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

In re: Russell City Energy Center PSD Permit No. 15487	)	PSD Appeal Nos. 10-01, 10-02, 10-03, 10-04 & 10-05

RUSSELL CITY ENERGY COMPANY, LLC'S OPPOSITION TO PETITIONERS' MOTIONS FOR LEAVE TO FILE A REPLY BRIEF AND REQUEST FOR EXPEDITED CONSIDERATION

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

REGULATIONS

OTHER AUTHORITIES

I. INTRODUCTION

Permittee Russell City Energy Company, LLC ("RCEC") respectfully requests that the Environmental Appeals Board ("Board") deny the motions of Chabot-Las Positas Community College District ("Chabot"), Citizens Against Pollution ("CAP"), Robert Sarvey, and CAlifornians for Renewable Energy, Inc. and Rob Simpson ("CARE/Simpson") (collectively, "Petitioners") for leave to file a reply brief.

Chabot requests leave to file a brief to respond to arguments on six issues related to analyses conducted by the Bay Area Air Quality Management District ("Air District") during the Prevention of Significant Deterioration ("PSD") permit proceeding. Chabot's request should be denied. The opportunity to file a reply brief on any of these issues would allow Chabot to introduce argument and evidence that it should have submitted with its petition and, consequently, amount to a late-filed appeal.

Similarly, CAP should not be allowed to submit a reply on any of the five issues that it raises in its motion because such a reply would provide CAP an opportunity to submit additional argument and evidence that should have accompanied its petition. In addition, no reply is warranted on two of CAP's issues because CAP failed to comply with the Board's May 6, 2010 Order to "stat[e] with particularity the arguments to which Petitioner seeks to respond and the reasons Petitioner believes it is necessary to file a reply on those arguments." Order Establishing Requirements for Motions To File a Reply Brief and Oppositions Thereto, PSD Appeal Nos. 10-01, 10-02, 10-03, 10-04, 10-05 & 10-06 (May 6, 2010) ("Order") at 1.

Mr. Sarvey requests leave to submit reply briefing or additional evidence on five issues. With the exception of additional evidence related to the untimeliness of his petition or the parties to the CARE/Simpson Petition, his requests should be denied because they do not comply with the Board's Order, rely on false information, and/or would introduce new evidence or arguments that should have been included in his petition for review.

CARE/Simpson should not be allowed to file a reply brief on any issue because they wholly failed to comply with the Board's Order. In addition, their requests to conduct discovery,

to be provided a hearing prior to reply briefing, and to submit additional petitions or other separate filings should not be granted. To the extent that CARE/Simpson wish to submit evidence related to good-faith attempts to submit their petition using the CDX system on the evening of March 22, 2010, RCEC does not oppose submission of this evidence.

Overall, the substantive issues raised by Petitioners have been fully briefed and stand ready for decision by the Board. The opportunities Petitioners were afforded to participate in the development of the final PSD permit went far beyond the legal mandates of the federal PSD regulations. The fact that Petitioners generally gave scant recognition to the Air District's Responses to Public Comments in their petitions suggests that Petitioners are interested not in assuring the lawfulness of the process and resulting PSD permit, but in causing indefinite delay for the project. Indeed, in anticipation of the Board's decision, one Petitioner has already filed an appeal with the United States Court of Appeals for the Ninth Circuit, naming, *inter alia*, the U.S. Environmental Protection Agency, Administrator Jackson, the Air District, and Calpine Corporation as respondents, in part due to alleged deprivations of his rights in these proceedings.[1] Accordingly, the Board should not afford Petitioners additional opportunities to raise issues in reply briefs at this time.

For the same reasons, oral argument on these or any other issues raised by the remaining petitions for review is unwarranted. As described in more detail below, RCEC has already experienced substantial delay due to the eighteen-month period of time it took the Air District to respond to the Board's July 2008 remand order. As a consequence, RCEC has failed to meet several contractual milestones in its power purchase agreement ("PPA") with Pacific Gas and Electric Company ("PG&E") and, as a result, is now again seeking approval of the California Public Utilities Commission ("CPUC") for an amendment to the PPA that will postpone the project's on-line date for another year, until June 1, 2013. Further, after seeking and obtaining a

[1] *See infra* section V.A.2.

two-year extension from the California Energy Commission ("CEC") of the deadline for commencement of construction due to a number of pending permit appeals (including the Board's prior consideration of this matter), RCEC is facing a September 10, 2010 deadline for commencement of construction. The prospects for an extension of this deadline are highly uncertain. Due to these exigencies and the absence of any substantive issue that would benefit from oral argument, RCEC respectfully requests that the Board cancel the oral argument scheduled for August 17, 2010. Should the Board decide that any issue warrants oral argument, RCEC respectfully requests that the Board hold such argument no later than June 30, 2010. RCEC appreciates the Board's efforts to date to issue its orders promptly and would urge the Board, regardless how it should decide on Petitioners' motions for leave to file a reply, to expedite its final consideration of the remaining petitions for review.

II. PROCEDURAL BACKGROUND

The five remaining petitions for review in this case[2] challenge the Air District's decision to issue a PSD permit to RCEC to construct a new natural gas-fired combined-cycle power plant in Hayward, California (the "Project"). These petitions were filed by the following parties: (1) California Pilots Association ("CalPilots") (PSD Appeal No. 10-01), (2) Chabot (PSD Appeal No. 10-02), (3) CAP (PSD Appeal No. 10-03), (4) Robert Sarvey (PSD Appeal No. 10-04), and (5) CARE/Simpson (PSD Appeal No. 10-05).

Both the Air District and RCEC fully briefed threshold procedural issues (including the untimeliness of the Sarvey and CARE/Simpson Petitions) and the merits of all five remaining petitions for review.[3] *See* Air District's Response to Petition for Review, PSD Appeal No. 10-01

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[2] On May 3, 2010, the Board dismissed four petitions for review due to their untimeliness. *See* Order Dismissing Four Petitions for Review as Untimely, PSD Appeal Nos. 10-07, 10-08, 10-09 & 10-10 (May 3, 2010) (dismissing petitions for review filed by Karen D. Kramer, Hayward Area Recreation and Park District, Minane Jameson, and Idojine J. Miller). On May 17, 2010, the Board dismissed one additional petition for review due to its untimeliness. *See* Order Dismissing Petition for Review as Untimely, PSD Appeal No. 10-06 (May 17, 2010) (dismissing petition for review filed by Juanita Gutierrez).

[3] With respect to the CalPilots and CARE/Simpson Petitions, the Air District and RCEC filed responses requesting summary disposition on April 8, 2010. *See* Air District's Response to Petition for Review

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(Apr. 29, 2010); RCEC's Response to Petition for Review Filed by the California Pilots Association, PSD Appeal No. 10-01 (Apr. 29, 2010); Air District's Response to Petition for Review, PSD Appeal No. 10-02 (Apr. 23, 2010); RCEC's Response to Petition for Review Filed by Chabot-Las Positas Community College District, PSD Appeal No. 10-02 (Apr. 23, 2010); Air District's Response to Petition for Review, PSD Appeal No. 10-03 (Apr. 23, 2010); RCEC's Response to Petition for Review Filed by Citizens Against Pollution, PSD Appeal No. 10-03 (Apr. 23, 2010); Air District's Response to Petition for Review, PSD Appeal No. 10-04 (Apr. 23, 2010); RCEC's Response to Petition for Review Filed by Robert Sarvey, PSD Appeal No. 10-04 (Apr. 23, 2010); Air District's Response to Petition for Review, PSD Appeal No. 10-05 (Apr. 29, 2010); RCEC's Response to Petition for Review Filed by CAlifornians for Renewable Energy, Inc., Bob Sarvey, and Rob Simpson, PSD Appeal No. 10-05 (Apr. 29, 2010).

On May 6, 2010, the Board ordered any petitioner that "wish[es] to file a reply brief to submit a motion to that effect stating with particularity the arguments to which Petitioner seeks to respond and the reasons Petitioner believes it is necessary to file a reply to those arguments." Order at 1. Chabot, CAP, Mr. Sarvey, and CARE/Simpson requested leave to file a reply brief. All remaining petitions for review stand ready for decision, however, and the Board should deny these requests.

(Footnote Continued from Previous Page.)

Requesting Summary Dismissal, PSD Appeal No. 10-01 (Apr. 8, 2010); Air District's Response to Petition for Review Requesting Summary Dismissal, PSD Appeal No. 10-05 (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 the Air District's and RCEC's requests for summary disposition and requested that the Air District and RCEC address the merits of these petitions. *See* Order Denying Request for Summary Dismissal of CalPilots Petition and Requesting Response on the Merits, PSD Appeal No. 10-01 (Apr. 14, 2010); Order Denying Request for Summary Dismissal of CARE Petition and Requesting Response on the Merits, PSD Appeal No. 10-05 (Apr. 14, 2010). On April 29, 2010, in accordance with the Board's Orders, the Air District and RCEC submitted substantive responses and again requested that the Board dismiss the CalPilots and CARE/Simpson Petitions in their entirety. *See* Air District's Response to Petition for Review, PSD Appeal No. 10-01 (Apr. 29, 2010); Air District's Response to Petition for Review, PSD Appeal No. 10-05 (Apr. 29, 2010); RCEC's Response to Petition for Review Filed by the California Pilots Association, PSD Appeal No. 10-01 (Apr. 29, 2010); RCEC's Response to Petition for Review Filed by CAlifornian's for Renewable Energy, Inc., Bob Sarvey, and Rob Simpson, PSD Appeal No. 10-05 (Apr. 29, 2010).

III. PETITIONERS SHOULD NOT BE GRANTED LEAVE TO FILE A REPLY BRIEF ON ANY ISSUE

After responses have been filed, the EAB "normally does not require further briefing before issuing a decision whether to grant review." U.S. Environmental Protection Agency, Environmental Appeals Board Practice Manual (June 2004) ("EAB Practice Manual") at 36. In this case, the Board specified that "[n]o further briefing will be allowed except by order of the Board." *See* Letter from Eurika Durr, Clerk of the Board to Jack Broadbent, Officer (Mar. 25, 2010) at 4.

For the reasons discussed below, the requests for Chabot, CAP, Mr. Sarvey, and CARE/Simpson for leave to file a reply brief should be denied.

A. Chabot Should Not Be Allowed to File a Reply Brief on Any Issue

Petitioner Chabot requests leave to file a brief responding to arguments on the following six issues: (1) failure to preserve certain arguments for review, including the Air District's alleged "clear err [*sic*] of not disclosing, plotting out and circulating for public review the modeling results for 24-hour PM2.5 at the achievable emissions rate of 9 lbs/hour" and Chabot's claim that the Air District's cost-effectiveness analysis for an auxiliary boiler was based on a much larger boiler; (2) the requirement to demonstrate compliance with the 24-hour National Ambient Air Quality Standard ("NAAQS") for fine particulate matter (*i.e.*, less than 2.5 microns in diameter ("PM2.5")), and applicability of non-attainment permitting requirements for PM2.5 to the Project; (3) use of the federally enforceable emissions limit established by the PSD permit as the basis for the air quality impacts analysis; (4) exclusion of roadways other than Highway 92 from the cumulative impacts analysis for PM2.5; (5) Chabot's submittal of the wrong data in support of its alternative cost-effectiveness analysis concerning an auxiliary boiler and Chabot's false allegation that the Air District's cost-effectiveness analysis was based on a boiler more than four times larger than the boiler used in the analysis; and (6) Chabot's contention that a contribution greater than a significant impact level ("SIL") to an environmental justice community should provide a basis for denial of the PSD Permit and that the Project would

impact identified environmental justice communities. *See* Motion by Chabot-Las Positas Community College District for Permission To File Reply Brief to Responses by BAAQMD and RCEC, PSD Appeal No. 10-02 (May 14, 2010) ("Chabot Motion") at 2-5. For the reasons discussed below, RCEC opposes Chabot's requests to file a reply brief on any of these issues. Allowing Chabot an opportunity to reply at this time would allow it to introduce argument and evidence that it should have submitted with its petition and would, accordingly, amount to a belated amendment of its petition.

1. Chabot Can Point to No Evidence that Certain Arguments Were Preserved for Appeal; Hence, No Reply Is Warranted

Chabot first seeks to reply to RCEC's contention "that the College District did not 'preserve' certain arguments raised in its petition for review, such as BAAQMD's clear err [*sic*] of not disclosing, plotting out and circulating for public review the modeling results for 24-hour PM2.5 at the achievable emissions rate of 9 lbs/hour." Chabot Motion at 2. Additionally, Chabot seeks to reply to RCEC's and the Air District's contention that "arguments re Mankato Facility concerning cost analysis for use of an auxiliary boiler" (*id.*) were not preserved for appeal. According to the Chabot Motion, Chabot "seeks to reply since addressing the College District's entitlement to raise these important substantive arguments may likewise assist the Board in determining the merits of those substantive issues." *Id.*

Chabot is wrong to suggest that it has any "entitlement" to raise issues for the first time on appeal. According to EPA's regulations concerning permit appeals, "[a]ll persons, including applicants, who believe any condition of a draft permit is inappropriate . . . must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing) under § 124.10." 40 C.F.R. § 124.13. Further, to meet the minimum pleading requirements of the Board, "[t]he petition shall include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period

(including any public hearing) to the extent required by these regulations . . . ." 40 C.F.R. § 124.19(a). Board precedent is clear that comments must be raised with sufficient specificity to be preserved for appeal. *See In re Rockgen Energy Center*, 8 E.A.D. 536, 540-45 (EAB 1999) (general comments raising various catalysts for consideration insufficient to preserve issue of selection of dry low-NO_x technology over selective catalytic reduction technology for appeal); *In re Sutter Power Plant*, 8 E.A.D. 680, 691 (EAB 1999) (rejecting issue where earlier comments did not fairly raise the issue advanced on appeal); *In re ConocoPhillips Co*., PSD Appeal No. 07-02, slip op. at 46 (EAB, June 2, 2008) (extensive comments concerning greenhouse gas emissions did not reflect the requisite level of specificity required to properly preserve the issue of whether BACT for carbon dioxide and methane was required). Thus, Petitioner Chabot is simply wrong that it has any "entitlement" to raise issues that were not first raised during the public comment period.

Notably, Chabot does not, in its motion, suggest that it would provide evidence in its reply that these arguments were, in fact, preserved for appeal. Rather, Chabot says simply that, "addressing the College District's entitlement to raise these important substantive arguments may likewise assist the Board in determining the merits of those substantive issues." Chabot Motion at 2. Chabot appears to suggest that its "entitlement" to raise these issues arises from their importance, rather than from its satisfaction of the Board's jurisdictional prerequisite that a petitioner identify with specificity where an issue raised on appeal was previously raised during public comment and how the permitting authority's response was somehow deficient or otherwise in error. Accordingly, the Board need not provide Chabot leave to address these preservation issues, when Chabot failed in the first instance to demonstrate that these issues were preserved for appeal. Indeed, Chabot could not make such a demonstration, since neither of the issues RCEC contends were not preserved – the appropriateness of 7.5 lb/hr as an emissions rate for use in the PM2.5 air quality impacts analysis and use of the auxiliary boiler at Calpine's Mankato Energy Center (and its size and, correspondingly, cost) as the basis of the Air District's cost-effectiveness analysis – was ever previously raised by Chabot or anyone else during public

comment. For this reason, the Board should deny Chabot leave to file any reply on this issue.

