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

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

RESPONDENT'S CONSOLIDATED OPPOSITION TO MOTIONS REQUESTING LEAVE TO FILE REPLY BRIEFS

Brian C. Bunger, Esq.
District Counsel
Alexander G. Crockett, Esq.
Assistant Counsel
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109

May 18, 2010

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY

Petitioners in four of these consolidated PSD permit appeals have submitted motions for leave to file reply briefs addressing the substantive issues raised in their appeals. Petitioners in two of them are also seeking to provide the Board with additional information regarding the circumstances surrounding the late filing of their Petitions.

For the reasons explained herein, the Respondent Bay Area Air Quality Management District ("District") opposes the granting of leave to file additional briefs on the substantive issues. These issues have already been fully briefed and are ready for adjudication by the Board, and the motions do not provide good cause for why additional briefing could be warranted at this stage. Moreover, allowing further briefing at this point would simply open up this proceeding for Petitioners to introduce new evidence and argument beyond what Petitioners have already provided in their Petitions, which would not promote the speedy and efficient resolution of these appeals. To the extent that the Board does allow such further evidence and argument, however, the District respectfully requests that it be granted leave to submit a short sur-reply addressing whatever issues Petitioners are allowed to raise in reply briefs, as explained herein.

With respect to the submission of additional information regarding the circumstances surrounding the late filing of two of the Petitions (Petitions Nos. 10-04 and 10-05), the District has no objection to such additional submissions if it will help the Board in its investigation of whether these late filings were attributable to malfunctions with the CDX electronic filing system that prevented these Petitions from being filed by the March 22, 2010, deadline for appeals in this matter.

STANDARD OF REVIEW

The EAB's rules do not provide for filing of reply briefs after petitions for review and oppositions thereto are filed, the Board therefore "normally" does not entertain further briefing after those papers are filed. Environmental Appeals Board Practice Manual at 36. The Board does however "[o]n occasion" allow petitioners to file a reply brief "upon motion explaining why a reply brief is necessary." *Id.* The Board has requested any Petitioners in this proceeding who wish to leave to file a reply brief make such a motion. *See* Order Establishing Requirements For Motions To File A Reply Brief And Oppositions Thereto, Filing No. 80, (May 6, 2010) (hereinafter, "Reply Motion Scheduling Order") at 1. The Board set forth two substantive requirements for such Motions:

(i) That the petitioner "state[e] with particularity the arguments to which Petitioner seeks to respond"; and

(ii) That the petitioner explain "the reasons Petitioner believes it is necessary to file a reply to those arguments."

Id.

In order to be granted leave to file a reply brief under these standards, Petitioners must demonstrate that good cause exists for such a filing by showing that there is some reason why further briefing is necessary for a full and complete airing and understanding of the issues on appeal. Where a motion fails to make such a showing – that is, where the issues are already well-framed by the Petition and Response sufficient to meaningfully inform the Board – leave to file additional briefing should be denied. *See In re City of Salisbury, Maryland*, 10 E.A.D. 263, 296 n.44 ("Because the legal issues have been well-framed by the Appeal Brief and Response Brief and further briefing would thus not meaningfully inform the Board's views, the City's request for leave to file a reply to the Region's Response Brief is denied."); *In re Bethlehem Steel Corp.*, 4 E.A.D. 29, 30 n.1 ("The Board believes that the Region's appeal brief and Bethlehem Steel's reply to the appeal brief adequately address the issue . . . . Accordingly, the Board has

not considered the Region's response brief, and the Region's motion for leave to file it is denied.").

In making a showing of good cause for leave to file a reply brief, Petitioners cannot simply claim that they want to further argue the points they made in their Petition. As the Board has explained, leave to file a reply should not be granted simply for Petitioner to "repeat . . . comments submitted on the draft permit," or to submit "repetitive contentions" that simply "repeat and elaborate[] upon some aspects of the arguments made in the Petition." *In re Keene Wastewater Treatment Plant*, NPDES Appeal No. 07-10 (EAB Mar. 19, 2008), slip op. at 19-20. Similarly, Petitioners cannot claim that they should be able to file a reply brief to raise new points that they did not raise in their Petitions. The Board has also explained that leave should also be denied where the reply seeks to present "arguments [that] raise substantive nuances that are not set forth in the Petition . . . ." *Id.*, slip op. at 20. Reply briefs that seek to raise such new arguments – even where they can be cast as "nuances" to other arguments – are in essence "late-filed appeals" because they raise issues that could have been raised in the Petition fro Review but were not so raised. *Id.* (citing cases). The Board should reject such attempts to bring in such new issues in through a reply brief where they were not squarely raised in the Petition itself.

The Board should therefore grant leave to file reply briefs only in those narrow cases where there is some existing issue that has been squarely raised in a Petition for Review that has not been fully and completely briefed by the parties in the Petition and Response. Where the Petitioner has squarely raised its arguments in the Petition and the District (and real-party-in-interest Russell City Energy Company ("RCEC")) have squarely raised their arguments in their responses, the Board should deny leave to file a reply brief.

Finally, if for some reason the Board finds that there is an issue that warrants further briefing because it has not been adequately briefed in the submissions to date, the Board should hear from both sides on such issues. If an issue is of sufficient importance and is sufficiently unclear from the parties' submissions to date that the Board concludes that it needs additional briefing in order to be able to fully understand and adjudicate it, then the Board would benefit

from hearing the positions of both sides on such issues. If the Board does find that some issue presented in these motions warrants further briefing, it should grant the Petitioner leave to file a reply brief and grant the District leave to file a sur-reply on the same issue. *See In re Sumas 2 Generation Facility*, PSD Appeal No. 05-03 (EAB Mar. 26, 2005), slip op. at 11 ("Upon consideration, the Board accepts the Province's reply brief as well as SE2's sur-reply as part of the record before the Board."); *In re Three Mountain Power, LLC*, 10 E.A.D. 39, 46 (EAB 2001) (granting leave to file sur-reply).

THE BOARD SHOULD DENY THE MOTIONS FOR LEAVE TO FILE REPLY BRIEFS ON THE SUBSTANTIVE ISSUES

The District hereby opposes the four motions filed seeking leave to submit reply briefs on the substantive issues raised in these Petitions for Review. None of the motions has provided good cause to establish that additional briefing beyond what the parties have already provided in their Petitions and Responses is warranted at this stage. To the contrary, the substantive issues have already been well briefed and are fully before the Board for decision at this point. The District addresses each motion in turn below.

I. PETITIONER CHABOT-LAS POSITAS COMMUNITY COLLEGE DISTRICT HAS NOT DEMONSTRATED GOOD CAUSE AS TO WHY ADDITIONAL BRIEFING IS WARRANTED IN PETITION NO. 10-02

Petitioner in Petition for Review 10-02 Chabot-Las Positas Community College District (CLP) seeks leave to file a reply brief on six issues. But although CLP's motion claims at the outset that it will explain why it is necessary for CLP to be granted leave to file a reply brief, the motion itself simply identifies arguments that the District (and real-party-in-interest Russell City Energy Co.) made in response to the Petition and states that CLP disagrees. CLP is entitled to disagree on these issues, but without some showing as to why additional briefing is warranted, it should not be entitled to file a reply on them. And for the reasons discussed below, there is no valid reason why any further briefing is warranted.

A. CLP Has Not Shown Good Cause For Further Briefing On Whether It Raised Certain Arguments In Its Comments

CLP first requests leave to file further briefing on the issue of whether it preserved two issued for review – (i) whether the District should have used an emissions rate of 9 pounds per hour of $PM_{2.5}$ in its air quality impact analysis instead of the maximum permitted emissions rate of 7.5 pounds per hour; and (ii) whether the District should have considered additional cost information in its cost-effectiveness analysis of using an auxiliary boiler to help reduce startup emissions – by raising them in comments on the draft permit. CLP argues that further briefing

on whether it properly raised these issues in its comments "may likewise assist the Board in determining the merits of those substantive issues." CLP Motion at 2 ¶ 1.

With respect to CLP's claims that the District should have used an emissions rate of 9 pounds per hour instead of the maximum permitted rate of 7.5 pounds per hour, the District has not objected on issue-preservation grounds to CLP's arguments based on statements the District made in its Responses to Public Comments document (regarding opinions voiced by power plant owner/operators about whether 7.5 pounds per hour should be required as the BACT limit, about the lack of vendors who will provide guarantees for a 7.5 pound-per-hour emission rate, *etc.*). The District has responded on the merits explaining why these passages from the Responses to Public Comments document do not support CLP's argument that the District should have used 9.0 pounds per hour instead of the maximum permitted 7.5 pounds per hour in its $PM_{2.5}$ air quality impact analysis. *See* Response to Petition 10-02 at 23-24. As there is no argument from the District that these passages from the Responses to Public Comments document were in the permitting record on which the final permit was issued, there is no need for additional briefing on whether CLP can properly raise arguments based on these passages. (Note that there is no need for further briefing on the substance of CLP's argument that the District erred in using the maximum permitted 7.5 pounds-per-hour emissions rate, either, as the District addresses in subsection I.C below.)

