health Risk Assessment should use a lower exposure threshold for aircraft pilots, crews, and passengers than for the general population, given the nature of aircraft operation. *Id.* at 188-89. According

to the Air District's response to this suggestion, "[t]he Reference Exposure Levels on which the Health Risk Assessment analysis is based are already designed to take into account sensitive populations (with an appropriate margin of safety), and there is no reason to conclude that pilots, aircrews, or passengers would experience a risk of adverse health effects where the hazard index is well below 1.0." *Id.* at 189.

Not only does CalPilots proffer no new information or contention that might call into question the Air District's methods or conclusions in performing these analyses, its petition evinces no recognition whatsoever that the Air District even undertook any additional analysis in response to CalPilots' comments and then provided further explanation of this analysis in both the Additional Statement of Basis and Responses to Public Comments. As a consequence, CalPilots completely fails to demonstrate that the Air District's analyses of aviation concerns for purposes of PSD permitting were clearly erroneous or otherwise warrant review. *See, e.g., Indeck-Elwood*, slip op. at 87-88 (petitioners "must not only state their objections to a permit but must also explain why the permitting authority's response to those objections (for example in a response to comments document) is clearly erroneous or otherwise warrants review.").

Moreover, the Petition repeats verbatim the same comments CalPilots previously submitted during the first public comment period.⁶ Such verbatim restatements of earlier comments fall short of establishing any legitimate basis for Board review. *See* EAB Practice Manual at 33 ("[p]etitioners for review may not simply repeat objections made during the comment period; instead they must demonstrate why the permitting authority's response to those objections warrants review") (citing *Knauf II*, 9 E.A.D. at 5).

5. The Air District Had a Rational Basis for Its Conclusion Regarding SCR Technology

CalPilots goes no further than to argue, as part of its requested "risk analysis for mobile

⁶ *See supra* note 5.

sensitive receptors,” that “[s]pecial attention should be given to the affect [*sic*] of the ammonia and or ammonia slip on all phases of commissioning and startups” Petition at 6. In response to comments, the Air District already gave this issue “special attention” by conducting an additional health risk assessment to assess the potential for ancillary environmental impacts associated with ammonia slip emissions from SCR technology. Based on the results of this assessment, the Air District concluded that “there will not be any significant ancillary environmental impacts regarding health risks from ammonia slip emissions that would rule out selection of SCR as the BACT control technology.” Exhibit 5, Responses to Public Comments at 59. Thus, the Air District had a rational basis for its permitting decision. *See Three Mountain Power*, 10 E.A.D. at 50 (“When the Board is presented with conflicting expert opinions or data, [it] look[s] to see if the record demonstrates that the permitting agency duly considered the issues raised in the comments and if the approach ultimately selected is rational in light of all the information in the record, including the conflicting opinions and data.”) (citations omitted). By failing to offer any information to suggest that a different control technology should be used, CalPilots falls far short of meeting the “heavy burden” that the Board assigns to petitioners seeking review of technical issues. *Id.* (“We generally accord deference to permitting agencies when technical issues are in play. As such, we assign a heavy burden to persons seeking review of issues that are quintessentially technical.”) (citations omitted).

IV. CONCLUSION

In sum, the petition for review filed by CalPilots raises issues outside the Board’s jurisdiction, lacks specificity, and fails to identify any deficiency or error in any permit condition or in the Air District’s Responses to Public Comments that would in any way warrant review. To the contrary, the Air District appropriately addressed all aviation issues during the PSD permitting proceeding and had a rational basis for its conclusion regarding SCR technology.

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Dated: April 29, 2010

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of April, 2010, copies of the foregoing Russell City Energy Company, LLC's Response to the Petition for Review Filed by the California Pilots Association were served via first-class U.S. mail, postage prepaid, to:

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