Moreover, Chabot's arguments on these issues are completely without merit, as demonstrated by both RCEC and the Air District in their respective responses. Chabot should not be provided another opportunity to argue these issues in its reply. As the Board has explained, petitions for review may not be supplemented by further briefing. *See, e.g., In re Zion Energy, L.L.C.*, 9 E.A.D. 701, 707 (EAB 2001) (declining to allow petitioner to amend a facially inadequate petition); EAB Practice Manual at 32 ("petitioners should be aware that '[a] petition for review under § 124.19 is not analogous to a notice of appeal that may be supplemented by further briefing'") (quoting *In re LCP Chemicals - N.Y.*, 4 E.A.D. 661, 665 n.9 (EAB 1993)). Chabot had its chance to raise these issues – in two public comment periods – but failed to do so. *Cf. In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 724 (EAB 2006) ("By failing to raise the argument in its comments on the draft permit, Scituate failed to preserve the argument for review on appeal. Furthermore, by failing to raise the argument in its petition, Scituate failed to present a timely appeal on this issue. The Board will not entertain a claim raised for the first time in a reply brief filed on appeal.") (citations omitted), *appeal dismissed upon stipulation of parties*, No. 06-1817 (1st Cir. Aug. 4, 2006). Accordingly, Chabot's request to file a reply on whether these issues were preserved should be denied.

2. No Reply Is Warranted Concerning Whether the Project Was Required To Demonstrate Compliance with the 24-Hour PM2.5 Standard or Is Subject to Non-Attainment NSR Permitting Requirements for PM2.5

Chabot seeks to reply to voice again its disagreement with the legal conclusions (i) that the Air District was not required to demonstrate compliance with the 24-hour PM2.5 NAAQS, once the non-attainment designation became effective, and (ii) that, under 40 C.F.R. Part 51, Appendix S, the Project does not qualify as a major stationary source for PM2.5 or designated precursors and therefore is not subject to separate non-attainment New Source Review ("NSR") permitting requirements. *See* Chabot Motion at 3. Regarding the requirement to demonstrate compliance with the 24-hour PM2.5 NAAQS, Chabot asserts that "[t]his is an important question

because the College District asserts that such a legal construction as urged by RCEC and BAAQMD violates the Clean Air Act and is not supported." *Id*. Regarding applicability of non-attainment NSR permitting to the Project, Chabot claims that the Air District's conclusion that the Project is not subject to such permitting for its emissions of PM2.5 and designated precursors violates the Clean Air Act. *Id*. at 3-4. Chabot also suggests that this issue relates to its later concerns regarding environmental justice. *Id*. at 4.

As provided by RCEC's response to Chabot's petition:

> Petitioner does not demonstrate any error in the Air District's conclusion that the 24-hour PM2.5 standard no longer applied for purposes of PSD permitting and that the corresponding analysis was irrelevant for purposes of its permitting decision. While Petitioner expresses disagreement with this decision, suggesting instead that the Air District should have considered the 24-hour PM2.5 analysis regardless of the non-attainment designation, Petitioner provides no legal argument that would call into question the Air District's decision in this respect.

RCEC's Response to Petition for Review Filed by Chabot-Las Positas Community College District, PSD Appeal No. 10-02 (Apr. 23, 2010) ("RCEC Response to Chabot Petition") at 7.[4]

In its motion, Chabot again "asserts that such a legal construction as urged by RCEC and BAAQMD violates the Clean Air Act and is not supported." Chabot Motion at 3. Chabot failed, however, in its Petition to provide any legal basis to support its bald assertion that the 24-hour PM2.5 standard remains relevant for purposes of PSD permitting. It cannot provide such a basis now, not only because it would be untimely, but because no such basis exists in statute, regulation, policy, guidance, or case law. There is absolutely no legal basis whatsoever for Chabot's contention that the Air District must still demonstrate compliance with the 24-hour PM2.5 NAAQS, once the non-attainment designation became effective. Further, the Air

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[4] *See also* Air District's Response to Petition for Review, PSD Appeal No. 10-02 (Apr. 23, 2010) ("Air District Response to Chabot Petition") at 12 ("Petitioner has not provided any argument to counter this analysis, either during the comment period or in its Petition for review. Petitioner's only attempt to claim that a PSD analysis is still legally required for the 24-hour PM2.5 NAAQS is to allude to regulatory requirements applicable where a source in an area that is 'attainment' for a particular pollutant (and thus properly subject to PSD permitting for that pollutant) may cause an impact above a PSD 'Significant Impact Level' in an *adjacent* area that is 'non-attainment' for that pollutant.")

District's approach of assuming that it still needed to demonstrate compliance with the annual PM2.5 NAAQS represented a conservative approach. *See* RCEC Response to Chabot Petition at 9. For these reasons, the Board should not entertain any further reply on this point.

Regarding Chabot's objection to the conclusion that the Project would not be subject to non-attainment NSR permitting under Appendix S, Chabot again offers nothing more than its bald assertion that this violates the Clean Air Act. *See* Petition for Review of Prevention of Significant Deterioration Permit and Request for Oral Argument by Chabot-Las Positas Community College District, PSD Appeal No. 10-02 (Mar. 22, 2010) ("Chabot Petition") at 32. Chabot had its chance in its petition to raise any law, regulation, or other authorities that might support this assertion. But then again, no such authorities could be cited by Chabot, either in its petition or now in a reply, since there is absolutely no legal basis for Chabot's assertion. Accordingly, no further briefing is necessary and, in the interest of assuring an expeditious resolution of these appeals, the Board should deny Chabot the opportunity to submit a reply on these issues.

3. No Reply Is Warranted Concerning Whether the Federally Enforceable Permit Limit of 7.5 lb/hr PM2.5 Provides an Appropriate Basis for the Air Quality Impacts Analysis

Chabot repeats its contention that the federally enforceable emissions limit of 7.5 lb/hr PM2.5 does not provide an appropriate basis for the PSD modeling analysis, claiming that both the Air District's and RCEC's "argument is not supported by statutory and/or decisional law." Chabot Motion at 4. Chabot again suggests that this limit "may not be achievable" and that it was therefore wrong for the Air District not to publish preliminary modeling results based on the higher limit of 9 lbs/hr, which had appeared in the December 2008 draft version of the PSD permit. *Id.*

Again, Chabot does nothing more than assert the same legally incorrect propositions contained in its petition. As explained by both the Air District and RCEC in their respective responses, the EPA guidance cited by Chabot in its petition cannot possibly be interpreted to

support Chabot's assertion:

> As Petitioner explains, according to the NSR Workshop Manual, "the *emissions rate* for the proposed new source or modification must reflect the maximum allowable operating conditions as expressed by the federally ***enforceable emissions limit, operating level*** and ***operating factor*** for each pollutant and averaging time." Petition 10-03 at 30 (quoting NSR Workshop Manual at C.45 (emphasis in original). That is exactly what the District did here in using the 7.5 lb/hr emissions limit in the permit: it used the maximum allowable emissions as expressed in the federally enforceable emissions limit in Condition 19(h) of the permit.

Air District Response to Chabot Petition at 21; *see also* RCEC Response to Chabot Petition at 22.

To the extent Chabot intends in its reply to argue about the meaning of certain "decisional law" (Chabot Motion at 4), "Petitioner [Chabot] clearly misconstrues the Board decision cited in its Petition." RCEC Response to Chabot Petition at 23. Both the Air District and RCEC explained that the cited case, *In re Northern Michigan University Ripley Heating Plant*, PSD Appeal No. 08-02 (EAB, Feb. 18, 2009), provided no support for Chabot's position. Air District Response to Chabot Petition at 22 n.13; RCEC Response to Chabot Petition at 23. Unless Chabot again intends to misconstrue Board precedent or cite EPA policy that provides no support for its position, Chabot simply cannot provide such support in a reply since none exists. Nor should Chabot be allowed the opportunity to do so at this late stage of the proceedings, two months after petitions were due to be filed and while the automatic stay remains in effect. For these reasons, the Board should deny Chabot any opportunity to reply on this issue.

Regarding the alleged wrongfulness of the Air District in not publishing preliminary modeling runs that relied upon the higher 9 lbs/hr PM limit that had appeared in the December 2008 draft version of the PSD permit (Chabot Motion at 4 n.3), no reply is warranted on this point. Chabot cannot claim that its legal counsel did not actually receive compact discs containing these preliminary modeling runs. Nor can it claim any basis in law, policy, or guidance for requiring a permitting agency to publish modeling runs that would be based on an exceedance of the proposed emissions limit. Accordingly, no reply is warranted on this point.

4. No Reply Is Warranted Concerning Exclusion of Certain Roadways from the Cumulative Modeling Analysis

Chabot again objects to the exclusion of certain roadways from the cumulative modeling analysis, notwithstanding evidence that such roadways would not cause a significant concentration gradient in the vicinity of the Project's significant impacts. Chabot Motion at 4-5. According to Chabot, "[t]he failure to map out and plot these 'significant PM concentrations' for this community already at a health risk in relation to this major significant stationary source is an important public issue that needs to be addressed." *Id.* at 5. Chabot's request to submit a reply further addressing this point should be denied. Chabot had an obligation to submit all arguments and supporting evidence in its petition. Chabot failed, however, to provide any evidence that would call into question the Air District's judgment in selecting only certain highway segments for consideration as part of the cumulative PM2.5 impacts analysis.

In their respective responses, both the Air District and RCEC reviewed the analysis concerning this issue that had appeared in the Air District's Responses to Public Comments and supporting record documents. *See* Air District Response to Chabot Petition at 24-32; RCEC Response to Chabot Petition at 24-35. Chabot, on the other hand, failed in its petition to "provide[] any reason why the District's response to the comments requesting inclusion of these additional roadways could be wrong." Air District Response to Chabot Petition at 26. While Chabot included certain "Alameda County Congestion Management Maps" as exhibits to its petition, it "provide[d] no explanation of or evidence for how these maps might demonstrate the existence of a significant concentration gradient in the same location as the proposed source's significant impacts." RCEC Response to Chabot Petition at 30. Chabot should not now be afforded the opportunity to submit additional evidence or argument that should have been included in its petition. *See, e.g., In re Keene Wastewater Treatment Facility*, NPDES Appeal No. 07-18, slip op. at 20 (EAB, Mar. 19, 2008) ("to the extent that some of these arguments raise substantive nuances that are not set forth in the petition . . . they constitute, in essence, 'late-filed appeals' because they could have been raised in the petition but were not so raised"); *In re*

Arecibo & Aguadilla Regional Wastewater Treatment Plants, 12 E.A.D. 97, 123 n.52 (EAB 2005) ("This Board has generally denied petitioner's efforts to supplement deficient appeals, because . . . 'allowing petitioners to do so typically constitutes an unwarranted expansion of a party's appeal right and prejudices the permittee's interest in the timely resolution of the permitting process'") (citations omitted). Chabot actively participated during public comment and filed a petition for review; thus, it had ample opportunity to raise any evidence that might possibly call into question the Air District's exclusion of certain roadways from the cumulative impacts analysis. RCEC's interest in a timely resolution of these appeals would be prejudiced if Chabot were allowed to introduce new evidence or argument now.

In sum, Chabot failed in its petition to substantively confront the Air District's detailed Responses to Public Comments on this point. It should not be afforded yet another opportunity to present any evidence that would challenge the Air District's rationale and technical judgment as part of a reply. Moreover, by arguing that failure to specifically model the contributions from these other roadways "is an important public issue that needs to be addressed" because "this community [is] already at a health risk" (Chabot Motion at 5), Chabot's motion suggests that it intends to do nothing more in its reply than repeat its earlier contentions on this point. *See Keene*, slip op. at 20 (stating the "repetitive contentions, which again do not address the Region's responses to comments on the draft permit, do not provide adequate grounds to justify a grant of review of this permit"). Accordingly, the Board should not provide Chabot leave to file a reply concerning this issue.

5. No Reply Is Warranted Concerning Chabot's Errors in Submitting the Wrong Data and in Alleging that the Auxiliary Boiler Used for Purposes of the Cost-Effectiveness Analysis Is More Than Four Times Larger Than It Actually Is

Chabot next appears intent on revisiting the errors it made, first, in submitting the wrong vendor data in support of its own calculations of the emissions reduction that would be achieved through use of an auxiliary boiler, and then, in wrongly assuming that the boiler used for

purposes of the Air District's analysis was more than four times larger than it actually is. The Chabot Motion provides, in full, as follows:

> BAAQMD and RCEC also contend that the College District somehow misled BAAQMD on reviewing the Caithness records and that the College District's cost comparisons to other projects raised by RCEC based on the BAAQMD's records provided are "false." (RCEC at 35-47 [Mankato]) These issues need to be addressed so that the Board knows what documents were before BAAQMD, and why the reasoning upon which BAAQMD utilizes to reject inclusion of an auxiliary boiler as BACT and LAER for NOx and CO is flawed.

Chabot Motion at 5. In a footnote, Chabot then suggests that it "also wishes to provide to the Board the cost effective analysis prepared by Calpine, RCEC's proponent, and provided to BAAQMD which is the source for confusion by apparently combining different facilities and listing on the page '320MMBtu/hr.'" *Id*. at 5 n.4. No such reply is warranted, however, because both the Air District and RCEC already provided the cost-effectiveness analysis to the Board as part of their respective exhibits to their responses. *See* Exhibit 12, Spreadsheet, Mankato Energy Center Start profile for winter months;[5] Declaration of Alexander G. Crockett, Esq. in Support of Responses to Petitions for Review 10-02, 10-03, & 10-04 (Apr. 23, 2010), Exhibits 11.b & 11.b.1 (Docket Nos. 60.14, 60.15).

Further, both the Air District and RCEC already explained how Chabot apparently misconstrued information on this spreadsheet as suggesting that the boiler was actually much larger than it was. *See* Air District Response to Chabot Petition at 40-42; RCEC Response to Chabot Petition at 43-44. While Chabot's motion suggests that it now seeks to shift the blame to RCEC as "the source for confusion by apparently combining different facilities" (Chabot Motion at 5 n.4), as already explained by RCEC's response on this point, "[t]he only reference to a 320-MMBtu/hr boiler in the administrative record left no room for such confusion." RCEC Response

[5] All references to Exhibits 1-34 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, 62 and 73.02. References to Exhibits 35-59 are to RCEC's Exhibits to this Opposition to Petitioners' Motions for Leave To File a Reply Brief and Request for Expedited Consideration.

to Chabot Petition at 44.

Moreover, as explained by RCEC, "[h]ad Petitioner [Chabot] or anyone else raised any question about the reference to the 320-MMBtu/hr boiler at Los Medanos Energy Center that appeared in the spreadsheet, the Air District or RCEC could have clarified any confusion and provided an appropriate response." *Id.* But the issue was never raised and, accordingly, was not preserved for appeal. Chabot's request to provide an explanation that would shift the blame for failing to undertake a timely or detailed review of this information, either during public comments or in preparation of its petition, is much belated and should not be accepted by the Board.

Regarding Chabot's error in submitting the wrong vendor data from Siemens in support of its alternative cost-effectiveness calculation, both the Air District and RCEC fully explained this issue in their respective responses. *See* Air District Response to Chabot Petition at 33-37; RCEC Response to Chabot Petition at 37-40. Thus, no additional briefing or explanation is required at this time.