With respect to whether CLP preserved any arguments on this issue based on its own comments (*i.e.*, based on statements other than the communications from power plant owner/operators described by the District in the Responses to Public Comments document referred to above), any such issue would be moot as CLP has not provided any other support for its argument that the District should have used the 9.0 lb/hr rate beyond what was recited in the Responses to Public Comments. *See* CLP Petition 10-02 at 27-29. If CLP wanted to make any such arguments based on its own comments, it was required to do so in the Petition, and was required at that time to state with particularity how any such arguments were properly preserved for review. CLP cannot now seek to expand the scope of its Petition through a reply brief.

Moreover, even if CLP did somehow have a reason for wanting to rely on its comment letters in this regard at this late state, the comments letters that CLP submitted are a matter of fact and the facts are already fully before the Board for decision. CLP's February 6, 2009, comment letter from the initial comment period has been submitted as Exhibit 5 to Petition 10-03 (filed by Citizens Against Pollution); and CLP's September 16, 2009, comment letter from the second comment period has been submitted as Exhibit 9 to the Declaration of Alexander G. Crockett, Esq., submitted in support of the District's Response to this Petition for Review. These documents speak for themselves. The issue of what comments CLP submitted during the comment period has therefore been squarely presented to the Board for decision, and the Board can easily review the comment letters at issue and determine whether they show whether CLP ever contended during either comment period that the District should have used the 9.0 lb/hr emission rate in its $PM_{2.5}$ modeling analysis (to the extent that these letters are even relevant to the points raised in the Petition, which are all based on the District's Response to Public Comments document and not on any comment letters in any event).

With respect to the additional cost information regarding the cost-effectiveness of using an auxiliary boiler, it is clear from even a cursory perusal of CLP's comment letters that CLP never made any comment about the cost assumptions from the Mankato facility that the District used in its cost-effectiveness analysis. Again, the information that was submitted in these letters is a factual issue, and it has already been squarely presented to the Board in CLP's comment letters that have been submitted for Board consideration. The District also notes that CLP concedes in its Petition that that it only developed its position that the Mankato data were purportedly based on an over-sized boiler "since publication of the Response [to Public Comments document]", which took place after the close of the comment periods. The issue of whether this issue was brought up in public comments has therefore been fully briefed and presented to the Board for adjudication, and there is no need for additional briefing at this stage.

Furthermore, in the event that the Board does decide that there is need for further briefing on any issues concerning the impact of any comments that CLP submitted – for example, if the

Board wants to consider further argument on the meaning or impact of the underlying factual documents, instead of just considering the documents on their face – the District respectfully submits that it should be granted leave to submit a short sur-reply brief, to be limited to responding to arguments raised by CLP on such issues and with a page limit of no more than the number of pages submitted in CLP's reply brief. To the extent that CLP seeks to submit arguments regarding the impact of its comments, it should not be allowed to do so for the first time in a reply brief without the District having an opportunity to respond. Thus, to the extent that the Board allows CLP to present its issue-preservation arguments in a reply brief, the Board should allow the District an opportunity to respond, which is the opportunity the District would have had if CLP had presented such argument in the Petition itself as it was supposed to.

B. CLP Has Not Shown Good Cause For Further Briefing On Whether The PSD Permit Required An Analysis Of 24-Hour $PM_{2.5}$ Ambient Air Quality Impacts

CLP next reiterates the argument it made in its Petition that the District was legally required to evaluate 24-hour ambient $PM_{2.5}$ impacts as part of its PSD permitting review. CLP alludes to the District's position that the PSD permitting program under 40 C.F.R. Section 52.21 no longer applies for the 24-hour $PM_{2.5}$ standard now that the San Francisco Bay Area has been designated as non-attainment for that standard; that as a result of the non-attainment designation, non-attainment new source review permitting requirements under 40 C.F.R. Part 51, Appendix S govern 24-hour $PM_{2.5}$ impacts; and that the Russell City facility does not trigger any Appendix S requirements because its $PM_{2.5}$ emissions will be below the 100-ton-per-year "major source" threshold for Appendix S permitting requirements. *See* CLP Motion at 3-4 ¶ 2. After describing the District's position, CLP states that the District's position "is not legally supportable" and "violates the Clean Air Act". *Id.*

But other than reciting the District's position and stating that it disagrees, CLP does not actually request leave to file additional briefing on this issue – let alone explain any reasons how further briefing could be necessary or helpful. Moreover, a review of the issues as presented by

the parties in the briefing to date shows that in fact the issue has been comprehensively presented already and does not require further briefing in order for this Board to make a reasoned determination. CLP has presented its arguments as to why it believes that 24-hour ambient $PM_{2.5}$ impacts are still covered by PSD source impact review now that the Bay Area is non-attainment for the $PM_{2.5}$ 24-hour NAAQS, which are namely that:

(i) under 40 C.F.R. Section 51.165(b)(4), a PSD source located in an area designated as attainment for a certain NAAQS may not receive a PSD permit if it will cause or contribute to a NAAQS violation in an adjacent area that is designated non-attainment (*see* CLP Petition at 31-32); and

(ii) under *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121 (EAB 1999), a source must always conduct a PSD NAAQS analysis, even if it is located in a non-attainment area for that NAAQS and not in an attainment area subject to PSD permitting (*see id.* at 32-33).

The District and RCEC have similarly presented its arguments as to why these arguments should be dismissed, which are namely that:

(i) PSD permitting applies only for areas that are in attainment of the NAAQS (or unclassified), and that where as here the District is non-attainment for the 24-hour $PM_{2.5}$ standard Appendix S Non-Attainment NSR permitting applies instead of PSD permitting (*see* District Response to Petition 10-02 at 10-12; *see also id.* at 14 (noting also that the Board lacks jurisdiction to consider Appendix S non-attainment issues in a PSD permit appeal));

(ii) 40 C.F.R. Section 51.165(b)(4) applies where a source in an *attainment* are has the potential to cause a NAAQS violation in an *adjacent non-attainment* area, which is not the case here because this source is not located in an attainment area for the 24-hour $PM_{2.5}$ standard, and does not have the potential to cause an appreciable impacts in any adjacent non-attainment area in any event (*see* District Response to Petition 10-02 at 12-14); and

(iii) CLP failed to explain how the District's Responses to Public Comments on this issue was somehow flawed or erroneous, as is required for Board review.

CLP's Motion does not provide any reason why the Board cannot adjudicate this issue based on the briefing that the parties have submitted to date, and there is none. The Board should therefore deny CLP's motion with respect to this issue.

Should the Board decide that these issues warrant additional briefing, however, the District respectfully submits that it should be allowed to file a short sur-reply to be limited to the issues CLP raises in its reply brief and with a page limit of not more than the number of pages CLP files in its reply. If the Board finds that this issue is sufficiently important to consider additional arguments and briefing from CLP, then it should similarly consider the District's position on such additional arguments and briefing.

C. CLP Has Not Shown Good Cause For Further Briefing On Whether The District Erred In Using The Maximum Permitted Emissions Rate Of 7.5 Pounds Per Hour As The Basis For Its $PM_{2.5}$ Modeling Analysis

Third, CLP recites the District's position that it was proper to use the 7.5 pound per hour maximum emissions rate allowed under the permit as the basis for the $PM_{2.5}$ modeling analysis it undertook. As CLP notes, the District argued in its Response that using the maximum emissions rate specified in the permit is an appropriate measure of the "worst case" emissions scenario for modeling purposes because it is the maximum emissions that the facility will be allowed under federally enforceable permit conditions. *See* CLP Petition at 4 ¶ 4. After describing the District's position on this issue, CLP states that it submits that the District's position "is not supported by statutory and/or decisional law." *Id.*

Again, CLP simply describes the District's position and states that it disagrees, and does not actually request leave to file additional briefing on this issue or explain any reasons how further briefing is needed. And a review of the briefing to date shows that the issue has been fully briefed and is ready for decision on what has already been submitted. CLP has fully presented its argument as to why it believes that the District should have used the 9.0 lb/hr emission rate. As CLP explains on pp. 28-29 of its Petition, it believes that the District should have used the higher 9.0 lb/hr rate instead of the actual permit limit because of certain communications the District received from other power plant owner/operators who questioned whether a 7.5 pound-per-hour limit should be considered achievable, based on a small number of test results in the record showing emissions above 7.5 lb/hr and on the fact that equipment

manufacturers will not provide guarantees for emission rates below 9.0 lb/hr. As CLP argues, based on this information it contends that the 7.5 lb/hr permit limit does not represent the "worst case" emissions rate. The District and RCEC have also fully presented their position as to why the PSD permit analysis should have been based on the enforceable 7.5 lb/hr permit limit. As the District explains on pp. 18-23 of its Response:

(i) The District was not legally required to consider 24-hour $PM_{2.5}$ impacts in its PSD source impact analysis because the Bay Area is non-attainment for the 24-hour $PM_{2.5}$ NAAQS[1];

(ii) Even if a 24-hour $PM_{2.5}$ analysis were required, 7.5 lb/hr is the appropriate emissions rate to use in such an analysis because it is the maximum rate of emissions that the facility will be able to emit, and the facility will be subject to enforcement action under the Clean Air Act to ensure that emissions stay below that level;

(iii) EPA guidance in the NSR Workshop Manual and the Guideline on Air Quality Models in Appendix W to 40 C.F.R. Part 51 require that the District use the maximum permitted rate of 7.5 lb/hr;

(iv) EAB precedent from prior PSD permit appeals requires the use of the maximum permitted rate of 7.5 lb/hr;

(v) Lack of a vendor guarantee does not necessarily mean that equipment will not be able to perform better than the level at which a vendor is willing to accept legal liability through provision of a guarantee, as recognized by the NSR workshop manual;

(vi) A small number of test results that list emissions above a rate of 7.5 lb/hr does not necessarily mean that the turbines at this facility will not be able to achieve that emissions rate, for the technical reasons the District set forth in its Responses to Public Comments.