If allowed the opportunity to explain these errors, Chabot would likely claim, as it has on several occasions in its opposition to the Project when other errors in its arguments were identified by the Air District or RCEC, that the identified errors were "inadvertent" and in no way impair its underlying contention concerning the flaws in the Air District's analysis. For example, when the Air District debunked the central premise of Petitioner's February 6, 2009 comment letter – that both the Caithness Long Island Energy Center and the Lakeside Power Plant comprised examples of Siemens' advanced "Flex Plant 30" technology[6] – Chabot, after

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[6] *See* CAP Petition Exhibit 5, Docket No. 3.01, Letter from Joel L. Kinnamon, Ed.D to Weyman Lee, P.E., February 6, 2009, re: Objections And Comments to Draft "Amended Federal 'Prevention of Significant Deterioration' Permit" For The Russell City Energy Center, BAAQD [*sic*] Application No. 15487" (hereinafter, "Chabot Petition Exhibit 4"), at 13 (referring to the Lake Side Power Plant as "a 2x1 combined cycle project [that] utilizes [Flex Plant] 30 technology and has been in operation since December 2007"; reporting that, "[t]he Caithness Energy Long Island Power 1x1 combined cycle plant currently under construction also is permitted to use [Flex Plant] 30 technology.").

emphatically denying RCEC's evidence to the contrary,[7] finally apologized to the Air District "for this inadvertent confusion" and then immediately shifted the focus of its comments to the auxiliary boiler used at these other facilities:

> We suspect that the source of this confusion arose because although Lake Side does not incorporate all elements of the trademarked "Flex Plant 30" design, nevertheless Lake Side is equipped with an auxiliary boiler, a major element which provides the Lake Side plant with the capability to startup much more quickly and with much lower air emissions than RCEC. In this regard, **this clarification as supported by the accompanying documentation further supports, and in no way takes away from, our point on behalf of Chabot-Las Positas College District that RCEC is not utilizing the best available control technology (BACT).**

Errata to Petition for Review and Appendix of Exhibits in Support of Petition for Review of Prevention of Significant Deterioration Permit by Chabot-Las Positas Community College District, Exhibit 4, June 15, 2009 letter from Jewell J. Hargleroad to Weyman Lee and Alexander Crockett, "Re: Russell City Energy Center (RCEC) Application No. 15487: clarification and correction concerning Utah's Lakeside Power Plant referred to in February 6, 2009 comments and April 6, 2009 e-mail," at 1-2 (emphasis in original) (Docket No. 2.08).

Now, several months after the Air District responded to Chabot's comments by performing a full cost-effectiveness analysis of the use of an auxiliary boiler, and despite the Air District's response to Chabot's further comments assailing that analysis through submission of the wrong vendor data, Chabot attempts in its petition for review to assail the Air District's analysis by raising an issue never previously raised during any public comment period: the size of the boiler used in the cost-effectiveness analysis. In so doing, however, Chabot makes another significant technical error, due either to its own carelessness or inattention to the details in the record, and wrongly alleges that the boiler used in the analysis is more than four and a half times

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[7] *See* Exhibit 35, Letter from Jewell J. Hargleroad to Weyman Lee, P.E., March 31, 2009 Re: RCEC's Representations Concerning Chabot-Las Positas Objections And Comments to Draft "Federal 'Prevention of Significant Deterioration' Permit" For The Russell City Energy Center, BAAQD [*sic*] Application No. 15487.

larger than it actually is. Such an error, if not inadvertent, can only be intended to confound the Board and suggest error where none exists.

Chabot's use of the wrong emissions rate of 9 lbs/hr instead of 7.5 lbs/hr in its modeling exercise is another example of an instance where Chabot has responded to identification of an error in its technical analysis with a substantive legal claim. In selecting the wrong rate, Chabot expressly acknowledged that it was selecting a higher rate (in grams per second) than was relied upon by the applicant's own modeling analysis, without any technical justification or rationale for doing so. *See* RCEC Response to Chabot Petition at 13-14. The Air District explained Chabot's error in this respect in its Responses to Public Comments. Exhibit 5, Responses to Public Comments, Federal "Prevention of Significant Deterioration" Permit (Feb. 10, 2010) ("Responses to Public Comments") at 160. Now, unsatisfied with that response, Chabot seeks in its petition to turn its own error in using the wrong emissions rate into a substantive legal claim, which it seeks to raise for the first time on appeal: that the federally enforceable permit limit of 7.5 lbs/hr is unachievable and therefore does not provide an appropriate basis for modeling. Not only was this argument not raised during public comment; it runs contrary to Chabot's earlier position that the proposed limit of 7.5 lbs/hr is not low enough. *See* RCEC Response to Chabot Petition at 16-17.

In all these examples, Chabot's shifting legal claims and factual assertions seem designed, not to raise any issue warranting substantive consideration, but to obfuscate the facts and record, with the goal of so confounding the Board's consideration of its petition that it further delays construction of the Project. For the foregoing reasons, the Board should not allow Chabot to confound the analysis any further and should deny Chabot leave to submit any further explanation concerning these errors.

6. No Reply Is Warranted Concerning the Air District's Environmental Justice Analysis

Lastly, Chabot seeks to object to RCEC's argument that the Board should dismiss Chabot's claims that the Air District's environmental justice analysis was incomplete and

inadequate. Chabot Motion at 5. Chabot objects to RCEC's conclusion that the occurrence of a concentration in excess of a significant impact level in an environmental justice community, by itself, provides no basis for remand of the PSD permit. *Id*. Chabot then suggests the following:

> [g]iven the Bay Area's non-attainment status for 8-hour ozone and PM2.5, applying the facts at issue, this certainly should be a solid basis to require full modeling disclosure, including the significant roadways of Interstate 880 and Hesperian Blvd. as well as the impacts which will result by applying the achievable emission rate of 9lbs/hour for PM2.5, a rate guaranteed by the vendors.

Id. at 5-6.

As previously discussed, Chabot has provided no evidence that would call into question the Air District's rationale for excluding these roadways from the cumulative impacts analysis. Nor has it presented any basis to challenge the appropriateness of using the federally enforceable permit limit of 7.5 lbs/hr PM2.5 as the basis for emissions modeling. Chabot cannot now, nearly two months after the deadline for filing of appeals, submit additional argument or evidence on these points or on the allegedly derivative deficiencies in the environmental justice analysis. Further, the issues raised by Chabot's motion suggest that Chabot intends to do nothing more in its reply than repeat its earlier unsupported contentions on all these points. For these reasons, no reply should be allowed.

Chabot also seeks to refute RCEC's contention that the maps submitted by Chabot as part of its Supplemental Errata, which depict certain areas that the Air District has identified as "priority communities" for purposes of its Community Air Risk Evaluation ("CARE") program, fail to support Chabot's allegation that the Project will significantly impact an environmental justice community. *Id*. at 6. Chabot apparently does not disagree with RCEC's observation that all of the Project's impacts in excess of the SIL lie outside of the designated priority community boundaries; rather, according to Chabot, it "wishes to briefly address just 'how close' to the line drawn by CARE RCEC would be located." *Id*. The Board should not entertain such a reply.

Chabot failed upon submitting its petition to include any discussion or explanation for how the maps attached to Chabot's Supplemental Errata might possibly support its allegations

concerning deficiencies in the environmental justice analysis. Further, as pointed out by RCEC, these maps actually provide no support for Chabot's contention that the Project would result in significant impacts to communities already disproportionately impacted by air pollution. RCEC Response to Chabot Petition at 51. Rather, "[u]pon close examination of the map attached to Petitioner's Supplemental Appendix Exhibit 2 and RCEC's Source Impact Analysis, it is clear that all of the significant impacts of the source lie *outside* of the identified priority community." *Id*.

Without explaining why it had failed to include any discussion of this map or how the map might support its arguments as part of its petition, Chabot now wishes in its reply to point out "just 'how close' to the line drawn by CARE RCEC would be located." Chabot Motion at 6. However, any further argument or evidence Chabot might submit at this stage of the proceedings to demonstrate alleged deficiencies in the environmental justice analysis would be untimely. *See, e.g., Keene*, slip op. at 20; *Arecibo*, 12 E.A.D. at 123 n.52. For this reason, the Board should deny Chabot any opportunity to file a reply on this issue.

7. Conclusion

Chabot concludes its motion by saying that, "[g]enerally, the College District seeks to assist the Board in identifying the undisputed facts and presenting why based on those undisputed facts the PSD permit approval must be reversed and remanded back." Chabot Motion at 6. This request, however, fails to satisfy the threshold requirement of the Board's May 6, 2010 Order, requiring Petitioners to state "with particularity the arguments to which Petitioner seeks to respond." Order at 1. Accordingly, the Board should not provide Chabot leave to file a reply that would "generally . . . assist the Board in identifying the undisputed facts and presenting why based on those undisputed facts the PSD permit approval must be reversed and remanded back." Chabot Motion at 6.

For all of the foregoing reasons, RCEC respectfully requests that the Board deny Chabot the opportunity to file a reply on any of the issues raised by its motion.

B. CAP Should Not Be Allowed to File a Reply Brief on Any Issue

Petitioner CAP requests leave to file a brief responding to arguments on the following issues: (1) the maximum number of startup and shutdown events allowed by the PSD permit; (2) whether CAP's argument concerning the relevance of cost to consideration of an auxiliary boiler as BACT was preserved for appeal; (3) whether the Air District's delegation agreement with EPA Region IX precluded consideration of cost for existing technologies; (4) the arguments and emissions assumptions used by the Air District to reject existing technologies as BACT; and (5) Board precedent cited by the Air District and RCEC as supporting the cold and hot startup limits for nitrogen dioxide ("NO_2") as BACT. Motion of Petitioner Citizens Against Pollution for Leave To File a Reply, PSD Appeal No. 10-03 (May 14, 2010) ("CAP Motion"). RCEC opposes CAP's request to reply on each of these issues and requests that the Board deny CAP's motion because such a reply would provide CAP an opportunity to submit additional argument and evidence that should have accompanied its petition. Additionally, no reply is warranted on certain issues because CAP failed in its motion to meet the requirements of the Board's Order that it state with particularity the arguments to which it seeks to respond and the reasons why any response is necessary.

1. No Reply Is Warranted on CAP's Suggested Argument Concerning the Maximum Number of Startup and Shutdown Events Allowed by the Permit

CAP first seeks to file a reply for the following reason: According to CAP, the Air District established BACT limitations for startup and shutdown events based on a likely operating scenario. CAP Motion at 1. However, because the daily and annual emissions limits would allegedly allow for more startup and shutdown events than the likely scenario, CAP argues that the Air District "should have determined the maximum number of cold, warm, or hot startup events (and combination of such events) to determine the appropriateness of requiring technology that can limit the emissions for each startup event." *Id.* According to CAP, this issue is also relevant to the cost-effectiveness analyses. *Id.* CAP seeks to file a reply to both the Air District's and RCEC's "lengthy" responses on this issue, suggesting that such a reply would

demonstrate, "once CAP has an opportunity to explain certain inaccuracies in the Air District's response, that there are no material factual disputes on this issue." *Id*. at 2. Further, according to CAP, "[t]hen the issue for the Board is a legal one: whether BACT was properly set without providing the public with information concerning the maximum number of high emission startup events that would merit imposing technology requirements rather than work practices as BACT." *Id*. CAP asserts that, "[t]his issue appears to be a question of first impression for the Board" and that a reply is therefore warranted. *Id*.

RCEC objects to CAP's request to file such a reply. The issue raised by CAP in its motion is not the same one presented by its petition, but rather represents a substantive shift in both emphasis and argument, which cannot be raised at this late stage of the proceedings. In its petition, CAP alleged that "the District failed in its most fundamental job of ascertaining the impact of RCEC's operating scenario on [startup/shutdown] emissions." Petition for Review of Prevention of Significant Deterioration Permit, PSD Appeal No. 10-03 (Mar. 22, 2010) ("CAP Petition") at 8. CAP further alleged that, "[t]he District's response to comments violates the [Clean Air Act] because it does not respond to the public's significant comments asking for a credible scenario of likely [startup/shutdown] events as required by [40 C.F.R.] § 124.17." *Id*. at 14. In support of its position that the Air District failed to ascertain a credible operating scenario, CAP alleged, incorrectly, that certain evidence of the Project's anticipated "6 x 16" operating scenario was not contained within the record. *Id*. CAP then suggested that the record is replete with inconsistencies concerning the Project's intended duty cycle. *Id*. 14-17.

In short, while CAP alleged in its petition that the Air District had failed to establish *any* credible operating scenario for the Project, CAP now appears to concede that the Air District's BACT analysis was, in fact, based on such an operating scenario. CAP now seeks to argue in reply that the daily or annual emissions limits would allegedly allow for more startup and shutdown events than provided by the assumed scenario or that the Air District erred in failing to establish a ceiling on the maximum number of such events, either as express permit conditions or for informational purposes. *See* CAP Motion at 1. This would represent a substantial shift in

both emphasis and argument, which the Board should not allow in a reply. *See Keene*, slip op. at 20 (finding that arguments in reply raised "substantive nuances" not set forth in the petition and as such "constitute, in essence 'late-filed appeals.'"). While CAP's petition referenced earlier comments that had suggested that "the daily CO limit divided by the maximum CO emissions from [startup/shutdown] yielded . . . as many as 700 warm starts" per year (CAP Petition at 13), these comments were referenced in passing, as but one among several different combinations of startup and shutdown events that CAP alleged could be possible for the facility, notwithstanding its 6 x 16 operating scenario.[8] Should CAP now seek to challenge the daily or annual emissions limits as allowing greater than the anticipated number of startup and shutdown events under this scenario or to argue that the Air District should have established a maximum number of such events as a condition of the permit or for informational purposes, its argument would be untimely and should not be accepted by the Board.

Further, it is entirely unclear how CAP can now suggest that this amounts to a purely legal issue, with no material dispute remaining concerning the facts, when the central premise of its argument was that the Air District had not established a credible operating scenario for the Project. Moreover, the purely legal question CAP proffers to the Board in its motion is not one that was raised by its petition. According to CAP's motion, the issue comes down to "whether BACT was properly set without providing the public with information concerning the maximum

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[8] Following is an example of the multiple scenarios suggested by CAP in its petition:

> Contrary to the District's bald assertion that 6 x 16 means six cold startups and 100 warm startups, it could also mean as many as 300 warm startups per year per turbine, or 600 warm startups for both turbines, or any combination of warm and cold startups, depending on whether the 6 x 16 represents an average. (For example, under a 6 x 16 operating scenario, if the RCEC facility operated for 16 hours per day, 6 days per week, that could mean six warm startups per week, which would be 300 warm starts for one turbine for 50 weeks.) Further, contrary to the District's bald assumption about six cold stars and 100 warm starts, depending on the source, there will be anywhere from one cold start to 52 cold starts or 600 to 700 warm starts.

CAP Petition at 16-17.

number of high emission startup events that would merit imposing technology requirements rather than work practices as BACT." CAP Motion at 2. If such a contention can be found in CAP's petition, it is only by unraveling, expanding upon, and then compounding various strands of argument. Indeed, nowhere in its petition does CAP argue that the Air District's failure to establish a ceiling on the maximum number of startup and shutdown events constituted error. Rather, CAP's contention was clear: the Air District had failed both to ascertain a credible operating scenario for the Project and to respond to public comments asking it to do so. Now, in its motion, CAP appears to shift focus to the inadequacy of the daily and annual limits and the failure to establish a maximum ceiling on the number of startup and shutdown events. Clearly such a substantial reshaping of the issues for consideration cannot be allowed in a reply. *See Keene*, slip op. at 20. For this reason, RCEC would respectfully request that the Board deny CAP the opportunity to submit a reply in any way related to its argument that the Air District failed in its Responses to Public Comments to ascertain a credible operating scenario for the Project.

2. No Reply Is Warranted Concerning CAP's Failure to Preserve Its Argument on the Relevance of Cost to Whether an Auxiliary Boiler Should Be Required to Meet BACT

In their respective responses, both the Air District and RCEC contend that CAP failed to preserve the argument raised by its petition that the Air District was precluded by its own rules and its Delegation Agreement with EPA Region IX from considering cost in its analysis of whether to require use of an auxiliary boiler during startup to meet BACT. *See* Air District's Response to Petition for Review, PSD Appeal No. 10-03 (Apr. 23, 2010) ("Air District Response to CAP Petition") at 44 ("As a threshold matter, Petitioner did not present this argument – that the District cannot consider the cost-effectiveness of an auxiliary boiler here under the PSD BACT rules but must instead impose a LAER level of control – in its comments and so it should not be allowed to object on this basis on appeal."); RCEC's Response to Petition for Review Filed by Citizens Against Pollution, PSD Appeal No. 10-03 (Apr. 23, 2010) ("RCEC Response

to CAP Petition") at 17-19. CAP now seeks leave in its reply "to discuss how it indeed raised this argument with sufficient specificity." CAP Motion at 2. No reply is warranted on this issue.

As explained by RCEC's response, "Petitioner [CAP] misleadingly cites to its earlier comments concerning a wholly different subject matter." RCEC Response to CAP Petition at 17. CAP sought in its petition to graft comments made on the subject of a wholly different technology onto its arguments concerning an auxiliary boiler. It should come as no surprise then that, in its current motion, CAP speaks only generally of "the argument that 'achieved in practice' technology does not require a cost effectiveness determination" (CAP Motion at 2), and does not in any way suggest that it would demonstrate this issue was, in fact, raised with respect to whether an auxiliary boiler should be required as BACT.

To the contrary, as explained by the Air District, "a review of the comments Petitioner submitted on the auxiliary boiler issue shows just the opposite" (Air District Response to CAP Petition at 44); that is, "Petitioner specifically engaged the District on the cost-effectiveness issue, and far from objecting to the use of a cost-effectiveness analysis, Petitioner claimed that the District *should* perform such an analysis, only with more justification for the operating profile on which it was based." *Id.* (emphasis in original). Thus, it is plainly false that the issue raised by CAP in its petition was ever previously raised during public comment. Unless CAP intends in its reply to take further liberties in citing to the record as it did in its petition, CAP cannot seriously contend that the issue was raised with sufficient specificity to preserve it for appeal. Accordingly, no reply is warranted.

3. No Reply Is Warranted on Whether the Delegation Agreement Precludes Consideration of Cost for Achieved-in-Practice Technologies; This Is Not an Issue of First Impression

CAP next seeks to reply with respect to whether the Delegation Agreement between the Air District and EPA Region IX precludes consideration of cost for achieved-in-practice technologies. *See* CAP Motion at 2. According to CAP, the Delegation Agreement "provides that the Air District should apply the District's State Implementation Rule 2-2 to PSD

proceedings," which, in turn, "provides that 'achieved in practice' technology does not require a cost effectiveness determination." *Id*. CAP's motion further provides as follows:

> Should the Board rule in favor of Respondents on this issue, it will impact every PSD permitting analysis that involves "achieved in practice" technology. Moreover, this issue appears to be a question of first impression. A reply would therefore be in the public interest.

Id.

As explained by both the Air District and RCEC in their respective responses, the Clean Air Act and PSD rules expressly require consideration of cost as part of a BACT analysis. *See* Air District Response to CAP Petition at 43-45; RCEC Response to CAP Petition at 20. CAP's argument essentially seeks to conflate issuance of a PSD permit under delegated authority, with issuance of a PSD permit under a State Implementation Plan-approved permitting program. RCEC Response to CAP Petition at 20. "In so doing, Petitioner seeks to eliminate any distinction between the requirement to achieve BACT under the PSD rules, and the obligation to achieve the 'lowest achievable emissions rate' ('LAER') under the Clean Air Act's Non-Attainment NSR provisions and the Air District's rules implementing same." *Id*.

Further, while CAP suggests that the position taken by the Air District and RCEC would amount to an issue of first impression that departs significantly from existing Board precedent, just the opposite is true: this is not an issue of first impression, but one that is solidly rooted in case law cited by both the Air District and RCEC in their responses. *See* Air District Response to CAP Petition at 48; RCEC Response to CAP Petition at 21. In the case cited by both the Air District and RCEC, a permitting agency tried, upon just the theory offered by CAP, to deny a permit "for failure to demonstrate compliance with certain requirements of [state] law, including a demonstration of . . . 'lowest achievable emission rate' (LAER) . . . under [] State Implementation Plan (SIP) requirements for nonattainment area pollutants." *See* Air Disrtrict Response to CAP Petition at 48 (citing *In re West Suburban Recycling and Energy Center, L.P*., 6 E.A.D. 692, 696 (EAB 1996)). To avoid unnecessarily repeating the discussion presented by the responses, RCEC would refer the Board to the responses. *See* Air District Response to CAP

Petition at 48; RCEC Response to CAP Petition at 21.

Although CAP suggests that agreeing with the Air District's and RCEC's position would up-end prevailing practices for analysis of whether existing technologies should be required as BACT, just the opposite is true. That is, CAP's urged interpretation of the Clean Air Act would collapse any distinction between BACT and LAER and require LAER as part of a federal PSD permit. Such an interpretation finds no basis in law and runs contrary to the clear dictates of the Clean Air Act, PSD rules, and Board precedent. Accordingly, this is not a "question of first impression," but is one clearly answered by the Clean Air Act, PSD rules, and Board precedent. For this reason, no additional briefing is warranted and the Board should reject CAP's request to file a reply on this issue.

4. No Reply Is Warranted Concerning the Emissions Assumptions Used To Reject Technology that Is Achieved-in-Practice

CAP's motion provides that "[a] short reply is necessary to address Respondents' arguments about the emissions assumptions the District used to reject technology that is achieved in practice." CAP Motion at 2. That is the sum total of CAP's request. This request fails to satisfy the requirements of the Board's May 6, 2010 Order, which requires Petitioners seeking leave to file a reply to "stat[e] with particularity the arguments to which Petitioner seeks to respond and the reasons Petitioner believes it is necessary to file a reply to those arguments." Order at 1. From the vague request presented by CAP's motion, one cannot even begin to identify the "arguments" or "emissions assumptions" that CAP might seek to challenge in its reply. Further, CAP provides no basis for why a reply concerning these "arguments" or "emissions assumptions" is necessary. The general statement appearing at the end of CAP's motion ("[t]he Board has granted petitioners leave to file replies in similarly complex cases" (CAP Motion at 3)) is too vague to demonstrate why a reply is necessary concerning these unspecified "arguments" and "emissions assumptions." For the foregoing reasons, CAP's request to file a reply on this issue fails procedurally and should not be accepted by the Board.

5. No Reply Is Warranted to Distinguish Cases Cited in Support of Hot and Cold Startup Limits; Nor Should CAP Be Allowed Leave To Address Other Relevant Arguments on This Issue

CAP's final request in its motion is as follows:

> Respondents cite cases to argue that the high BACT limits that the Air District set for cold and hot startup NO_2 emissions are based on Board precedent. CAP would like an opportunity to distinguish the cases Respondents cite and to address other relevant arguments on this issue.

CAP Motion at 2.

Again, CAP fails to articulate with any specificity the arguments to which it seeks to reply. In the case of RCEC, its arguments defending the Air District's establishment of hot and cold startup limits for NO_2 span more than 25 pages of its response and include numerous citations to Board precedent on the establishment of BACT limits. *See* RCEC Response to CAP Petition at 33-58. However, in asking for leave to distinguish the cited cases, CAP provides no citation to any particular page number, argument, case citation, or legal proposition that might possibly narrow the range of arguments to which it now seeks to reply. This clearly fails to satisfy the Board's order that Petitioners "stat[e] with particularity the arguments to which Petitioner seeks to respond and the reasons Petitioner believes it is necessary to file a reply to those arguments." Order at 1. Further, in requesting leave to file a reply "address[ing] other relevant arguments on this issue" (CAP Motion at 2), CAP's motion is even more vague and, as a consequence, falls even shorter of meeting the Board's requirements set forth by the Order. Because CAP has failed to satisfy the threshold requirements articulated by the Board in its Order, the Board should deny CAP leave to file a reply on this issue.

Even if CAP had complied with the Board's Order, the Board should not accept further briefing on this issue, since CAP had the opportunity to submit all of its arguments with its petition and did, in fact, include substantive arguments on this point. As the Board has made clear, petitions for review may not be supplemented by further briefing. *See, e.g., Zion Energy*, 9 E.A.D. at 707; EAB Practice Manual at 32. This issue has already been fully briefed and no

further reply is warranted. *See In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 111 n.8 (EAB 1997) (denying leave to file a reply where "[t]he petitions, the responses to the petitions, and the administrative record provide ample basis on which the Board can evaluate the issues raised in the petitions"). Given RCEC's interest in an expeditious resolution of these appeals, RCEC would urge the Board to deny CAP's request to submit additional argument on this point.

6. Conclusion

CAP should not be allowed to submit a reply on any of the five issues that it raises in its motion. Such a reply would provide CAP an opportunity to submit additional argument and evidence that should have accompanied its petition. In addition, no reply is warranted on CAP's fourth and fifth issues because CAP failed in its motion to meet the requirements of the Board's Order that it state with particularity the arguments to which it seeks to respond and the reasons why any response is necessary.

C. Mr. Sarvey Should Not Be Allowed To File a Reply Brief or Submit Additional Evidence Except as It Relates to the Untimeliness of His Petition or the Parties to the CARE/Simpson Petition

Mr. Sarvey requests leave to file a reply brief and/or to submit additional evidence on five issues: (1) the untimeliness of his petition, (2) the parties to the CARE/Simpson Petition (PSD Appeal No. 10-05), (3) the BACT limits for startup and shutdown emissions of nitrogen oxides ("NO_x"), (4) an Air District draft study on PM2.5 formation, and (5) the Air District's BACT determination for the Project's cooling tower. *See* Motion Requesting Leave to File a Reply Brief, PSD Appeal No. 10-04 (May 13, 2010) ("Sarvey Motion"). For the reasons discussed below, RCEC does not oppose Mr. Sarvey's request to submit evidence related to his petition's untimeliness and the parties to the CARE/Simpson Petition, but opposes Mr. Sarvey's other requests because they do not comply with the Board's Order, rely on false information, and/or would introduce new evidence or arguments that Mr. Sarvey should have included in his petition.

1. RCEC Does Not Oppose Mr. Sarvey's Request To Provide Evidence Related to the Untimeliness of His Petition

Mr. Sarvey states that he "wishes to respond to allegations that the petition was untimely." Sarvey Motion at 1. In particular, he states that he "will provide evidence that the petition is timely and was submitted to the CDX system but the system malfunctioned." *Id.* As the Board explained, it is currently investigating whether there was a problem with the CDX portal on the evening of March 22, 2010 prior to the 11:59 pm Eastern Time deadline for filing petitions.[9] To the extent that Mr. Sarvey's evidence related to submission of his petition and malfunction by the CDX system is intended to assist the Board in its investigation, RCEC does not oppose Mr. Sarvey's request to provide it.

2. RCEC Does Not Oppose Mr. Sarvey's Request To Clarify that He Is Not a Party to the CARE/Simpson Petition

Mr. Sarvey states that he "wishes to clarify that he is not a party to PSD Appeal NO. 5," *i.e.*, the CARE/Simpson Petition. Sarvey Motion at 1. As RCEC noted in its response to the CARE/Simpson Petition, the CARE/Simpson Petition bears no title but contains a footnote indicating that "Petitioner(s) are CARE, Rob Simpson, and Robert Sarvey." *See* Petition for Review, PSD Appeal No. 10-05 ("CARE/Simpson Petition") at 1, 4 n.7. The introduction to the CARE/Simpson Petition also mentions comments submitted jointly by CARE, Bob Sarvey, and Rob Simpson. *Id.* at 3. Based on this language, both RCEC and the Air District concluded that Mr. Sarvey was one of the parties to the CARE/Simpson Petition. Although Mr. Sarvey has now clarified this is not correct, RCEC does not object to any additional clarification or information that Mr. Sarvey wishes to provide on this point.

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[9] *See* Order Denying Request for Summary Dismissal of CARE Petition and Requesting Response on the Merits, PSD Appeal No. 10-05 (Apr. 14, 2010) at 2.

3. Mr. Sarvey Should Not Be Allowed To Supplement His Arguments on Startup and Shutdown Limits for NO_x Emissions

Mr. Sarvey states that he "would also like to respond to arguments that the BAAQMD has selected the appropriate BACT limits for start up and shut down for NO_x emissions." Sarvey Motion at 1. He claims that the Air District and RCEC "have attempted to mischaracterize" his position and "cloud the issue with other matters." *Id.* In particular, he "wishes to clarify his position and point to evidence in the record" that establishes the Air District's alleged failure to require BACT. *Id.* The Board should deny this request because it fails to comply with the Board's Order, would impermissibly raise new issues, is unnecessary, and would be an untimely supplement of Mr. Sarvey's petition for review.

The Board's Order requires petitioners to state "with particularity the arguments to which Petitioner seeks to respond and the reasons Petitioner believes it is necessary to file a reply to those arguments." Order at 1. Mr. Sarvey does nothing more than identify the first issue in his petition – one which prompted a 13-page response by the Air District and a 25-page response by RCEC. RCEC's response, for example, addresses the Air District's elimination of OpFlex technology in its BACT analysis, the proposed consent decree for the Gateway Project, the Air District's basis for the NO_x limits hot and cold startups, and other startup and shutdown issues. *See* RCEC's Response to Petition for Review Filed by Robert Sarvey, PSD Appeal No. 10-04 (Apr. 23, 2010) ("RCEC Response to Sarvey Petition") at 8-34. Mr. Sarvey does not identify a single specific Air District or RCEC argument to which he wishes to respond. The only reasons he provides for seeking leave to file a reply are the Air District's and RCEC's alleged attempts to "mischaracterize" his position and "cloud the issue with other matters." Sarvey Motion at 1. He does not provide, however, a single example of an alleged mischaracterization or clouding of an issue. Thus, he entirely fails to state "with particularity" any arguments to which he seeks to respond or the reasons he believes it is necessary to file a reply. Because Mr. Sarvey did not comply with the Board's Order, his motion on this issue should be denied.