CLP's Motion does not provide any reason why the Board cannot adjudicate this issue based on these comprehensive arguments that the parties have already fully outlined in their briefing to

[1] All of the Petition's arguments about the effect of using 9.0 lb/hr instead of 7.5 lb/hr as the basis for the analysis are aimed at the 24-hour $PM_{2.5}$ analysis. The District also used the 7.5 lb/hr emission rate as the basis for its PSD source impact analysis for the annual $PM_{2.5}$ NAAQS, which is still required for PSD permits because the District is attainment/unclassified of the annual $PM_{2.5}$ NAAQS. But the Petition has not argued that there would be any substantive difference in the outcome of the annual $PM_{2.5}$ analysis if the higher emission rate were used.

date, and there is none. The Board should therefore deny CLP leave to file further arguments on this issue.

Should the Board decide that these issues warrant additional briefing, however, the District respectfully submits that it should be allowed to file a short sur-reply to be limited to the issues CLP raises in its reply brief and with a page limit of not more than the number of pages CLP files in its reply. If the Board finds that this issue is sufficiently important to consider additional arguments and briefing from CLP, then it should similarly consider the District's position on such additional arguments and briefing.

D. CLP And The District Agree That No Further Briefing Is Needed On Whether The District Made Publicly Available Its Earlier Modeling Analysis Based On A 9-Pound-Per-Hour Emissions Rate

In a footnote, CLP explains that it is not responding to the District's explanation in its Response that the District made the earlier modeling analysis it undertook using the original 9.0 lb/hr emissions rate available to the public as part of the administrative record during the comment periods. *See* CLP Motion at 4 n.3. CLP states that it does not agree that making the modeling analysis available for public review in the administrative record was sufficient for PSD permitting purposes. To the contrary, CLP asserts that the District needed to plot the locations of impacted receptors on a map included in the Statement of Basis. CLP explains that it does not believe that further briefing on this issue is necessary, although it explains that if the Board would like further briefing it would be willing to provide it.

The District disagrees that it was required to conduct an analysis at all using the higher 9.0-pound-per-hour emissions rate, as that is not the maximum emissions rate; and disagrees that it was required even to plot receptor locations using the correct 7.5 lb/hr emissions rate on a map published in the Statement of Basis. To the contrary, as the District explained in its Response to the Petition, the District contends that including the results of the source impact analysis in a memorandum supporting and cited in the Statement of Basis, and including the underlying modeling files in the administrative record, more than satisfies the public disclosure

requirements for making its PSD permitting analyses available for review. *See* Response to CLP Petition 10-02 at 23-24. The District agrees with CLP in one respect, however, and that is that the record speaks for itself on this issue. The parties have fully briefed this issue and there is no need for a further reply brief. To the extent that the Board would like additional briefing, however, the District is also willing to provide it, and would be willing to abide by the same page limits as applicable to CLP.

E. CLP Has Not Shown Good Cause For Further Briefing Regarding The Roadway Segments The District Used In Its $PM_{2.5}$ Multi-Source Modeling Analysis

CLP next addresses the issue of whether the District should have included additional roadways in the multi-source modeling exercise it undertook for its $PM_{2.5}$ ambient air quality impact analysis. But again, CLP does not actually request leave to file further briefing on this issue or attempt to provide any reasons why additional briefing would be warranted. CLP simply asserts that this "is an important public issue that needs to be addressed." CLP Motion at 4-5 ¶ 4.

At the outset, the District disagrees that this issue rises to the level of public importance that CLP claims. As noted above, CLP claims that the District committed reversible error with respect to this issue based on an argument that including additional roadways would likely show that the facility does not pass a 24-hour $PM_{2.5}$ NAAQS analysis. But as the District has explained, a 24-hour $PM_{2.5}$ NAAQS analysis is no longer an element of the PSD permitting review now that the Bay Area has been designated as non-attainment for the 24-hour $PM_{2.5}$ standard. For that reason, the District's choice of roadways to include in the multi-source analysis cannot by definition give rise to reversible error, even if the District did somehow abuse its discretion in conducting the analysis. The issue of what roadways were chosen for the $PM_{2.5}$ 24-hour impacts analysis cannot therefore warrant further briefing as a relevant legal issue.[2]

[2] Again, the selection of roadways for the analysis of annual $PM_{2.5}$ impacts is still legally relevant to the PSD analysis because PSD still applies for the annual standard. But the issue regarding the annual standard is not relevant to CLP's petition because it alleges reversible error only with respect to the 24-hour standard. Annual impacts from the facility are well below the

Furthermore, even if the issue were legally relevant, the issue has been fully briefed in the parties' submissions to date, and CLP has not identified any reason why additional briefing could be necessary in order for the Board to adjudicate it. CLP has clearly presented its argument why it believes that additional roadways should have been included in the multi-source modeling analysis, explaining that roadways such as Interstate 880 and Hesperian Boulevard "significantly contribute[e] to the emissions detrimentally harming the health of the surrounding community and within the RCEC significantly impacted area . . . ." CLP Petition at 35; *see also id.* at 33 ("[T]he communities within the significantly impacted area located near Interstate 880 and the six lane expressway, Hesperian, which is located between RCEC and Interstate 880, already suffer from a disproportionate amount of pollution."). In response, the District clearly explained its arguments why it appropriately exercised its technical judgment in including only Highway 92 and excluding additional roadways, which were:

(i) EPA's NSR Workshop Manual and Appendix W modeling Guideline, as well as EAB precedent, treat any contribution by a PSD source that is below the Significant Impact Level ("SIL") as *de minimis* and appropriate for exclusion from the analysis of whether the source will "cause or contribute" to a NAAQS violation;

(ii) EPA's NSR Workshop Manual and Appendix W modeling Guideline also make clear that additional sources need to be included in the multi-source modeling analysis only if they would "cause a significant concentration gradient" in the vicinity of the source under review;

(iii) Under this guidance, the multi-source modeling analysis need only consider receptor locations where *both* a) the facility's impact will be above the SIL *and* b) the other nearby source will cause a significant concentration gradient at the same time and place;

(iv) A roadway analysis showed that high-volume roadways can cause significant $PM_{2.5}$ concentration gradients out to a distance of 1,000 meters from the roadway;

NAAQS and CLP has not alleged that evaluating additional roadways could cause the facility to cause or contribute to a violation of the annual standard.

(v) There were no other roadways besides Highway 92 located within 1,000 meters from any location where the facility would cause a $PM_{2.5}$ impact above the SIL;

(vi) Accordingly, no other roadways could have the potential to cause a significant $PM_{2.5}$ concentration gradient at a location (same time and place) where the facility would cause a $PM_{2.5}$ impact above the SIL, and therefore no other roadways needed to be include in the multi-source modeling analysis;

(vii) Permitting agencies must necessarily be accorded deference in exercising their expertise and judgment in this highly technical area, and the Petition did not point to any reason how the District could have abused its discretion in applying these principles consistent with EPA guidance and reasonable technical assumptions; and

(viii) CLP did not point to any way in which the District's response to comments on this issue, in which it explained in detail why it had not included these additional roadway segments, was in any way flawed or erroneous.

See Response to CLP Petition 10-02 at 24-32. Although CLP now claims that further briefing is warranted because of the alleged public importance of this issue, CLP fails to provide any reason why the parties' various arguments have not already been adequately briefed, and there is none. The Board should therefore deny CLP leave to file further arguments on this issue as well.

Again, however, should the Board decide that this issue does in fact warrant additional briefing, the District respectfully submits that it should be allowed to file a short sur-reply to be limited to points CLP raises in its reply brief and a page limit of not more than the number of pages CLP files in its reply. If the Board finds that this issue is of sufficient public importance to warrant briefing from CLP, then it should also consider the District's position on the further issues and argument that CLP seeks to raise.