In addition Mr. Sarvey states that he would like to respond to arguments related to

"BACT limits for start up and shut down for NO_x emissions." Sarvey Motion at 1. As RCEC explained in its response to the Mr. Sarvey's petition, RCEC's PSD permit contains separate NO_x limits for hot, warm, and cold startups and for shutdowns. *See* RCEC Response to Sarvey Petition at 9. Mr. Sarvey did not raise any issue in his petition related to the NO_x limits for warm startups or for shutdowns. *Id.* at 32. To allow Mr. Sarvey to raise a new issue on these limits now would contravene both the Board's Order and Board precedent. *See* Order at 1 (stating that "[a] petitioner may not raise any new issues in its reply brief."); *In re City of Attleboro, MA Wastewater Treatment Plant*, NPDES Appeal No. 08-08, slip op. at 72 n.105 (EAB, Sept. 15, 2009) ("Ordinarily, the Board does not allow petitioners to raise new arguments in filings subsequent to their petition for review"); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999) ("New issues raised for the first time at the reply stage of these proceedings are equivalent to late filed appeals and must be denied on the basis of timeliness"). Thus, Mr. Sarvey should not be allowed to raise any issue related to the NO_x limits for warm startups or shutdowns – or, indeed, any new issue – in a reply brief.

With respect to the NO_x limits for hot and cold startups, which Mr. Sarvey did raise as issues in his petition, his request to "clarify his position and point to evidence in the record" is unnecessary and comes too late. Mr. Sarvey's position on these issues was clear. With respect to the hot startup limit, Mr. Sarvey contended that "[t]he 75 pound emission limit for the Palomar Project represents a 20% compliance margin over the 95 pound limit, but the District still failed to adopt a lower limit." Petition for Review of Prevention of Significant Deterioration Permit, PSD Appeal No. 10-04 (Mar. 23, 2010) ("Sarvey Petition") at 11. The Air District and RCEC both addressed this contention at length. *See* Air District Response to Petition for Review, PSD Appeal No. 10-04 (Apr. 23, 2010) at 16-19 ("Air District Response to Sarvey Petition"); RCEC Response to Sarvey Petition at 17-23. With respect to the cold startup limit, Mr. Sarvey contended that "the District should have chosen either the Delta limit of 281 pounds the Metcalf limit of 335 pounds or the Palomar limit of 375 pounds as BACT for NO2 startup emissions." Sarvey Petition at 11. Again, the Air District and RCEC both addressed this contention at

length. *See* Air District Response to Sarvey Petition at 9-16; RCEC Response to Sarvey Petition at 23-30. Thus, these issues were fully briefed, and clarification of Mr. Sarvey's positions on these issues is unnecessary. *See, e.g., In re City of Salisbury, Maryland*, 10 E.A.D. 263, 296 n.44 (EAB 2002) (denying leave to file a reply where issues were "well-framed by the Appeal Brief and Response Brief" and "further briefing would thus not meaningfully inform the Board's views"); *Kawaihae,* 7 E.A.D. at 111 n.8 (denying leave to file a reply where "[t]he petitions, the responses to the petitions, and the administrative record provide ample basis on which the Board can evaluate the issues raised in the petitions").

To the extent Mr. Sarvey wishes to "point to evidence in the record" on these issues, or to make any new arguments, his attempt to do so is untimely and should be denied. As the Board has explained, petitions for review may not be supplemented by further briefing. *See, e.g., Zion Energy, L.L.C.*, 9 E.A.D. at 707; EAB Practice Manual at 32. Mr. Sarvey had his chance to "point to evidence" in his petition for review, but he largely failed to do so. He does not even attempt to explain why he did not submit any such evidence with his petition. Any additional evidence or new arguments related to the NO_x limits for hot and cold startups submitted in a reply brief would be untimely. *See, e.g., Keene,* slip op. at 20; *Arecibo,* 12 E.A.D. at 123 n.52. Mr. Sarvey should have pointed to all of his evidence and raised all of his arguments in his petition for review. His attempt to supplement his petition on BACT limits for start up and shut down NO_x emissions via a reply brief should be denied.

4. Mr. Sarvey Is Incorrect that the Draft Study of PM 2.5 Formation Is Not in the Administrative Record

Mr. Sarvey asserts that the Air District and RCEC "have repeatedly referred to a draft study of PM 2.5 formation in the BAAQMD but have not provided the study for the record." Sarvey Motion at 1. He states that he "wishes to introduce" the study into the record, explain its significance, and explain how the Air District and RCEC have allegedly quoted selected portions of the study "to misinform" the Board about the study's results. *Id.* Mr. Sarvey is simply wrong on this issue, and no reply brief or additional evidence is needed or should be allowed.

The study to which Mr. Sarvey refers is titled "Draft 'Fine Particulate Matter Data Analysis and Modeling in the Bay Area.'" It is included in the Air District's Certified Index of Administrative Record as Document No. 2.24. *See* Air District's Certified Index of Administrative Record, PSD Appeal Nos. 10-01 through 10-10 (Apr. 25, 2010) at 5 ("Saffet Tanrikulu, BAAQMD, et al., Draft 'Fine Particulate Matter Data Analysis and Modeling in the Bay Area," dated 10/1/2009). As the Air District explained, its Statement of Basis, Additional Statement of Basis, Responses to Public Comments "*as well as all of the supporting documentation on which the Air District's permitting analysis is based*, are available for public review at Air District headquarters at 939 Ellis Street, San Francisco, CA, 94117." Exhibit 5, Responses to Public Comments at I (emphasis added). Thus, the draft study was both included in the Air District's Certified Index of the Administrative Record and available for public review.

There is no need for Mr. Sarvey to "introduce" the draft study now. Nor should Mr. Sarvey be granted leave to "explain its significance" or make any allegations concerning it. Mr. Sarvey had every opportunity to do so in his petition for review, and a reply brief on this issue would be untimely. *See, e.g., Keene*, slip op. at 20. Any failure by Mr. Sarvey to review the files that the Air District made available, including after the final PSD permit was issued and before petitions for review were due, or to review the Air District's Certified Index of the Administrative Record does not mean that the Air District "ha[s] not provided the study for the record." Sarvey Motion at 1. Mr. Sarvey's request for leave to file a reply brief on this issue should be denied.

5. Mr. Sarvey Should Not Be Allowed To Supplement His Arguments on the BACT Determination for the Cooling Tower

Mr. Sarvey states that he "whishes [*sic*] to respond to [Air District] assertions that it has evaluated all relevant issues in relation to its BACT determination for PM-10 Emissions from the proposed projects [*sic*] cooling tower." Sarvey Motion at 2. The Board should deny this request

because it fails to comply with the Board's Order, the issue was not preserved for appeal except with respect to dry cooling, and any supplemental arguments on dry cooling would be untimely.

Mr. Sarvey requests leave to reply to alleged Air District "assertions" about its BACT determination for PM emissions from the cooling tower, but fails to identify a single specific assertion within the Air District's 5-page response on the cooling tower BACT issue. *See* Air District Response to Sarvey Petition at 28-32. Moreover, Mr. Sarvey entirely fails to provide any reason he believes it is necessary to file a reply on any arguments. Because Mr. Sarvey did not comply with the Board's Order to state "with particularity the arguments to which Petitioner seeks to respond and the reasons Petitioner believes it is necessary to file a reply to those arguments" (Order at 1), his motion on this issue should be denied.

Even if Mr. Sarvey had complied with the Board's Order, his request to file a reply brief on the cooling tower BACT issue should be denied because all of the issues Mr. Sarvey raised in his petition with the exception of dry cooling were not preserved for review in the first place. As RCEC discussed in its response to Mr. Sarvey's petition, "Petitioner does not cite a single previous comment or provide any other evidence that any of the issues were raised during the public comment period." RCEC Response to Sarvey Petition at 48. He provided only one reference, on an unrelated issue, to the Air District's Responses to Public Comments. *Id.* Had Mr. Sarvey scoured the record, he would have found that the issues he raised concerning alternative technologies, work practices, and alternative sources of water, and the Total Dissolved Solids ("TDS") limit were not preserved for appeal. *Id.* at 49-51, 57-58. As the Air District explained in its response to Mr. Sarvey's petition, the Air District did not receive *any* comments on its BACT determination for the cooling tower during the two public comment periods, and "specifically no one questioned whether a TDS level below 6,200 ppm would be achievable." Air District Response to Sarvey Petition at 28. Because neither Mr. Sarvey – nor anyone else – raised these issues during the public comment periods, they were not preserved for appeal. *See* Air District Response to Sarvey Petition at 32; RCEC Response to Sarvey Petition at 49-50, 57-58. Thus, they could not be raised in a petition for review, let alone a reply. *Cf.*

Scituate, 12 E.A.D. at 724 ("By failing to raise the argument in its comments on the draft permit, Scituate failed to preserve the argument for review on appeal. Furthermore, by failing to raise the argument in its petition, Scituate failed to present a timely appeal on this issue. The Board will not entertain a claim raised for the first time in a reply brief filed on appeal.") (citations omitted).

With respect to dry cooling, Mr. Sarvey wholly failed to address in his petition for review the Air District's extensive discussion of why "[u]nder these circumstances, [it] would be hesitant to conclude that it could require the applicant to redesign this source to use dry cooling in this case, as it would disrupt one of the basic objectives of the proposed facility which is recycling the wastewater from the City's treatment plant." RCEC Response to Sarvey Petition at 54 (citing Exhibit 5, Responses to Public Comments at 87-88). Nor did Mr. Sarvey address the Air District's detailed explanation of why "regardless of whether the Air District could require the applicant here to change from a wet cooling system to a dry cooling system -- the Air District would decline to require dry cooling as BACT in this particular case because of the ancillary environmental benefits from using a wet cooling system here." *Id*. at 54 (citing Exhibit 5, Responses to Public Comments at 88). Thus, Mr. Sarvey failed to demonstrate any error in the Air District's analysis. To allow him to supplement his arguments at time via a reply brief would amount to a "late-filed appeal." *See, e.g.*, *Keene,* slip op. at 20-21 (refusing to consider arguments in reply brief where, instead of confronting permit agency's responses to comments in its petition, petitioner sought to do so in reply).

In sum, Mr. Sarvey's attempt to supplement his arguments on the Air District's BACT determination for PM emissions from the cooling tower via a reply brief should be denied.

6. Conclusion

Mr. Sarvey should not be allowed to file a reply brief or submit additional evidence excerpt as it relates to the untimeliness of his petition or the parties to the CARE/Simpson Petition. His other requests for leave to file a reply brief do not comply with the Board's Order,

rely on false information, and/or would introduce new evidence or arguments that should have included in the Sarvey Petition.

D. CARE/Simpson's Motion Requesting Leave To File a Reply Brief Should Be Denied

CARE/Simpson filed a Motion Requesting Leave to File a Reply Brief and Additional Information for Motion Requesting Leave to File a Reply Brief ("CARE/Simpson Motion" and "CARE/Simpson's Additional Information," respectively).[10] They begin their Motion by discussing why their petition for review was untimely. CARE/Simpson Motion at 1-2. As discussed below, CARE/Simpson are incorrect that their petition was not required to be filed by 11:59 p.m. Eastern Time, but RCEC does not oppose CARE/Simpson's submission of evidence related to good-faith efforts to submit their petition using the CDX system. CARE/Simpson then present "Issues of due process," "Technical issues," "Issues from Prior appeals," and "Environmental Justice." *Id.* at 2-5. These sections wholly fail to comply with the Board's directive to state "with particularity" any arguments to which they seek to respond and any reasons they believe it is necessary to file a reply to those arguments (Order at 1) and raise no issue that is appropriate for reply briefing. CARE/Simpson conclude with requests "to reply to all of the respondents [*sic*] issues," for "leave to conduct discovery and a hearing prior to filing a reply brief" in response to the Air District's and RCEC's briefs, and "to preserve their right to petition jointly and severely [*sic*]." *Id.* at 5. Similarly, CARE/Simpson's Additional Information requests "leave to conduct discovery and a hearing prior to filing a reply brief."[11]

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[10] Both filings bear the title "Motion Requesting Leave to File a Reply Brief," but the titles of their docket entries differ. *See* Docket Nos. 84 & 84.01.

[11] CARE/Simpson's Additional Information also requests the Board to take official notice of the "Petition for Review before the United States Court of Appeals Ninth Circuit of Petitioner, *Robert James Simpson v. United States Environmental Protection Agency, United States Environmental Protection Agency Administrator Lisa Jackson In her official capacity, North Coast Unified Air Quality Management District, Pacific Gas and Electric Corporation* [*sic*]*, Bay Area Air Quality Management District, Calpine Corporation, California Energy Commission, and California Public Utilities Commission*, Case No.: 10-71396" and the "Petition for Review before the United States Department of Labor Administrative Review Board of Petitioner *Michael E. Boyd, Complainant, v. U.S. Environmental Protection Agency,*

(Footnote Continued on Next Page.)

CARE/Simpson Additional Information at 1. For the reasons discussed below, the Board should deny these requests.

1. RCEC Does Not Oppose Submission of Additional Evidence Related to the Untimeliness of the CARE/Simpson Petition

In the section "Petitioners where [*sic*] timely," CARE/Simpson provide a narrative of some of the problems they allegedly encountered on the evening of March 22, 2010 in attempting to file their petition using the CDX system and then assert that "east coast time isn't the relevant time standard 'where the March 22, 2010, deadline was clearly set forth in the documentation *the District issued* with respect to the Final PSD Permit.'" CARE/Simpson Motion at 1-2 (footnote and citation omitted). As the Board explained, it is currently investigating whether there was a problem with the CDX portal on the evening of March 22, 2010 prior to the 11:59 pm Eastern Time deadline for filing petitions.[12] To the extent that CARE/Simpson wish to submit evidence related to good-faith attempts to submit their petition using the CDX system (*e.g.*, a pdf version of their petition that they attempted to submit on March 22, 2010, as opposed to the Word version that they submitted by email that evening; error messages received from the CDX system), RCEC does not oppose submission of this evidence.

CARE/Simpson are incorrect, however, that the Air District "waived the east coast time by adopting their own time standards (not the EAB's of 30 days)." CARE/Simpson Motion at 2. The Air District specified that "[p]ermit appeals must be actually received and filed with the Environmental Appeals Board no later than March 22, 2010, to be considered timely." Exhibit 5, Responses to Public Comments at i; *see also* Exhibit 4, Prevention of Significant Deterioration Permit Issued Pursuant to the Requirements of 40 CFR § 52.21 (Feb. 3, 2010) ("Final PSD

(Footnote Continued from Previous Page.)

Respondent, ARB Case No. 10-082 ALJ Case No. 2009-SDW-00005." CARE/Simpson Additional Information at 1. RCEC does not oppose these requests for official notice.

[12] *See* Order Denying Request for Summary Dismissal of CARE Petition and Requesting Response on the Merits, PSD Appeal No. 10-05 (Apr. 14, 2010) at 2.

Permit") at 2; Exhibit 6, Email from Barry Young, Subject: Russell City Energy Center - Notice of Issuance of Final PSD Permit (Feb. 4, 2010) at 1; Exhibit 7, Email from Alexander Crockett to Kevin Poloncarz (Apr. 6, 2010), attaching Notice of Issuance of Final Prevention of Significant Deterioration (PSD) Permit for the Russell City Energy Center at 1. Thus, the Air District established the *day* petitions for review were required to be filed with the Board. Board procedures require that "[t]o be considered timely, documents submitted electronically must be received by 11:59 p.m. Eastern Time *on the day the document is required to be filed with the Board."* Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board Not Governed by 40 C.F.R. Part 22 (Jan. 28, 2010) at 2 (footnotes omitted) (emphasis added); *see also* Environmental Appeals Board, Electronic Submission, *available at* http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/Electronic+Submission?OpenDocument. The Air District did not purport to, and indeed could not, "waive" a requirement of the Board's Order Authorizing Electronic Filing. Thus, all of the petitions for review were required to be filed with the Board by 11:59 p.m. Eastern Time, or 8:59 p.m. Pacific Time.