F. CLP Has Not Shown Good Cause For Further Briefing Regarding The Documents The District Relied On In Evaluating The Costs Involved In Using An Auxiliary Boiler

CLP also refers to its arguments regarding the District's auxiliary boiler cost-effectiveness analysis, which showed that using an auxiliary boiler for additional reductions in startup emissions would not be sufficiently cost-effective to require as BACT. *See* CLP Motion at 5. ¶ 5. CLP refers (i) to the startup emissions estimates that CLP submitted from the Caithness

Long Island Energy Center; and (ii) to cost information on which the District estimated the additional cost that would be involved to install and operate an auxiliary boiler at the Russell City facility. With regard to these issues, CLP states that "[t]hese 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." *Id.*

Once again, the motion fails to provide any explanation of why any additional briefing could be warranted on these issues. With respect to the startup emissions estimates, CLP is apparently referring to the District's explanation that the full set of Caithness vendor emissions estimates from Siemens that CLP provided as Exhibit 4 to its Petition were not actually provided with CLP's September 16, 2009, comment letter. *See* Response to CLP Petition 10-02 at 37-39. As the District explained, the September 16, 2009, comment letter attached only two data sheets, one for natural gas and one for fuel oil, and so the District evaluated Petitioner's submission using those two data sheets. CLP now apparently is seeking leave to submit additional factual briefing regarding the documents it submitted, and presumably argument that the proper data sheets were in fact provided to the District during the comment period. But as the District also explained in its Response, this issue is moot because, even using the proper natural gas data sheets, the Siemens vendor estimates still do not show that that an auxiliary boiler would be sufficiently cost-effective to require as a BACT control technology.[3] *See* Response to Petition

[3] CLP claims with respect to this issue that the District has taken the position that CLP "misled" the District with the information regarding startup emissions estimates from Siemens for the Caithness Long Island Energy Center. CLP Motion at 5 ¶ 5. But the District has never claimed that it was "misled" in its analysis; to the contrary, as the District explained in its Response, the District was fully informed about the costs and additional emission reduction benefits that would be involved with the use of an auxiliary boiler, and correctly determined that an auxiliary boiler would not be sufficiently cost-effective to require as a BACT control device. *See* Response to Petition 10-02, at 33-43. To the extent that the documentation CLP submitted with its comment letter did not present an accurate picture of what Siemens' estimates purported to show regarding the benefits of an auxiliary boiler, that may have been an additional piece of information that the District did not have before it when it made its determination (because CLP submitted the wrong

10-02 at 39. No productive purpose would be served by arguing over factual details such as exactly what documents were attached to CLP's comment letter where the results of any discrepancy do not affect the outcome of the BACT determination. CLP has therefore not pointed to any good cause that would warrant additional briefing on this factual issue.

With respect to the auxiliary boiler cost information, there is no factual question whatsoever regarding "what documents were before BAAQMD" when the District made its determination and therefore no basis for CLP's request on this point either. No party disputes the fact that the District relied on the spreadsheet "Aux Boiler start profile DJ.xls, which the District cited in the Additional Statement of Basis on page 69 in footnote 127 and in the Responses to Public Comments on page 114 in footnote 235 (and which the District submitted with its Response to CLP's Petition for Review as Exhibit 11.b.1 to the supporting Declaration of Alexander G. Crockett, Esq.). CLP argued for the first time in its Petition that the cost estimate presented in this document was based on an oversized auxiliary boiler of 320 MMBtu/hr. In response, the District pointed out that CLP is barred from raising this argument now because it failed to raise it in its comments. The District also noted that CLP is factually wrong in any event, because the cost estimate is based on a boiler of 70 MMBtu/hr, not 320 MMBtu/hr. The District noted that this size is very similar to the size boiler that CLP contends would be necessary for this facility, and further that CLP had not provided any reason to conclude that the costs of such a boiler would be materially different than the boiler it contends would be needed for RCEC in a way that would change the outcome of the cost-effectiveness analysis. *See* Response to CLP Petition 10-02 at 40. CLP has not provided any reason why additional briefing could be necessary on this issue "so that the Board knows what documents were before BAAQMD," CLP Motion at 5 ¶ 5, because there is no disagreement about which document the District used in making its determination on this issue.

---

documents), but it did not mean that the District did not have sufficient accurate information on which to make the determination.

Furthermore, to the extent that the Board finds that CLP should be able to submit additional briefing on these issues to explain what documentation it submitted along with its comments in this proceeding and how they support CLP's claims that its arguments on these points were adequately preserved for review, the Board should also grant the District leave to file a sur-reply. The burden in on Petitioner to show in its Petition that the issues it raises have been preserved. One important purpose of this requirement is to allow the Respondent to hear the Petitioner's position and respond accordingly. By allowing CLP to address these issues for the first time in a reply brief, the District will be denied the opportunity to respond and the Board will not have the benefit of hearing the District's position. The District therefore respectfully requests that it be granted leave to file a sur-reply if CLP is granted leave to file a reply. The District is prepared to limit its sur-reply to no more than the number of pages that CLP files in any reply.

G. CLP Has Not Shown Good Cause For Further Briefing On Its Environmental Justice Arguments

CLP's final issue on which it seeks leave to file a reply brief is the environmental justice argument that it has raised in the Petition. *See* CLP Motion at 5 ¶ 6. But once again, CLP does not provide any reason why good cause could be found to exist to warrant further briefing on this issue. CLP's environmental justice argument is wholly derivative of its $PM_{2.5}$ arguments, as it claims that the District's alleged errors in its ambient air quality impact analysis for the 24-hour $PM_{2.5}$ standard (which as the District explained was not even legally required) led to a violation of environmental justice principles. *See* Response to CLP Petition 10-02 at 43-46. CLP does not offer any reason why it should be allowed to brief such issues further in the environmental justice context, and instead simply reiterates its position that because the San Francisco Bay Area is non-attainment for the $PM_{2.5}$ 24-hour NAAQS, a PSD analysis needs to be conducted for $PM_{2.5}$ 24-hour impacts. As discussed above, this issue has been fully briefed in the parties' submissions to date, and there is no reason why further submissions would be warranted at this point.

II. PETITIONER CITIZENS AGAINST POLLUTION HAS NOT DEMONSTRATED GOOD CAUSE AS TO WHY ADDITIONAL BRIEFING IS WARRANTED IN PETITION NO. 10-03.

Petitioner Citizens Against Pollution ("CAP") seeks leave to file a reply brief on four issues. As explained in this section, none of CAP's arguments provides good cause why a reply brief would be warranted here, and its motion should therefore be denied.

A. CAP Has Not Shown Any Need For Further Briefing On The BACT Startup Limits.

Petitioner CAP first seeks leave to file a reply brief regarding its challenge to the District's BACT determination for startup emissions. CAP seeks to change its argument on this startup BACT determination, however, and address a concern that is different than what it raised in its Petition for Review. The Board should decline the invitation to allow CAP to raise new arguments in a reply brief that CAP could and should have raised squarely in its Petition.

Specifically, the claim that CAP raised in its Petition on this issue was that the District did not adequately evaluate the likely number and type of startups the facility will have. CAP claimed that without an adequate evaluation of the number and type of startups, the District could not have adequately evaluated whether additional control technologies such as an auxiliary boiler would be justified as BACT. CAP's argument was based on the contention that if there are more frequent startups than the District anticipated, then the additional technology will have a bigger impact in reducing overall startup emissions and will therefore be more cost-effective in terms of the total amount of emission reductions gained in return for the additional costs of the control equipment. CAP described this claim in its "Issues Presented For Review" section, where it alleged that the District "erred in failing to ascertain a credible operating scenario of the number and kind of startup and shutdown events that are expected to occur at RCEC . . . ." Petition 10-03 at 3. CAP presented its argument in the body of its brief in similar terms, stating that the District did not provide "a credible scenario of likely SU/SD events", *id.* at 14, and that "[a] credible determination of a SU/SD scenario is material because the number of SU/SD events

will determine whether certain pollution control equipment or technique [*sic*] is most appropriate," *id.* at 15.

In response, the District explained how it had in fact evaluated the facility's operating scenario in detail, and had provided the most credible and supportable determination of what the facility's startup and shutdown profile is expected to be: "6 x 16" operation, in which the facility starts up in the morning and operates for 16 hours per day, then shuts down overnight when demand falls and starts up again in the morning when demand rises again; and operates this way 6 days per week with one idle day with no startup and no operation. The District explained how it based its determination on the facility's power purchase agreement, as well as all other indications it could find as to how the facility would likely operate. The District also noted that even if the facility had somewhat more frequent startups and shutdowns than a typical "6 x 16" operation, even doubling the number of startups would still not render an auxiliary boiler cost-effective. *See* Response to Petition 10-03 at 9-40. Based on this evaluation, the District contended that it did indeed provide a "credible operating scenario" regarding the likely number of startup and shutdown events the facility will have, which was sufficient to form the basis of its BACT determination.

Now CAP seeks leave to take a different tack in a reply brief. CAP appears to concede that, in fact, the District did "set Best Available Control Technology (BACT) for startup and shutdown emissions based on a likely operating scenario," CAP Motion at 1 ¶ 1, as the District argued in its Response. CAP instead wants to file a brief on the issue of whether the permit imposes limits that would restrict the facility's startups to no more than the average number of startups that would occur under the typical "6 x 16" scenario. Specifically, CAP seeks leave to argue that the daily and annual limits "allow for more startup and shutdown events than the likely scenario [the "6 x 16" operating profile]," and that as a result the District's BACT determination is "not based on enforceable limits." CAP Motion at 1 ¶ 1. CAP implies that without permit limits restricting the facility to a typical "6 x 16" operating profile, it is possible that the facility could have a greater number of startups and shutdowns than typically expected

for "6 x 16" operation over a given time frame. CAP further implies that with the potential for additional startups, the emission reduction benefits from using an auxiliary boiler might be greater; and that with greater emission reduction benefits, an auxiliary boiler might be sufficiently cost-effective to justify as BACT. CAP Motion at 1 ¶ 1 ("[T]he information is relevant to determining cost effectiveness.").