2. No Additional Briefing Is Warranted on "Issues of due process"

CARE/Simpson begin their next argument, regarding "Issues of due process," by listing subsections of the section of the Air District's response to the CARE/Simpson Petition titled "The District Provided Ample Opportunities for Meaningful Public Participation." CARE/Simpson Motion at 2-3. Rather than stating "with particularity" any arguments in this section to which they seek to respond, they argue that they "fail to see how the Applicant is in any position to weigh in on this since this is a matter solely between Petitioners and the District." *Id.* at 3. They contend that RCEC "would (or should) have no knowledge in regards to this issue; unless of course the [Air District] advised them and assisted them to file similar arguments, which should be improper since the District would then be admitting to participating in a corrupt organization with [RCEC] regarding our Petition." *Id.*

This argument makes no sense. RCEC responded to CARE/Simpson's allegations that the Air District is "circumventing public participation" by pointing out that CARE/Simpson's specific allegations are near verbatim reproductions of comments submitted during the public comment periods. RCEC Response to CARE/Simpson Petition at 10 (citing Exhibit 23, Letter from CARE and Rob Simpson to Weyman Lee, P.E. (Feb. 5, 2009) at 4-6 ("II. District Is Circumventing Public Participation")). RCEC then showed that the Air District already responded at length to these comments in its Responses to Public Comments. RCEC Response to CARE/Simpson Petition at 10-17. CARE/Simpson failed to cite, let alone identify any errors in, the Air District's Responses to Public Comments. *See id.* On this basis, RCEC argued that the Board should deny review of these issues. *See id.* In addition, RCEC also showed that CARE/Simpson's arguments fail on the merits due to the governing law and/or the factual record as articulated by the Air District. *See id.* None of RCEC's arguments depends on advice or assistance from the Air District. To the contrary, every argument is based on RCEC's review of the factual record and governing law, *i.e.*, the same publicly available documents that RCEC contends CARE/Simpson should have cited and confronted in its petition. As the permit applicant, RCEC should – and does – have knowledge of the factual record and governing law, including as they relate to the Air District's public participation efforts. In light of the Board's order granting RCEC's motion to participate,[13] RCEC was entitled to submit a response on them. Thus, CARE/Simpson's allegations of impropriety are baseless.

CARE/Simpson then quote several provisions from 40 C.F.R. Part 22 (the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits). CARE/Simpson Motion at 3-4. By its title alone, 40 C.F.R. Part 22 does not apply to PSD permit appeals. As explained in the Board's Practice Manual, PSD permit appeals are governed by 40 C.F.R. Part 124. *See* EAB Practice

[13] Order Granting Motion To Participate, PSD Appeal Nos. 10-01, 10-02, 10-03, 10-04, 10-05, 10-06 & 10-07 (Apr. 6, 2010).

Manual at 26-27 ("Part 124 sets forth procedures that affect permit decisions issued by EPA under . . . the Prevention of Significant Deterioration ("PSD") program under the Clean Air Act") (footnote omitted)). Thus, the provisions cited by CARE/Simpson do not apply. Even if they did, CARE/Simpson never articulate their relevance to a motion for leave to file a reply brief. With respect to CARE/Simpson's argument that they "believe the evidence speaks for itself" (CARE/Simpson Motion at 4), RCEC agrees and, consequently, based its arguments in response to CARE/Simpson's petition on the Air District's Response to Public Comments and other documents in the administrative record.

In sum, none of CARE/Simpson's argument regarding due process raises any issue appropriate for reply briefing.

3. No Additional Briefing or Discovery Is Warranted on "Technical issues"

CARE/Simpson argue that, aside from due process issues, the "remaining issues are technical issues related to the project that Petitioners believe require adjudication by the Board that will require an opportunity for additional discovery by the Parties prior to filing Briefs." CARE/Simpson Motion at 4. In particular, CARE/Simpson contend that "[s]ince this is Petitioners first opportunity to carry out discovery on [RCEC] we ask for reasonable period for discovery on the District and [RCEC], followed by an opportunity for an [*sic*] prehearing conference, evidentiary hearings, and then the reply briefing." *Id.* As discussed below (*see infra* section III.D.6), CARE/Simpson should not be allowed to conduct discovery and should not be provided evidentiary hearings. In addition, because CARE/Simpson do not specify any "technical issues," they wholly fail to state "with particularity" any arguments to which they seek to respond or any reasons they believe it is necessary to file a reply to those argument. *See* Order at 1. Thus, CARE/Simpson should not be allowed to file a reply brief on any "technical issue."

4. No Additional Briefing Is Warranted on "Issues from Prior appeals"

In response to RCEC's argument that unresolved issues from prior appeals cannot be

incorporated by reference, CARE/Simpson argue that "[s]hould the Board consider this a correct interpretation we would like the opportunity to brief the 'unresolved issues.'" CARE/Simpson Motion at 5. That is the sum total of their argument.

As RCEC discussed in its response to CARE/Simpson's petition, a mere reference to prior appeals is insufficient to raise a specific issue. RCEC Response to CARE/Simpson Petition at 64 (citing *LCP Chemicals*, 4 E.A.D. at 665 n.9 (petitioner must "specifically identify disputed permit conditions and demonstrate why review is warranted")). If CARE/Simpson wanted the Board to review "unresolved issues," they needed to meet their burden of identifying these issues with specificity *in their petition for review* and providing a reason why review is warranted. *See Knauf*, 8 E.A.D. at 127 (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"). They did not take advantage of that opportunity.

At this point, CARE/Simpson have failed to meet their burden not only in their petition for review but also in their Motion: they did not comply with the Board's directive to state "with particularity" any arguments to which they seek to respond or any reasons they believe it is necessary to file a reply to those argument. *See* Order at 1. Moreover, even if CARE/Simpson had done so, they should not be granted leave to file a reply brief because the reply would impermissibly raise new issues that were not raised in their petition. *See* Order at 1 (stating that "[a] petitioner may not raise any new issues in its reply brief"); *City of Attleboro*, slip op. at 72 n.105; *Knauf*, 8 E.A.D. at 126 n.9. Thus, CARE/Simpson should not be allowed to file a reply brief on any "unresolved issues" from prior appeals.

5. No Additional Briefing Is Warranted on Environmental Justice

CARE/Simpson's argument with respect to environmental justice consists of the heading "Environmental Justice" and the request that "[w]e would like the opportunity to respond to

these issues." CARE/Simpson Motion at 5. As with the issues discussed above, in failing to state any specific arguments or reasons they believe it is necessary to file a reply, CARE/Simpson did not comply with the Board's Order.

Moreover, CARE/Simpson's argument on environmental justice in their petition for review lacked merit both procedurally and substantively, and they should not be allowed to supplement this argument through reply briefing. CARE/Simpson's argument, in its entirety, was that "[t]here are also important environmental justice issues of impacts on low income and minority households as demonstrated in the Chabot College Brief filed with the Commission for another nearby planned facility." CARE/Simpson Petition at 26 (footnote omitted). CARE/Simpson did not confront any of the Air District's environmental justice analyses, findings, or responses to comments, including the Air District's conclusion that "[t]here is no adverse impact on any community due to air emissions from the [Project] and therefore there is no disparate adverse impact on an Environmental Justice community located near the facility." RCEC Response to CARE/Simpson Petition at 69 (citing Exhibit 1, Statement of Basis for Draft Amended Federal "Prevention of Significant Deterioration" Permit (Dec. 8, 2008) at 66). CARE/Simpson should not have an opportunity in reply briefing to supplement the bare, unsupported allegation about environmental justice that they included in their petition for review, because any new arguments or evidence would be untimely. *See, e.g., Keene,* slip op. at 20; *Arecibo*, 12 E.A.D. at 123 n.52.

Thus, CARE/Simpson's argument regarding environmental justice does not raise any issue appropriate for reply briefing.

6. CARE/Simpson Should Not Be Allowed To Reply to "All" Issues, To Conduct Discovery, or To Submit Any Additional Petitions or Other Separate Filings

CARE/Simpson conclude with requests "to reply to all of the respondents [*sic*] issues," for "leave to conduct discovery and a hearing prior to filing a reply brief" in response to the Air District's and RCEC's briefs, and "to preserve their right to petition jointly and severely [*sic*]."

CARE/Simpson Motion at 5. Similarly, CARE/Simpson's Additional Information requests "leave to conduct discovery and a hearing prior to filing a reply brief." CARE/Simpson's Additional Information at 1. The Board should deny these requests.

First, CARE/Simpson should not be granted leave to reply to "all" of the issues raised in the Air District's and RCEC's responses to the CARE/Simpson Petition. The Board's Order specifically directed a Petitioner wishing to submit a reply brief to "submit a motion to that effect stating with particularity any arguments to which Petitioner seeks to respond and the reasons Petitioner believes it is necessary to file a reply to those arguments." Order at 1. CARE/Simpson's blanket request fails to specify any arguments or any reasons. Moreover, the Air District's and RCEC's responses to the CARE/Simpson Petition were 45 and 70 pages in length, respectively. Replying to "all" of the issues contained therein would be infeasible, especially given that the Board "anticipates that [a] reply brief will be due no later than May 28, 2010, and will be subject to page limitations." Order at 1.

Second, CARE/Simpson should not be granted leave to conduct any discovery and should not be provided any hearings prior to reply briefing. As an initial matter, neither 40 C.F.R. Part 124 nor the Board's Practice Manual provides for discovery or an evidentiary hearing as part of the PSD permit appeal process. Thus, CARE/Simpson have no right to request these procedures. Even if they did, a request should not be granted in this case because CARE/Simpson failed to specify any issues that allegedly should be the subject of discovery or an evidentiary hearing. They have not even attempted to make the case that the evidence is deficient on any topic. Thus, the purpose of CARE/Simpson's proposed discovery and evidentiary hearing is unclear to the extent that it relates to anything more than another attempt to delay this project indefinitely.

Third, CARE/Simpson should not be given opportunity to submit any further petitions. CARE/Simpson state that "CARE and Rob Simpson wish to preserve their right to petition jointly and severely [*sic*] and Rob Simpson would like to be added to the service list for this proceeding at the below address." CARE/Simpson Motion at 5. While RCEC does not object to

adding Mr. Simpson to the service list and will do so going forward, the purpose of the express reservation of rights is unclear. The deadline for filing petitions in this PSD permit proceeding passed nearly two months ago, on March 22, 2010. CARE and Mr. Simpson no longer have any right to submit additional petitions either jointly or severally. As to other types of filings, CARE and Mr. Simpson filed their petition for review as a single petitioner. If they wish to seek severance, they should be required to submit a motion to that effect showing cause and explaining why the Board in its discretion should allow separate filings from CARE and Mr. Simpson at this point in the proceedings.

7. Conclusion

CARE/Simpson should not be allowed to file a reply brief on any issue because they wholly failed to comply with the Board's Order: they did not state "with particularity" any arguments to which they seek to respond or any reasons they believe it is necessary to file a reply to those arguments. In addition, they should not be granted leave to conduct any discovery, should not be provided any hearings prior to reply briefing, and should not be allowed to submit any additional petitions or other separate filings. To the extent that CARE/Simpson wish to submit evidence related to good-faith attempts to submit their petition using the CDX system on the evening of March 22, 2010, RCEC does not oppose submission of this evidence.

IV. NONE OF THE ISSUES RAISED BY PETITIONERS WARRANTS ORAL ARGUMENT

In its May 6, 2010 Order, the Board notified participants that it "intends to hold oral argument in this matter on August 17, 2010, at 1 pm EDT . . . ." Order at 1. In addition, the Board provided that "[w]ell in advance of that time, [it] will issue an order clarifying the parties to be participating and specifying the issues to be argued." *Id.* at 1-2.

While RCEC recognizes that it is entirely within the Board's discretion to hold oral argument when doing so would assist in its deliberations, RCEC believes that none of the issues raised by Petitioners warrant oral argument. Like Petitioners' requests to file a reply to the Air District's and RCEC's responses, Petitioners' requests for oral argument are intended to cause

further delay in the completion of these PSD permit proceedings, in the hopes that such delay will kill the Project. As described below in Section V, the Project has already experienced substantial delay and further delay jeopardizes its continued viability. For this reason and because none of the issues raised by Petitioners warrant consideration at oral argument, RCEC would respectfully request that, should the Board agree that none of the issues raised by Petitioners warrants oral argument, it cancel oral argument scheduled for August 17, 2010.

V. EXPEDITED CONSIDERATION IS WARRANTED IN THIS CASE AND ANY ORAL ARGUMENT SHOULD BE HELD NO LATER THAN JUNE 30, 2010

Should the Board decide that oral argument on any issue is warranted, RCEC respectfully requests that oral argument be held no later than June 30, 2010 due to the serious consequences of delay in this case. RCEC also requests that the Board expedite its consideration of the six remaining petitions and issue a final decision in time for RCEC to commence construction prior to the September 10, 2010 deadline for commencement of construction imposed by the CEC license.

This is an unprecedented third separate time that petitions for review have been filed by opponents during a PSD permit proceeding.[14] Moreover, some of the Petitioners in this case have a long history of filing petitions in the related CPUC and CEC proceedings to further delay the Project. Due to the uncertainty of renegotiating the PPA with PG&E, obtaining CPUC approval of any amendments to the PPA, and obtaining from the CEC additional extensions of the deadline to begin construction, further delay threatens the viability of the Project. Failure to complete the Project would mean a loss of substantial economic and environmental benefits, including construction of the nation's first power plant with a federal limit on greenhouse gas

[14] RCEC is aware of only one other case that had three appeals at separate points in the PSD permitting process: *In re West Suburban Recycling and Energy Center, L.P.* (PSD Appeal Nos. 95-1, 96-1, and 97-12). In that case, the *permittee* brought the appeals. *See In re West Suburban Recycling and Energy Center, L.P.*, 8 E.A.D. 192, 193 (EAB 1999) ("This is the third PSD permit appeal filed by WSREC over the course of WSREC's long and somewhat tortuous history of efforts to obtain a permit to construct a resource recovery facility.").

("GHG") emissions. Given the Project's advanced state of development, it also promises to provide a much needed source of jobs at a time when the unemployment rate in the vicinity continues to climb towards 12 percent. As such, the Project would provide a *de facto* stimulus to the local economy, with no governmental funding at all.

RCEC appreciates the Board's efforts to respond swiftly to the numerous petitions filed in this matter. In light of the benefits that would be foregone if the Project fails, RCEC respectfully requests that the Board consider the five remaining petitions and issue a final decision dismissing them based on the responses already filed by the Air District and RCEC and without requiring further briefing or oral argument. However, should the Board decide that oral argument is warranted, RCEC respectfully requests that the Board advance the date for such argument to no later than June 30, 2010 given the exigencies facing the Project, as described in more detail below.

A. This Project Has Already Been Substantially Delayed

While the Board already assigns PSD cases the highest priority, it has also granted motions for expedited consideration where warranted. *See, e.g., In re Hawaii Electric Light Co., Inc.*, 10 E.A.D. 219, 223 (EAB 2001) (upholding order granting permittee's motion to expedite); *In re Milford Power Plant*, 8 E.A.D. 670, 671 (EAB 1999) (granting state agency's expedited motion for dismissal). Due to delays already faced by the Project, as well as the exigencies currently facing it, expedited consideration is warranted.