The Board should not allow CAP to redirect its argument in this way in a reply brief. CAP is not seeking to respond to or rebut the points that the District made in response to its Petition. To the contrary, CAP appears to concede that the District did in fact establish a credible scenario of likely startup events and based its BACT determination "on a likely operating scenario." CAP Motion at 1 ¶ 1. Instead, CAP wants to claim at this point that in order for the District to use the "6 x 16" operating profile as a basis for its BACT determination, it must enshrine that operating profile in a BACT limit on the number of startups and shutdowns the facility can have – if not directly, then at least through daily and annual emissions limits established at rates that would effectively limit the number of startups and shutdowns the facility can have. But if CAP wanted to pursue this argument on appeal, it was required to have raised it in its Petition and given the District a chance to respond. It should not be allowed to do so for the first time in a reply brief. *See Keene Wastewater Treatment Plant, supra*, NPDES Appeal No. 07-10, slip op. at 20.

Notably, the District did consider this issue in its Responses to Public Comments, and so it would have had considerable arguments to make in response if CAP had raised this concern in its Petition. For example, the District explicitly addressed "whether the Air District should impose a specific numerical limit on the number of startups and shutdowns the facility may have . . . ." Responses to Public Comments at 124. It explained that "[p]ower plants need flexibility to be dispatched as determined by the [California Independent Systems Operator] in order to ensure a reliable and efficient electrical grid, and a specific limit on the number of times a facility can start up and shut down over a given period of time would hinder that goal." *Id.* The District also addressed whether there was any likelihood that the facility would be used in a

manner that would have substantially more startups than envisioned under the "6 x 16" operating scenario, which could potentially call into question whether an auxiliary boiler would in fact be cost-effective. The District found that, based on all of the evidence it could find, "there is no indication that this facility will be used as a peaker plant with low overall usage but a high number of startups and shutdowns." *Id.* The District also found that even if its assumptions regarding the number of startups were off by a factor of two or more – that is, even if there would be more than double the number of startups the District estimated based on "6 x 16" operation – it still would not make the auxiliary boiler cost-effective. *Id*. at 116. The District also addressed the concern CAP seeks to raise here that the daily emission limits do not correspond to the assumption of a typical "6 x 16" operating profile with one startup in the morning and 16 hours of continuous operation thereafter, noting that the daily limits were based on the possibility that a particular day may in fact have two startups, which is a possibility for any particular day under "6 x 16" operation, even though it will not be a common occurrence. *See id.* at 123 n.251. All of these points are relevant to the issue of whether the permit needs to go beyond just providing limits on startup emissions and also include a limitation that will effectively restrict the facility to the average number of startups expected under a typical "6 x 16" operation. The District would certainly have presented these arguments in its response if this issue had been squarely raised in the Petition for Review.

But CAP did not address any of these points that the District made in the Responses to Public Comments in its Petition, and instead argued only that the District's use of the "6 x 16" startup profile was not adequately justified as "a credible operating scenario of the number and kind of startup and shutdown events" that the facility will experience. CAP even specifically claimed that some of these other points the District addressed in its Responses to Public Comments were not relevant to CAP's concerns. For example, CAP noted that the District had explained in the Responses to Public Comments that the maximum daily emissions limits were based on multiple startups per day because it is possible that there could be a day with multiple startups under a "6 x 16" operating scenario, even though that would not be a common

occurrence. *See* CAP Petition at 17 (citing Responses to Public Comments at 123 n.251). But instead of objecting that the daily limit was too high, as CAP now seeks to do, it asserted that arguments such as these were not relevant to the claim it was making in the Petition, which was that the District needs to develop a credible basis for "the number and kind of SU/SD events" *Id.*[4] CAP therefore declined to address the District's position regarding limits on the *maximum* number of startups that could be envisioned in a given time period for this facility, and instead addressed its arguments towards the District's position on the most credible operating scenario that will be expected from typical operation of this facility. Having passed on its chance to engage on these issues in its Petition, CAP should not be allowed to submit its arguments for the first time in a reply brief.

CAP also claims that a reply brief is warranted here to show that there are no material factual issues in dispute with respect to this issue. The CAP claims that the issue is therefore a wholly legal one, and is "a question of first impression", and that for these reasons additional briefing would assist the Board in deciding this issue. But these are not the criteria on which the necessity of a reply brief should be judged. Factual and legal issues are both equally amenable to decision where they have been fully briefed in the Petition and Response, as are well-settled issues and questions of first impression. The question is not the nature of the issue in dispute, but whether both sides have presented their arguments sufficiently that the Board can understand and evaluate them for decision. That is the case here on the issue that CAP raised in its Petition regarding whether the District's "6 x 16" operating profile was a "credible scenario of likely SU/SD events," Petition 10-03 at 14, which has been fully briefed. CAP now seeks leave to

[4] CAP did state that if the District applied BACT based on a different startup profile and determined that "the facility will need different technologies to meet BACT", applying such different technologies "then may result in reduced annual and daily limits." CAP Petition 10-04 at 17. CAP therefore raised the issue of whether annual and daily limits should be reduced if an auxiliary boiler were required, but it never raised the issue it seeks to raise now of whether the daily and annual limits for the facility *without* an auxiliary boiler should be reduced to support a BACT determination that an auxiliary boiler is not required.

broaden the scope of its Petition regarding the District's startup BACT analysis, but for the reasons outlined above the Board should decline this invitation.

Finally, if the Board does agree to allow CAP to file a reply brief to address these issues, the District respectfully requests that the Board allow it to file a sur-reply to respond to CAP's shift in the basis of its claims. As noted above, the District has a host of arguments as to why its BACT limits on startup emissions are more than adequate to satisfy the PSD BACT requirement; why limits on the maximum number of startups that the facility is allowed to have would not be feasible for a power plant that needs to be dispatched in response to demand from the electrical grid; and why the District's BACT technology determination that used the most credible likely operating scenario – which CAP now appears to concede – was a proper manner in which to apply BACT and did not require that the permit also limit the total number of startups allowed. The District would have raised these arguments in its Response if they had been raised in the Petition, and if the Board allows CAP to raise its new arguments in a reply brief it should also allow the District an opportunity to respond.

B. CAP Has Not Shown Any Need For Further Briefing On The Issue Of Whether A BACT Analysis Should Take Into Account "Costs and Other Economic Impacts"

CAP also addresses the argument it has raised in its Petition that in considering whether an auxiliary boiler should be required as BACT, the District was required to apply the District's Non-Attainment NSR permitting standard in District Regulation 2, Rule 2, in issuing this permit. This standard applies a "Lowest Achievable Emissions Rate" ("LAER") level of emissions control that is more stringent than the BACT level of control that is used for PSD permitting under 40 C.F.R. Section 52.21. CAP claims that the District erred in considering "economic impacts and other costs" when evaluating the auxiliary boiler as required by 40 C.F.R. Section 52.21(b)(12), and claims that instead the District should have followed District regulation 2-2-206, which requires that a technology be used if it is "achieved in practice", regardless of cost-effectiveness concerns.

1. CAP Has Not Shown Any Need For Further Briefing On The Issue of Whether The District's State-Law Regulations or 40 C.F.R. Section 52.21 Govern this Federal PSD Permit.

CAP requests leave to file further briefing on whether the District should have considered the cost-effectiveness of the auxiliary boiler (i) because it claims that the issue "will impact every PSD permitting analysis that involves 'achieved in practice' technology", and (ii) because it claims that "this issue appears to be a question of first impression." CAP Motion at 2 ¶ 2. But neither of these points provides any reason why further briefing would be warranted.

To the extent that this issue will impact other PSD permitting analyses, that is because it is a legal issue – whether a delegated PSD permitting agency must apply the federal PSD BACT definition in 40 C.F.R. Section 52.21(b)(12) when making federal PSD BACT determinations, or must apply a more stringent LAER level of control under the agency's state-law non-attainment NSR permitting regulations – and any EAB determination on a legal issue will necessarily apply to other PSD permitting analyses arising under the same regulation. The fact that the Board is being called upon to make a legal determination regarding what BACT standard to apply when a delegated state agency issues PSD permits does not mean that this is a difficult determination or one that would require further briefing. To the contrary, the issue is quite straightforward here: should the District have followed the BACT definition in 40 C.F.R. Section 52.21(b)(12) when determining if the auxiliary boiler was required as BACT, or did the existence of the Delegation Agreement require it to apply the District's LAER-level of control under District Regulation 2-2-206 instead? Moreover, the parties' positions are also quite straightforward: The District contends that as a delegated agency it is required to exercise EPA's authority as EPA would exercise it under 52.21, and nothing in the Delegation Agreement alters that reality (or could legally alter that reality consistent with the federal PSD permitting regulations adopted after notice and comment in the Code of Federal Regulations); and Petitioner CAP contends that notwithstanding the federal definition of BACT in the Clean Air Act and 40 C.F.R. Section 52.21, the District was required to depart from the federal PSD BACT requirement and apply District regulations instead. The issue has been squarely presented for the Board to decide it, and

just because it involves a rule of law applicable to all PSD permits issued by delegated agencies generally does not mean that further briefing is necessary in order to decide it.