1. The Air District Conducted a Robust PSD Permitting Process After the Board's Issuance of the Remand Order

Two previous petitions for review and subsequent permit proceedings by the Air District have already substantially delayed the Project. In the first case, *In re Russell City Energy Center*, PSD Appeal No. 08-01 (EAB, July 29, 2008), the Board denied review and remanded the permit to the District after approximately seven months of proceedings. In the second case, *In re Russell City Energy Center*, PSD Appeal No. 08-07 (EAB, Nov. 25, 2008), the Board denied review and dismissed the petition based on a lack of jurisdiction after approximately two months

of proceedings.

In response to the Board's July 29, 2008 remand order, the Air District undertook considerable technical and legal analyses, as well as public notice and comment, before issuing RCEC's PSD permit – all of which went far beyond what is required by federal regulations and consumed more than 18 months. As the Air District described in detail in its response to the CARE/Simpson Petition, it issued a draft PSD permit and later a revised draft PSD permit and accepted public comments on these drafts for 60 days and 44 days, respectively. Air District's Response to Petition for Review 10-05, PSD Appeal No. 10-05 (Apr. 29, 2010) at 6-8. The Air District held two public hearings at the Hayward City Hall to receive additional comments. *Id.* The Air District published a General PSD Notice in eighteen periodicals/newspapers as well as on the Air District's website to notify the public about the opportunity to be on a mailing list for the PSD proceeding. *See* Declaration of Barry G. Young in Support of Response to Petition for Review 10-05, PSD Appeal No. 10-05 (Apr. 29, 2010) at 3-4. The mailing list it created contained approximately 1,900 addresses. *Id.* at 6. The District collected all documents it relied on in preparing the draft PSD permits, Statement of Basis, and Additional Statement and made the documents available for members of the public to review. *Id.* at 6-8. For the Additional Statement of Basis, it also published an electronic version of the document index on its website. *Id.* at 8. On February 3, 2010, the Air District issued the final PSD permit along with a 235-page Response to Public Comments. *See* Exhibit 4, Final PSD Permit; Exhibit 5, Responses to Public Comments. The Responses to Public Comments, which are prefaced by a comprehensive seven-page table of contents, respond to hundreds of public comments.[15] While all of these activities from July 29, 2008 to February 3, 2010 ensured a robust PSD permitting process, they came at

[15] The Air District received 56 comment letters on the draft PSD permit and 147 comment letters on the revised draft PSD permit, in addition to comments received during the two public hearings. *See* http://www.baaqmd.gov/Home/Divisions/Engineering/Public%20Notices%20on%20Permits/2009/080309%2015487/Russell%20City%20Energy%20Center.aspx.

considerable delay for the Project. Further delay while the Board considers the remaining petitions could jeopardize the Project's continued viability for the reasons described below.

Since the Board remanded the original PSD permit, the Air District has scrupulously applied the federal PSD rules to correct the defect in the original permit's notice. As a consequence, the public was afforded abundant opportunities to participate and provide comment on the draft permit. These comments resulted in the Air District issuing a final PSD permit with substantially lower emissions limits for some pollutants. They also resulted in U.S. EPA Region IX's reinitiation and completion of informal consultation with the U.S. Fish and Wildlife Service, which involved a comprehensive nitrogen deposition analysis to demonstrate that the Project would not cause any adverse impacts to listed species.[16]

Further, the period of time since the Board remanded the original permit has involved many significant regulatory changes associated with the change of administration, such as Administrator Jackson's decision to reconsider the PM2.5 Surrogacy Policy and associated grandfathering provision. RCEC, with the Air District, has responded to and met the challenges created by this evolving regulatory landscape: for PM2.5, this involved completion of a whole new air quality impacts analysis, even though EPA had yet to promulgate certain regulatory tools to assist in such analysis.[17] For GHGs, this involved meeting with and responding to the comments of the Sierra Club and EarthJustice concerning the Best Available Control Technology ("BACT") analysis for GHGs, which resulted in a BACT analysis that was presented as a "case study" to the Clean Air Act Advisory Committee ("CAAAC") Climate Change Work Group and

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[16] *See* Exhibit 34, Letter to Barry Young, BAAQMD, from Gerardo C. Rios, U.S. EPA, Subject: Section 7 Endangered Species Act Consultation for the Proposed Russell City Energy Center - Hayward, California"; attaching letter to Gerardo C. Rios from Cay C, Goude, Subject; Endangered Species Act Informal Consultation on the Proposed Russell City Energy Center Project by Calpine/GE Capital; City of Hayward, Alameda County, California.

[17] For a description of PM2.5 air quality impacts analysis, see Exhibit 5, Responses to Public Comments at 141-69.

the entire CAAAC, before it voted on proposed guidance for GHG BACT.[18] In sum, since the Board remanded the original PSD permit, the Air District and RCEC have responded to an evolving regulatory landscape and, as a consequence, produced a groundbreaking permit.

2. Petitioners Give Scant Recognition to the Air District's Robust Efforts

Given the outcome of the Air District's robust process and efforts, it is not surprising that neither Sierra Club, nor EarthJustice, participated in any petition of the final PSD permit.[19] A number of the Petitioners, on the other hand, remain opposed to the Project. Notwithstanding the Air District's substantial efforts to respond to their comments, their petitions gave scant recognition to those efforts. It is unlikely that any result, other than indefinite delay, would satisfy them that the process has been properly followed and the resulting permit is lawful. For this reason, the Board should deny their requests for leave to file a reply to the responses of the Air District and RCEC, as described in more detail above.

Indeed, even in advance of any decision by the Board, one of the Petitioners, Mr. Simpson, filed a Petition for Review with the U.S. Court of Appeals for the Ninth Circuit on April 29, 2010 against U.S. EPA, Administrator Lisa P. Jackson (in her official capacity), the Air District, the CEC, the CPUC, the North Coast Unified Air Quality Management District, PG&E and Calpine, claiming that these "[g]overnmental agencies have violated my civil rights to protect the fossil fuel industry, and PG&E."[20] While his petition to the Court of Appeals

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[18] Exhibit 36, GHG BACT Analysis Case Study, Russell City Energy Center (Nov. 2009, updated Feb. 3, 2010), *available at* http://www.epa.gov/air/caaac/climate/2010_02_GHGBACTCalpine.pdf.

[19] Indeed, upon the Air District's issuance of the final PSD permit, Sierra Club chief climate counsel David Bookbinder provided a strong endorsement of the final PSD permit's GHG limits: "'It's an example of what is possible,' Sierra Club chief climate counsel David Bookbinder said. 'Calpine is leading the way and showing how it's possible to generate all the electricity that America needs with half the greenhouse gases.'" Exhibit 33, Robin Bravender and Colin Sullivan, *Planned Calif. Power Plant Would Be Nation's First with GHG Emissions Limits*, New York Times (Feb. 4, 2010) at 2.

[20] Exhibit 38, ROBERT J. SIMPSON, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ADMINISTRATOR; LISA JACKSON, in her official capacity; NORTH COAST UNIFIED AIR QUALITY MANAGEMENT DISTRICT; PACIFIC GAS AND ELECTRIC COMPANY; BAY AREA QUALITY MANAGEMENT DISTRICT; CALPINE CORPORATION; CALIFORNIA ENERGY

(Footnote Continued on Next Page.)

primarily concerns the decision of another air district concerning another project unrelated to RCEC or Calpine, Mr. Simpson raises the Board's remand order concerning RCEC, presumably as illustrative of the violations of law he contends occurred with respect to this other permit. *See id*. at 6. He then alleges fraud and misrepresentation against PG&E and Calpine, for which he claims relief under the Racketeer Influenced and Corrupt Organizations Act ("RICO") (*id*. at 21), as well as violations of his civil rights and due process against the CEC and air districts. *Id.* at 25-26. Given the nature of his claims and the alleged violations of his rights, it seems unlikely that Mr. Simpson will find satisfaction in the outcome of any administrative or judicial proceeding.

In its comments to the EPA on the EPA's proposed PSD and Title V Greenhouse Gas Tailoring Rule,[21] the CEC recognized the serious impacts that delay has on power plant projects:

> The negative impact on power plant projects delayed by EAB review is almost inestimable. Financing for such projects (often on the order of hundreds of millions of dollars) is complex, reliant on contracts with utilities for the power to be provided, and subject to time-based milestone agreements. Open-ended delay at the EAB can prevent satisfaction of such milestones, making such contracts voidable. Thus, EAB review . . . has the potential to kill projects even if the objections raised are specious or nonsubstantive.

Exhibit 37, Letter from Melissa Jones, Executive Director, California Energy Commission to Administrator, U.S. Environmental Protection Agency (Dec. 24, 2009) at 5.[22] In fact, the CEC referred to RCEC's experience and predicted that RCEC would again face delay:

> In one recent and typical example, a defective PSD permit notice for a California power plant led to a 7-month EAB proceeding, followed by an opinion more than 40 pages in length, and finally required remand of the permit to the air district. It has taken the delegated air district more than 16 months to reissue a permit meeting all PSD requirements (in fact, as yet the permit is not issued). The new

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COMMISSION; CALIFORNIA PUBLIC UTILITIES COMMISSION, Respondents, Case No. 10-71396, Petition for Review, Apr. 29, 2010, at 4. In their motion, CARE/Simpson ask the Board to take official notice of this petition. *See supra* at n.11. As previously noted, RCEC does not oppose this request. *Id.*

[21] 74 Fed. Reg. 55,292 (Oct. 27, 2009), Docket ID EPA-HQ-OAR-2009-0517.

[22] We note that CARE/Simpson also included a copy of this letter as Exhibit 4 to their petition for review. *See* Docket No. 5.06.

> permit is almost certain to be contested once again at the EAB when it is finally issued.

Id. at 4 n.4. The CEC's words ring true: RCEC's PSD permit was contested by ten petitioners and the Project's continued viability now hangs in the balance.

As the CEC pointed out, "[o]pen-ended delay at the [Board] can prevent satisfaction of [time-based] milestones … [and] has the potential to kill projects even if the objections raised are specious or nonsubstantive." *Id.* at 5. Petitioners are aware of this fact. Equipped with no more than their meritless claims of deficiencies in the PSD permit, they intend to use the Board's review process to impose further delay on the Project. The Board should not tolerate such misuse of the permit appeals process. All remaining petitions stand ready for decision. Accordingly, RCEC would respectfully request that the Board expedite its consideration and issue its decision so that RCEC can commence construction of the Project, for the reasons described in more detail below.

B. The Current Delivery Date Under the PPA is June 1, 2012; a One-Year Extension of This Date Is Now Pending CPUC Approval

Due in part to the first petition for review (PSD Appeal No. 08-01) and subsequent remand of the PSD permit to the Air District, RCEC has missed several contractual milestones and, as a consequence, has been forced to renegotiate its PPA with PG&E twice. The related CPUC proceedings have been hindered by repeated oppositions by several Petitioners, namely CalPilots and CARE/Simpson. At the same time as these Petitioners have raised meritless claims to delay completion of these PSD proceedings, they have argued that the consequences of such delay – RCEC's failure to meet contractual permitting milestones – should cause the PPA to be voided. An amendment that extends the expected initial delivery date by one year from June 1, 2012 to June 1, 2013 currently awaits CPUC approval. While RCEC is hopeful that the CPUC will grant approval of this amendment very soon, approval of this or any subsequent amendment is far from certain and is likely to face opposition from several Petitioners. To meet the June 1, 2013 date for commercial operation, construction can commence no later than October 31, 2010, given the Project's 32-month construction schedule. Stated simply, at this

stage of development, the Project cannot withstand additional significant delay of the sort that occurred when the PSD permit was first remanded to the Air District in 2008.

In 2006, the CPUC approved several contracts between PG&E and electricity suppliers that resulted from PG&E's 2004 long-term request for offers, including the original PPA with RCEC. *See* Exhibit 39, CPUC Opinion Approving Results of Long-Term Request for Offers (D.06-11-048) (Dec. 4, 2006). Due to permitting delays and cost increases, RCEC was forced to renegotiate the June 2010 on-line date and other terms and, after protracted negotiations, RCEC and PG&E agreed to a (First) Amended PPA ("1st APPA"). *See* Exhibit 40, CPUC Decision Approving Settlement Agreement Regarding the Second Amended and Restated Power Purchase Agreement (D.09-04-010) (Apr. 20, 2009) ("CPUC Decision 4/20/09") at 2-3. While PG&E's application for CPUC approval of the 1st APPA and related oppositions were pending, PG&E, RCEC, and several other parties, known collectively as the "Joint Parties,"[23] filed a Joint Motion for Approval of Second Amended and Restated Power Purchase Agreement ("2nd APPA"). *Id.* at 3-5. Despite opposition by several parties, including several Petitioners,[24] the CPUC approved the 2nd APPA on April 20, 2009. *Id.* at 33. The 1st and 2nd APPAs both delay the online date of the Project by two years to June 1, 2012. *Id.* at 7.

Unsatisfied with the CPUC's approval of the 2nd APPA, CARE and Mr. Simpson, along with other "Group Petitioners" (which include CalPilots and are represented by Jewell Hargleroad, who represents Chabot in this proceeding) petitioned the CPUC for rehearing and requested oral argument.[25] Group Petitioners then filed a Petition for Modification of Decision

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[23] The "Joint Parties" are PG&E, RCEC, the CPUC's Division of Ratepayer Advocates ("DRA"), The Utility Reform Network ("TURN"), and California Unions for Reliable Energy ("CURE"). *Id.* at 1.

[24] The dissenting parties were Mr. Simpson, CARE, and "Group Petitioners," which consist of the California Pilots Association, Skywest Townhouse Homeowners Association, and Hayward Area Planning Association. *Id.* at 2.

[25] *See* Exhibit 41, Group Petitioners' Application for Rehearing Decision No. 09-04-010 Approving Settlement Agreement Regarding the Second Amended and Restated Power Purchase Agreement and Request for Oral Argument by Group Petitioners, App. No. 08-09-007 (May 8, 2009); Exhibit 42, CARE and Simpson's Application for Rehearing of D.09-04-010, App. No. 08-09-007 (May 19, 2009).

No. 09-04-010.[26] Ironically, Group Petitioners' main argument – one that Group Petitioners and CARE/Simpson have raised throughout the CPUC proceedings – is that RCEC cannot meet its contractual obligations.[27] Thus, at the same time as Group Petitioners and CARE/Simpson have sought to cause delay by filing meritless petitions in all available venues, they have argued that the consequences of the resulting delay – namely, the failure of RCEC to meet critical contractual milestones pertaining to permitting – warrant voiding RCEC's PPA. On March 2, 2010, the CPUC denied Group Petitioners' and CARE/Simpson's applications for rehearing, finding that none of the legal issues raised in the petitions has merit.[28]

To address RCEC's failure to meet critical construction milestones, RCEC and PG&E recently amended the 2nd APPA to extend the on-line date by an additional year, from June 1, 2012 to June 1, 2013. On April 15, 2010, PG&E, RCEC, and the other Joint Parties submitted a petition to the CPUC requesting approval of that amendment. *See* Exhibit 46, Joint Petition of PG&E, RCEC, DRA, CURE, and TURN for Modification of Decision 09-04-010, as Modified by Decision 10-02-033 (Public Version) (Apr. 15, 2010) at 5, 30. As the Joint Parties explain in their petition to the CPUC for approval of this amendment, further amendment of the PPA was

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[26] Exhibit 43, Group Petitioners' Petition for Modification of Decision No. 09-04-010 Approving Settlement Agreement Regarding the Second Amended and Restated Power Purchase Agreement, App. No. 08-09-007 (June 22, 2009).