Furthermore, Petitioner CAP is incorrect that this is a question of first impression. As the District explained in its Response at pp. 47-49, the Board has addressed this issue in *In re West Suburban Recycling & Energy Center, L.P.*, 6 E.A.D. 692 (EAB 1996). There, the Board addressed a substantively identical argument that a delegated state permitting agency should apply its SIP-approved Non-Attainment NSR requirements – including LAER – in issuing PSD permits under delegated authority from EPA under 40 C.F.R. Section 52.21. The Board clearly resolved this issue, holding that a delegated state agency "stands in the shoes" of EPA when issuing PSD permits on delegated authority, and must follow the same rules and procedures as EPA would in issuing a PSD permit, no more and no less. The Board held that since EPA would be required to follow the federal PSD regulations in 40 C.F.R. Section 52.21 and not any state-law Non-Attainment NSR requirements, the delegated state agency must do so as well. Notably, one of the state-law Non-Attainment NSR requirements at issue in that case was the LAER requirement, the same state-law Non-Attainment NSR requirement that Petitioner CAP argues here. Thus, the Board has clearly addressed this issue previously, contrary to Petitioner CAP's assertion, and the Board's *West Suburban* decision provides controlling precedent on which the Board can dispose of this issue here. Moreover, even if *West Suburban* had not yet been decided, that still would not provide good cause for further briefing here, because the underlying principles that led to the Board's decision in that case are sufficiently clear and well-settled that the Board can rule on this issue based on the briefing submitted to date. The Board has explained the well-settled principle that a delegated state agency merely "stands in the shoes" of federal EPA on many occasions in the past,[5] and this principle required that the District apply 40

[5] *See, e.g., In re Indeck-Elwood, LLC*, 13 E.A.D. __, PSD Appeal No. 03-04 (EAB Sept. 27, 2006), slip op. at 106-07; *In re Prairie State Generating Co.*, 13 E.A.D. __, PSD Appeal No. 05-05 (EAB Aug. 24, 2006), *aff'd sub nom., Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007), slip. op. at 150 n.128.

C.F.R. Section 52.21(b)(12) in determining whether an auxiliary boiler is BACT just as EPA would, and not District Regulation 2-2-206.

Thus, for both of these reasons, Petitioner CAP has not shown good cause to warrant further briefing on this issue of whether the District should have considered the cost-effectiveness of the auxiliary boiler. Both sides have explained their positions in detail in the papers submitted thus far, and that is all that the Board needs to decide this issue. CAP has clearly laid out its position in Section III.A. of its Petition (at pp. 19-20), in which it explains that the references in the Delegation Agreement to the District's Regulation 2, Rule 2 mean that the District is required to implement the LAER-level of control embodied in District Regulation 2-2-206 when conducting a federal PSD BACT analysis, which would mean that the District was prohibited from considering the cost-effectiveness of the auxiliary boiler. The District has clearly laid out its position in Section II.A. of its Response (at pp. 43-49), that a federal BACT analysis is required to take into account "economic impacts and other costs" under the PSD BACT definition in CAA Section 169(a)(3) and 40 C.F.R. Section 52.21(b)(12); that as a delegated state agency "standing in the shoes" of EPA, the District cannot depart from these controlling federal requirements, regardless of the references in the Delegation Agreement to District Regulation 2, Rule 2; and that the District was therefore required to consider the "economic impacts and other costs" associated with the auxiliary boiler in making its BACT determination under 40 C.F.R. Section 52.21. The issue has been squarely teed up for decision, and there is no need for further briefing at this point.

Finally, to the extent that the Board finds that Petitioner CAP's claims that this is a novel legal issue with broader applicability do constitute good cause for additional briefing beyond what has already been submitted, the District respectfully requests leave to file a short sur-reply, to be limited to responding to any new issues or arguments raised by CAP and with a page limit of no longer than the reply brief that CAP submits. If this issue really is so close and important that the Board cannot decide it based on the arguments the parties have submitted to date, then the Board would benefit from hearing additional briefing from both sides. Petitioner CAP

cannot reasonably object that this issue is of such importance that it should be allowed to submit additional arguments, but not so important that the Board should not hear the District's position regarding such additional arguments.

2. CAP Has Not Shown Good Cause For Further Briefing On Whether It Raised This Issue In Comments

In addition, CAP also claims that it "would like an opportunity to discuss how it indeed raised this argument with sufficient specificity." CAP Motion at 2 ¶ 2. But whether an issue has been preserved for review by being raised in comments is a factual issue, and CAP has already presented the factual basis for how it claims to have satisfied the issue-preservation in its Petition. CAP described how it allegedly preserved this issue on page 20 of its Petition, in which it cites the discussion it presented on pages 5-8 of its February 5, 2009, comment letter (which CAP attached as Exhibit 3 to the Petition).[6] In response, the District pointed out the fact that the comments CAP referred to addressed an earlier BACT analysis that the District published regarding "once-through steam boiler" technology in the initial December 2008 Statement of Basis; and did not address the subsequent BACT analysis the District published regarding the auxiliary boiler in the August 2009 Additional Statement of Basis, which is the BACT analysis that CAP now challenges. *See* Response to Petition 10-03 at 44-45. The comment letter speaks for itself, and it has been submitted for the Board to review as Exhibit 3 to the Petition. The issue has therefore been squarely presented to the Board for decision, and the Board can easily review the comment letter at issue and determine whether it meets the minimum standards for issue-preservation without any need for additional briefing from the parties.

Furthermore, in the event that the Board does decide that there is need for further briefing on this issue – for example, if it wants to hear argument on the meaning or impact of the underlying factual document, instead of just considering the document on its face – the District

[6] Note that it is CAP's responsibility to present in its Petition the basis for how it preserved the issue for review. *See In re ConocoPhillips Co.*, 13 E.A.D. __, PSD Appeal 07-02 (EAB Jun. 2, 2008), slip op. at 45, (articulating the well-established parallel principle that it is not the Board's responsibility "to scour the record to determine whether an issue was properly raised below").

respectfully submits that it be granted leave to submit a short sur-reply brief, to be limited to responding to arguments raised by CAP and with a page limit of no more than the number of pages submitted in CAP's reply brief. To the extent that CAP wants to submit arguments regarding the impact of its comment letter instead of just citing that letter as it did in the Petition, CAP should not be allowed to submit such arguments for the first time in a reply brief without the District having an opportunity to respond. To the extent that the Board allows CAP to present its issue-preservation arguments in a reply brief, the Board should allow the District an opportunity to respond, which the District would have had if CAP had presented such argument in the Petition itself as it was supposed to.

C. CAP Has Not Shown Good Cause For Further Briefing Regarding "The Emissions Assumptions" Used In The Cost-Effectiveness Analysis.

CAP also claims, without further explanation, 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 ¶ 4. The District notes that this request fails to state with any particularity whatsoever what "arguments about the emissions assumptions" CAP would like to respond to, nor does it provide any reasons as to why a reply may be necessary, as the Board required it its Order establishing the requirements for these motions. The District presumes that CAP is referring to the District's discussion of the emissions data that the District used to evaluate what additional startup emissions reductions could be achieved from an auxiliary boiler, which the District discussed this issue in Section II.C. of its Response, at pages 51-54. There, the District responded for the first time to new arguments that CAP raised in its Petition, which it had not been raised in any comments. The District explained how it had used data from an existing facility in Mankato, MN, which uses an auxiliary boiler for some startups and does not use it for other startups and therefore allows for a direct comparison of the impact on startup emissions that would result from using an auxiliary boiler. The District also addressed certain other questions that CAP raised for the first time in its Petition regarding why it was appropriate for the District to use this data in evaluating what an auxiliary boiler could achieve at

the Russell City facility. CAP now (apparently) seeks leave to submit additional briefing on this issue.

The District opposes this request first because CAP was never entitled to any briefing on this issue at all since it failed to bring the issue up in comments. As the District explained in its Response at 52-53, nobody ever raised the concerns CAP presents in its Petition regarding the use of the data from the Mankato facility during either of the comment periods. Nobody claimed that the District's analysis of the Mankato data was insufficient. Indeed, nobody addressed the Mankato data at all, let alone claim that that the spreadsheet summarizing the data was unclear or needed additional explanation. CAP is therefore barred from raising these issues for the first time on appeal, and the District was technically not even required to respond to them other than noting that they must be rejected on issue-preservation grounds. The District did respond to the substance of these claims, of course, in order to ensure the Board and members of the public that the Mankato data do in fact provide a sound basis for evaluating what emission reductions could be achieved with an auxiliary boiler. This is the response that the District would have provided in a response to comments had the issues been properly raised during the comment period. CAP would then have had a chance to address the District's position in its Petition for Review, and the District would have had a chance to respond it its response to such a petition. CAP should not be allowed to short-circuit this process by raising its concerns for the first time in its Petition, inviting a District response on the merits for the first time in response to the Petition, and then attacking the District's position in a reply brief with no chance for the District to respond.

The District also opposes this request because CAP has not provided any justification for why a reply brief is necessary on this issue. The request simply states that "[a] short reply is necessary". This request does not meet the requirement that the Board set forth in its Order governing these motions that any motion set forth "with particularity" the reasons *why* a reply may be necessary, and should be denied for that reason. Moreover, the lack of a statement as to how a reply could be necessary makes it difficult for the District to understand why CAP is making its request here. The District can only presume that CAP is seeking leave to reply to

raise arguments that it should have raised in its Petition, and which it would have had the issue been properly raised in comments and the District's response been included in the Responses to Public Comments. The District objects that such a reason does not constitute good cause for leave to file a reply.

Finally, should the Board determine that further briefing is warranted on this issue, the District respectfully requests that it be granted leave to file a sur-reply in light of the fact that CAP raised these issues for the first time in its Petition and the District's discussion in its Response has been the first and only opportunity for the District to address them. Normally, an issue is raised in comment, the agency provides its position in response in the responses to public comments, a petitioner then challenges that response in a petition for review, and the agency gets a chance to respond to the challenge in its response to the petition. CAP has short-circuited that normal process here by raising these issues in its Petition for the first time. Moreover, rather than providing specific reasons why the Mankato spreadsheet on which the District relied could have been flawed or inappropriate in some way, CAP simply raises questions about what certain elements of the spreadsheet mean and why it provides an appropriate basis for comparison to Russell City. The District has now provided responses to those questions in its Response. If CAP is allowed to present arguments – for the first time – challenging the District's position these questions in a reply brief, the District should be allowed to respond to such challenges in a sur-reply.

D. CAP Has Not Shown Good Cause For Further Briefing Regarding EAB Precedents.

Finally, CAP claims that "it would like the opportunity to distinguish the cases Respondents cite" regarding the NO_2 startup emissions limits, as well as to address "other relevant arguments" on this issue. CAP Motion at 2 ¶ 5. Once again, CAP does not provide any reasons why any further briefing would be warranted here other than CAP's desire that it "would like" to present further argument. The District therefore opposes CAP's request.

With respect to the cases that the District (and RCEC) have cited regarding NO_2 startup limits, presumably CAP is referring to the EAB caselaw on use of a 'safety factor' or 'compliance margin' in setting BACT limits where there is variability in the level of emissions performance that a control technology can achieve. This issue has already been fully briefed by the parties and is ready for decision by the Board without any need for further argument. The issue was addressed by CAP in Section IV.B. of its Petition (at pp. 26-27), and by the District in Section III.B. of its Response (pp. 59-67). CAP acknowledged that the use of a 'safety factor' or 'compliance margin' has been recognized as appropriate by the Board in cases such as *In re Prairie State*, but claimed that the District had not adequately justified its use of a 'safety factor' in this particular case. *See* Petition 10-03 at 26-27. CAP also claimed that the extent of the 'compliance margin' the District used here is not supported by any precedent in the Board's caselaw, citing the *Prairie State* and *Masonite* cases as examples of 'compliance margins' of only a few percentage points. *See id.* at 27. The District responded by pointing to the analysis it had provided in the Statement of Basis, Additional Statement of Basis, and Responses to Public Comments explaining the basis for the 'compliance margin' it provided, and how this approach was justified under the *Prairie State* case and the earlier similar case that the Board relied on extensively in *Prairie State*, *In re Newmont Nevada Energy Investment, L.L.C.*, 12 E.A.D. 429 (EAB 2005). *See* Response at 55-66. The District also responded to the point about EAB precedents on the use of a 'compliance margin' of larger than a few percentage points, citing a number of prior cases in which the Board upheld compliance margins of 25% and even larger. *See id.* at 66-67. The issue has therefore been squarely addressed by both sides, and there is no need for further briefing.

CAP's only argument for leave to file a reply brief here is that "would like an opportunity to distinguish the cases Respondents cite" on this issue of Board precedents upholding the use of a compliance margin. But if CAP wanted to argue that these Board decisions are somehow inapposite here as precedents upholding the use of a compliance margin, the time for making such arguments was in the Petition for review along with CAP's arguments about other Board

precedents relevant to this issue, *Prairie State* and *Masonite*. Arguments seeking to distinguish these additional precedents in a reply brief would simply be "arguments [that] raise substantive nuances . . . not set forth in the Petition . . . ," which the Board has held are not properly raised in a reply. *Keene Wastewater Treatment Plant, supra*, NPDES Appeal No. 07-10, slip op. at 20.

The District also opposes CAP's open-ended request for leave to file a reply brief to address "other relevant arguments" on this issue. CAP Motion at 2 ¶ 5. This request fails to identify issues for further briefing as required in the Board's Reply Motion Scheduling Order. Moreover, it risks opening up a whole new set of issues to argument in reply brief with no regard to how they may be related to issues presented in the Petition. If the Board does agree to this vague request to brief "other relevant arguments", however, the District respectfully submits that it be allowed to file a sur-reply responding to any such issues. Again, the District is willing to limit its sur-reply to no longer than the number of pages CAP submits in any such reply brief.

III. PETITIONER ROBERT SARVEY HAS NOT DEMONSTRATED GOOD CAUSE AS TO WHY ADDITIONAL BRIEFING IS WARRANTED IN PETITION NO. 10-04

Petitioner Robert Sarvey in Petition No. 10-04 seeks leave to file a reply brief on four substantive points raised in his Petition for Review (in addition to the timeliness issue, which the District addresses at the end of this document). But he has not shown any good cause to justify his request on any of these issues.

A. Petitioner Sarvey Has Not Shown Any Need For Additional Briefing To Clarify His Status Regarding PSD Appeal No. 10-05

Petitioner Sarvey first states that he wishes to clarify that he is not a party to PSD Appeal No. 10-05, contrary to indications in Petition No. 10-05. *See* Sarvey Motion at 1; *compare* Petition No. 10-05 at 4 n.7 ("Petitioner(s) are CARE, Rob Simpson, and Robert Sarvey"). The District has no objection to this clarification, or to the Board treating Petition No. 10-05 as being filed by CARE and Rob Simpson only. (The District also agrees that it will treat Petition 10-05 as being filed by CARE and Rob Simpson only.) There is no need for additional briefing in order to clarify this point, as Mr. Sarvey has made his position clear in his Motion.

B. Petitioner Sarvey Has Not Shown Any Need For Additional Briefing Regarding NOx Startup Limits

Petitioner Sarvey also states that he would like to "clarify his position" regarding his arguments that the District did not properly establish NO_2 emission limits for startups, based on a claim that the District has attempted to "mischaracterize [his] position".[7] Sarvey Motion at 1. But again, this argument does not establish good cause for additional briefing on this issue. Mr. Sarvey's position on the District's NO_2 limits was clearly briefed and argued in his Petition, and he has clearly explained how he believes that the District should have imposed more stringent NO_2 limits for hot and cold startups based on the data that the District reviewed. *See* Petition 10-04 at 6-13. These arguments are clear on their face, and there is no reason why the Board cannot understand and evaluate them based on what Mr. Sarvey has already submitted. The District's position on why its NO_2 hot and cold startup limits were fully justified based on the data it reviewed was also clearly briefed and argued in its Response. *See* Response to Petition 10-04 at 7-22. Petitioner Sarvey has not provided any good cause for further briefing on these arguments at this stage.

Petitioner Sarvey also claims that he should be allowed to file a reply brief in order to "point to evidence in the record that establishes BAAQMD's failure to require BACT for start up and shut down emissions for NOx emissions." Sarvey Motion at 1. But it is Petitioner's duty to present the evidence in the record to support his arguments in the Petition itself. Attempting to bring up additional evidence in a reply brief is tantamount to a late-filed petition in this respect, and the Board should deny leave to file such a petition. *See Keene Wastewater Treatment Plant*, *supra*, NPDES Appeal No. 07-10, slip op. at 20.

[7] Note also that Petitioner Sarvey apparently claims to be requesting leave to file additional briefing on the District's shutdown NO_2 limits as well as the startup limits. *See* Sarvey Motion at 1. But although the petition alludes to shutdowns in several places, it never raises any specific arguments regarding the District's shutdown NO_2 limits or presents any specific reasons why the limits could somehow be flawed. Petitioner should not be given leave to expand his Petition to include such issues at this late stage.

Finally, the District respectfully requests that if the Board were to agree to allow Mr. Sarvey to present further argument and/or evidence regarding the NO_2 startup (or shutdown) BACT emission limits, that it provide the District the opportunity to respond to such argument and/or evidence in a sur-reply brief.