[27] *Id*. at 6 ("Applying the facts sought to be officially noticed, RCEC cannot satisfy its "Critical milestone" defined under section 11.2(c)(vi), pages B66-B67. The PSD is the authority to construct and necessary prior to issuance of any notice to proceed…As a result, the 2nd APPA under its own contract terms is not effective, RCEC is in default, the contract is subject to termination and RCEC will miss its critical milestone under section 11.2(vi)."), internal citations omitted; *see also* Exhibit 44, Request for Official Notice of Facts and Declaration of Jewell J. Hargleroad in Support of Group Petitioners' Petition for Modification of Decision No. 09-04-010 Approving Settlement Agreement Regarding the Second Amended and Restated Power Purchase Agreement, June 22, 2009 at 1-2 (seeking notice of certain facts allegedly "establishing as a matter of fact that the permitting authority Bay Area Air Quality Management District will not issue any permit to prevent the significant deterioration of the air (PSD) for Russell City Energy Center by or before September 1, 2009 in any form that is final and non-appealable. Based on these records, it is a fact that RCEC is and will be in default of multiple material provisions of the second amended purchase power agreement (2nd APPA) subject to Decision No. 09-04-010.").

[28] *See* Exhibit 45, Order Modifying Decision (D.) 09-04-010 for Purposes of Clarification, and Denying Rehearing of the Decision, As Amended, App. No. 08-09-007 (Mar. 2, 2010).

necessitated due to delays in obtaining the final PSD permit:

> At the time the Joint Parties requested approval of the 2nd APPA, [the Air District] had already issued a Draft PSD permit for public comment in compliance with the [Board's] remand decision. As a result, RCEC believed that, based on its experience, a Final PSD permit would be issued in time to allow it to meet the expected initial delivery date in the 2nd APPA [*i.e.*, June 1, 2012]. The Final PSD permit, however, was not issued by [the Air District] until February 3, 2010 -- approximately 18 months after the [Board's] remand decision. Given the unexpected length of time it took for BAAQMD to issue the Final PSD permit and the fact several parties have again appealed [the Air District's] issuance of the permit, it has become necessary to extend the expected initial delivery date in the 2nd APPA by one year.

Id. at 4-5 (footnotes omitted); *see also id.* at 19-22 (Declaration of Richard L. Thomas In Support of Petition).

Assuming that the CPUC approves this petition, RCEC must meet an on-line date of June 1, 2013. The construction schedule for RCEC is 32 months[29]; hence, RCEC must begin construction by October 31, 2010 to meet a June 1, 2013 on-line date. However, RCEC cannot begin construction prior to the Board's resolution of all remaining petitions. Should RCEC be precluded from meeting the June 1, 2013 on-line date due to further delay in the PSD proceedings, the prospects for further renegotiation and approval of the terms of the PPA are doubtful.

C. The Current Deadline To Commence Construction Is September 10, 2010; Further Extension Is Uncertain

In addition to the need to renegotiate the PPA to extend the Project's on-line date and obtain approval of such amendments from the CPUC due to delays in obtaining the final PSD permit, RCEC has already had to obtain two extensions from the CEC of the deadline for commencement of construction under the CEC license. The current deadline is September 10, 2010, less than four months away. The prospects for further extension are highly uncertain. For this reason, RCEC respectfully asks the Board to cancel oral argument, since none of the issues

[29] Exhibit 47, construction schedule, Russell City, California USA, prepared by Bechtel, Frederick, MD, Job No. 25483-001, Schedule Number Sch-001, Rev. F, Jan. 8, 2010 (evidencing 32-month construction schedule).

raised by Petitioners' warrant consideration at oral argument. However, should the Board decide to hold oral argument, RCEC respectfully requests that the Board advance the date for such argument to no later than June 30, 2010. In either case, RCEC requests that the Board expedite its consideration of the petitions and issue a final decision in time for RCEC to proceed with commencement of construction prior to the September 10, 2010 deadline for same imposed by the CEC license.

The CEC approved the original Application for Certification of the Project on September 11, 2002. *See* Exhibit 48, CEC Commission Decision, Russell City Energy Center Application for Certification (01-AFC-7). By regulation, construction was required to commence within five years, *i.e.*, by September 10, 2007. *See* 20 Cal. Code Reg. § 1720.3. On November 17, 2006, RCEC petitioned the CEC for an amendment of the September 11, 2002 Commission Decision to build the same facility with minor modifications in layout and associated equipment on a site located approximately 1,300 feet northwest of the original site ("Amendment No. 1"). *See* Exhibit 49, Russell City Energy Center, Amendment No. 1 (Nov. 2006).

While Amendment No. 1 was pending, RCEC petitioned the CEC to extend the deadline for commencement of construction from September 10, 2007 to September 10, 2008. *See* Exhibit 50, Petition for Extension of Deadline for Commencement of Construction for the Russell City Energy Center (July 25, 2007). The CEC approved RCEC's petition to extend deadline for commencement of construction on August 29, 2007 and approved Amendment No. 1 on September 26, 2007. *See* Exhibit 51, CEC Order No. 07-0829-5, Order Approving Extension of the Deadline for Commencement Construction (Aug. 29, 2007); Exhibit 52, CEC Final Commission Decision, Russell City Energy Center, Amendment No. 1 (01-AFC-7C) (Oct. 2007). Although Chabot and CalPilots (as part of Group Petitioners),[30] filed petitions for

[30] "Group Petitioners" included CalPilots, Citizens for Alternative Transportation systems, San Lorenzo Homeowners Association, Skywest Townhouse Homeowners Association, Hayward Democratic Club, and Hayward Area Planning Association. Exhibit 53, Order Denying Petitions for Intervention and Denying Petitions for Reconsideration, Etc., Docket No. 01-AFC-7C (Nov. 7, 2007) at 1. The CEC also

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intervention and reconsideration with respect to Amendment No. 1, the CEC denied these petitions because they were filed "months past the legal deadline for such petitions (as all petitioners acknowledge), and because no good cause for the delay has been shown." Exhibit 53, Order Denying Petitions for Intervention and Denying Petitions for Reconsideration, Etc., Docket No. 01-AFC-7C (Nov. 7, 2007) at 1. In addition, even if the petitioners had been successful in intervening, "the substantive grounds upon which reconsideration [was] sought are legally inadequate." *Id.*

It was not possible, however, for RCEC to meet a September 10, 2008 deadline to commence construction due to multiple appeals of the CEC's decision approving Amendment No. 1 and the then-pending petition for review to the Board (*i.e.*, PSD Appeal No. 08-01). On July 30, 2008, the CEC approved RCEC's second petition to extend the deadline for commencement of construction, extending the deadline from September 10, 2008 to September 10, 2010. *See* Exhibit 54, CEC Order No. 08-730-3, Order Approving a Petition to Extend the Deadline for Commencement of Construction (July 30, 2008). This time, petitions for reconsideration were filed with the CEC by two groups: (1) Mr. Simpson, CARE, the Hayward Area Planning Association, and CAP, and (2) CARE and Mr. Simpson. The CEC denied these petitions on multiple substantive and procedural grounds, including a finding that Mr. Simpson's argument that the CEC improperly noticed its July 30, 2008 hearing lacked merit. *See* Exhibit 55, Order Denying Petitions for Reconsideration Concerning Extension of Construction Deadline, Docket No. 01-AFC-7C (Sept. 24, 2008).

On November 17, 2009, RCEC submitted a petition requesting amendment of the CEC decision to add four additional construction laydown and parking areas, to reroute the potable water supply and sanitary sewer pipelines, and to update the Conditions of Certification concerning air quality to conform to the more stringent best available control technology

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denied the County of Alameda's petition for intervention and reconsideration. *Id.*

("BACT") standards set forth by the revised draft PSD permit. Exhibit 56, Russell City Energy Center, Petition for Amendment No. 2 (Nov. 2009). The requested amendment is pending at this time. The deadline to commence construction remains September 10, 2010.

D. Failure To Complete the Project Would Mean a Loss of Economic and Environmental Benefits

Failure to complete the Project at its advanced stage of development due to the pending PSD appeals would mean a loss of substantial economic and environmental benefits. For Alameda County, it would mean a loss of 650 union construction jobs and one-time tax revenue of approximate $30 million. *See* Exhibit 57, Calpine News Release, "Calpine Obtains Permit to Build Nation's First Power Plant with Federal Limit on Greenhouse Gas Emissions" (Feb. 4, 2010) ("Calpine News Release") at 2. Once the plant is on-line, it will employ about 25 staff and generate more than $5 million annually in property tax revenue. *See* Exhibit 1, Statement of Basis at 93; Exhibit 57, Calpine News Release at 2. Thus, the Project represents a much-needed, *de facto* stimulus package for Alameda County and surrounding areas requiring no federal funding, at a time when the unemployment rate within Alameda County has risen to just below 12 percent[31] and construction jobs are down more than 11 percent over the past year.[32]

Failure to complete the Project would also mean a loss of environmental benefits. The Project will be the nation's first power plant with a federal limit on GHG emissions. Exhibit 59, Air District News Release, "Air District Approves Landmark Permit for Hayward Power Plant" (Feb. 4, 2009) ("Air District News Release"). As such, it will produce 50 percent fewer GHG

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[31] *See* Exhibit 58, State of California, Employment Development Department, Labor Market Information Division, April 16, 2010, Oakland-Fremont-Hayward Metropolitan Division (MD) (Alameda and Contra Costa Counties), *Seasonal gains in education and in leisure and hospitality led month-over job changes* ("The unemployment rate in the Oakland-Fremont-Hayward MD was 11.9 percent in March 2010, up from a revised 11.6 percent in February 2010, and above the year-ago estimate of 9.8 percent.") ("The unemployment rate was 11.9 percent in Alameda County . . . .").

[32] *See id*., Oakland Fremont Hayward MD (Alameda and Contra Costa Counties), Industry Employment and Labor Force, March 2009 Benchmark (showing all construction jobs down by 11.1 percent over the past year and 12.5 percent in the subcategory of Heavy & Civil Engineering Construction).

emissions than the most advanced coal-fired plants and 25 percent fewer GHG emissions than the standard set by the CPUC. *See* Exhibit 57, Calpine News Release. As a highly efficient combined-cycle plant, it will be significantly cleaner than older power plants currently in operation. Exhibit 59, Air District News Release. By providing a reliable backstop for intermittent renewable generating resources, such as wind and solar, it will help meet state renewable portfolio and GHG emissions reduction requirements. *See, e.g.*, Exhibit 40, CPUC Decision 4/20/09 at 9.

In addition, as RCEC described in its response to the Sarvey Petition, the Project will use 100 percent reclaimed water from the City of Hayward's Waste Water Treatment Plant in its cooling tower. *See* RCEC's Response to Sarvey Petition at 41-60; *see also* Exhibit 5, Responses to Public Comments at 86-89. This design feature conserves water and will eliminate nearly four million gallons of wastewater per day from being discharged into San Francisco Bay:

> The facility's "Zero Liquid Discharge" plan will minimize potential harm to water quality in the vicinity of the Water Pollution Control Facility's outfall, where wastewater that has undergone secondary treatment would otherwise be discharged into the bay. Although the City's wastewater is treated before discharge, it still contains minor amounts of water pollutants that contribute to the overall pollution levels in the Bay. Elimination of such water pollution, even in relatively small amounts, contributes to the health of the Bay and is therefore a beneficial environmental effect. This conclusion is supported by the State Water Resources Control Board, which encourages power plants wherever possible to draw cooling water from wastewater that is already being discharged into surface water bodies.

Exhibit 5, Responses to Public Comments at 88 (footnote omitted).

As the Air District stated upon issuance of RCEC's PSD permit, "'[t]his permit is the most stringent the Air District has ever issued.'" Exhibit 59, Air District News Release (quoting Jack Broadbent, executive officer of the Air District). RCEC's PSD permit requires the Project to be equipped with state-of-the-art air pollution control equipment, including selective catalytic reduction and oxidation catalysts. *Id.* Overall, the PSD permit that resulted from the 18 months of proceedings that followed the Board's July 29, 2008 remand order "is more stringent and will include the tightest emission limits of any power plant in the Bay Area." *Id.*

E. Should the Board Decide To Hold Oral Argument on Any Issue, It Should Be Held No Later than June 30, 2010 Due to the Exigencies Facing the Project

As described above, the Project remains subject to a deadline for commencement of construction under its CEC license of September 10, 2010. The prospects for the CEC to grant an additional extension are highly uncertain. Further, with a 32-month construction schedule, the Project must begin construction by October 31, 2010 to meet the renegotiated on-line date of June 1, 2013. RCEC cannot commence construction until final disposition of all appeals by the Board. Given the many spurious and non-substantive claims made by Petitioners, RCEC is concerned that, should the Board proceed with oral argument on the scheduled date of August 17, 2010, it will not be in a position to issue a final decision disposing of the remaining petitions in time for RCEC to commence construction prior to September 10, 2010 and/or October 31, 2010. Thus, should the Board decide to proceed with oral argument on any issue, RCEC would ask the Board to reschedule such argument for no later than June 30, 2010, so that the Board will have adequate time to consider the issue and then issue a decision in time for RCEC to proceed with commencement of construction prior to such dates.

The Board's May 6, 2010 Order provides that, if the Board grants any Petitioners' request to file a reply, such replies would be due by May 28, 2010. *See* Order at 1. RCEC respectfully suggests that, if the Board requires any additional briefing prior to oral argument, such briefing occur within the first three weeks of June, with oral argument scheduled for no later than June 30, 2010. RCEC appreciates the Board's prompt issuance of orders in this matter and would request that the Board continue to expedite its consideration of the remaining petitions.

VI. CONCLUSION

RCEC respectfully requests that the Board deny the motions of Chabot, CAP, Mr. Sarvey, and CARE/Simpson for leave to file a reply brief. These issues raised by Petitioners have been fully briefed, and the five remaining petitions for review stand ready for decision. In addition, oral argument on these or any other issues raised by the remaining petitions for review is unwarranted. Should the Board decide that oral argument on any issue is warranted, RCEC respectfully requests that oral argument be held no later than June 30, 2010 due to the serious

consequences of delay in this case. In either case, RCEC would request that the Board expedite its consideration of the remaining petitions and issue a final decision allowing RCEC to commence construction prior to expiration of the CEC license on September 10, 2010.

Respectfully submitted,

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Attorneys for Permittee Russell City Energy Company, LLC

Dated: May 18, 2010

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of May, 2010, copies of the foregoing Russell City Energy Company, LLC's Opposition to Petitioners' Motions for Leave To File a Reply Brief and Request for Expedited Consideration were served via first-class U.S. mail, postage prepaid, to:

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I hereby certify that on the 18th day of May, 2010, copies of the foregoing Russell City Energy Company, LLC's Opposition to Petitioners' Motions for Leave To File a Reply Brief and Request for Expedited Consideration were served, per their consent and agreement with the undersigned, via electronic mail to:

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