C. Petitioner Sarvey Has Not Shown Any Need For Additional Briefing Regarding the District's Draft Study On Secondary Particulate Matter Formation

Petitioner Sarvey also requests leave to introduce additional evidence – specifically, the Draft $PM_{2.5}$ study that the District cited in its response to comments on secondary particulate matter concerns raised in public comments – and to submit additional argument based on that evidence. *See* Sarvey Motion at 1. But again, he does not point to any good cause for why he should be allowed to do so that this point, having not submitted such evidence along with his Petition. As noted above with respect to Mr. Sarvey's claims regarding additional record evidence on the issue of NO_2 startup emissions, submitting such additional evidence in a reply brief is tantamount to a late-filed Petition for Review and should be rejected.

Moreover, the District also notes that contrary to Mr. Sarvey's assertions, this document has been available in the administrative record since at least the time when the final permit was issued, and so there is no reason why Mr. Sarvey could not have had access to it and have included it with his Petition for Review. *See* Certified Index of Administrative Record, Entry No. 2.24. Indeed, he certainly seems to have been able to get access to the document at some point, as his claims that the District has allegedly mischaracterized its results imply that he has seen the document and has developed an opinion on what it says. He has not provided any reason in his Motion why he should be excused from having done so during the appeal period (which the District extended for two weeks longer than the minimum 30 days required by regulation) so that he could have made his points in the Petition that he filed.

Finally, although the District objects to allowing Mr. Sarvey to file a reply brief on this issue, the District does not have any objection to the Board reviewing this document as part of

the appeal record if the Board so desires. The District respectfully submits that if the Board desires to review this document, that it request that the District file a copy of the document by itself, without additional analysis or argument beyond what the parties have already submitted in their briefs to date. The District also respectfully submits that if the Board does allow Mr. Sarvey to present further argument on this issue in a reply brief, that it also grant the District leave to file a sur-reply, to be limited to the issues Mr. Sarvey raises and with a page limit of no more than the number of pages in Mr. Sarvey's reply brief.

D. Petitioner Sarvey Has Not Shown Any Need For Additional Briefing Regarding The District's Cooling Tower BACT Analysis

Finally, Petitioner Sarvey also states that he wishes to respond to the District's assertion that it has evaluated all relevant issues regarding the District's BACT determination for particulate matter emissions from the facility's cooling tower. But again, he does not provide any reason why any additional briefing could be necessary here or beneficial to the Board's resolution of his claims on this issue. Mr. Sarvey has already raised his arguments as to why the District's responses to his comments on this issue were allegedly flawed, as set forth in his Petition. He argued that the District failed to consider a dry cooling alternative, which the District responded to by explaining how it did in fact consider (but reject) dry cooling. He also raised a number of issues that were never raised in any comments. The District responded to these issues by pointing out that they had not been properly preserved for review. These issues have been squarely raised for the Board's review, and there is no reason why there would be any need for additional briefing at this point.

To the extent that Mr. Sarvey is seeking leave to submit further argument and/or evidence related to concerns not raised in comments or addressed in response to comments – such as his assertions that there may be additional work practices that the District should have considered to see whether they could potentially reduce particulate matter emissions further, or that the District should have considered whether a lower TDS limit could be achievable – he has already wandered well outside the arena of what can be properly raised in a permitting appeal by

bringing up issues that had not been raised during the comment period. The Board should not provide an opportunity to continue even farther afield by submitting additional evidence or argument on these issues in a reply brief.

IV. PETITIONERS CARE AND ROB SIMPSON HAVE NOT DEMONSTRATED GOOD CAUSE AS TO WHY ADDITIONAL BRIEFING IS WARRANTED IN PETITION NO. 10-05

Petitioners CARE and Rob Simpson in Petition No. 10-05 (hereinafter collectively referred to as "CARE") request leave to file a reply brief on five substantive points regarding this appeal. (Like Mr. Sarvey, they also address the timeliness of their Petition, which the District addresses at the end of this document.) But CARE has not shown any good cause to warrant further briefing on any of these issues, either.

A. CARE Has Not Shown Any Need For Further Briefing On "Issues of Due Process"

CARE first addresses the District's explanation in its Response of how it provided ample opportunities for meaningful public participation, going over and above the minimum required by 40 C.F.R. Section 52.21 and 40 C.F.R. Part 124. But CARE does not provide any explanation as to why additional briefing is warranted on this topic. Instead, it provides some discussion on the standard of review and burden of proof in civil penalty cases under 40 C.F.R. Part 22, which is not applicable to PSD permit appeals under 40 C.F.R. Section 124.19. CARE further concludes that "the evidence speaks for itself". CARE Motion at 3-4.

The District agrees that the evidence speaks for itself on this issue, and that evidence has already been fully briefed by the Parties. That evidence includes the fact that the District provided two public comment periods on this permit, both of which were longer than the minimum 30 days required by the PSD regulations; made all of the administrative record documents available during the public comment periods, as well as an index to all of the record documents posted on the District's website during the second comment period; and held two public hearings in Hayward to receive oral testimony from the public; among other public outreach efforts as explained in detail in Section II of the District's Response to Petition 10-05

(at pp. 11-14). Given that this evidence speaks for itself, as CARE concedes, there is no need for CARE to submit additional briefing on this issue. CARE's motion should be denied on this point.

B. CARE Has Not Shown Any Need For Further Briefing On "Technical Issues", And Does Not Have A Right To Conduct "Discovery" In A PSD Permit Appeal.

CARE next states that this appeal involves "technical issues", and that CARE should therefore be allowed to conduct "discovery" in this matter. CARE Motion at 4. But a PSD appeal is based on a review of the permitting record, and there is no provision for or right to discovery. CARE has not provided any grounds on which the Board could allow for "discovery" by CARE, and certainly no grounds on which further briefing would be warranted in this regard. CARE's motion should be denied with respect to this issue.

C. CARE Has Not Shown Any Need For Further Briefing On "Issues From Prior Appeals"

CARE also states that it would like the opportunity to brief "unresolved issues" from prior permit appeals. CARE Motion at 5. First, CARE has not identified any such "unresolved issues" with specificity, as the Board required in its Reply Motion Scheduling Order. But even if CARE had done so, it should not be allowed to file briefing now based on issues that it did not raise in its Petition for Review. Petitioners have a duty to state with specificity the issues on which they request review by this Board, and simply referring to "unresolved issues" such that the District is on notice of what issues are being raised and can provide a meaningful response. CARE has not done so here with respect to any "unresolved issues" from prior permit appeals. CARE's Motion should therefore be denied on this issue.

Furthermore, to the extent that the Board does allow CARE to raise such new issues in a reply brief, the District respectfully submits that it be granted leave to respond to them. Allowing CARE to bring up such issues for the first time in a reply brief would essentially grant CARE leave to file a new Petition at this stage. The District should be given an opportunity to

respond to what is effectively a new Petition, so that the Board can have the benefit of the arguments on both sides of any new issues when it rules on them.

D. CARE Has Not Shown Any Need For Further Briefing On Environmental Justice Issues

CARE also states, under the heading of "Environmental Justice", that it "would like the opportunity to respond these issues." CARE Motion at 5. Again, CARE has not pointed to any reason why further briefing is warranted on this issue. CARE did not provide any specific reasons at all in its Petition regarding how the District could have committed clear error on this issue. To the contrary, CARE's sole argument was an allegation 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," referencing a submittal to the California Energy Commission in its proceeding for the Eastshore power plant. CARE Petition 10-05 at 26. The District pointed out that this mere oblique reference to another proceeding regarding another facility cannot provide grounds for review here. *See* District Response to Petition 10-05 at 44-45. There is no reason why CARE would need additional briefing at this stage to address this issue further, where it has not even cited any concerns relevant to the Russell City facility in its Petition.

E. CARE Has Not Shown Any Need For Further Briefing On "All Of The Respondent's Issues"

Finally, CARE also claims that it "would like the opportunity to reply to all of the respondents [*sic*] issues," with no justification whatsoever for this completely open-ended request. CARE Motion at 5. This request fails to identify with particularity the issues on which Petitioners seek to respond, and does not provide any reason that Petitioners believe that it is necessary to file such a response, as the Board required for these motions. As such, the Board should deny it. If a minimal showing such as this were the rule for granting leave to file a reply brief, then every Petitioner in every permit appeal before this Board would be allowed to do so.

THE DISTRICT HAS NO OPPOSITION TO FURTHER SUBMISSIONS FROM PETITIONERS IN APPEAL NOS. 10-04 AND 10-05 TO EXPLAIN THE CIRCUMSTANCES SURROUNDING THEIR LATE FILINGS

Petitioner Robert Sarvey in Appeal No. 10-04 and Petitioners CARE and Rob Simpson in Appeal No. 10-05 claim that they were late in filing their Petitions for Review because of problems they encountered in trying to use the Board's CDX electronic filing system on March 22, 2010, the deadline for filing appeals of this permit. Petitioner Sarvey states that he wishes to submit evidence that he tried to file his Petition in a timely manner but was unable to do so because of a malfunction with the CDX electronic filing system. *See* Sarvey Motion at 1. Petitioners CARE and Rob Simpson go ahead and provide factual statements regarding the circumstances surrounding their late filing.

As the District explained in its Response to Petition 10-04, it would not have any objection to appeals in this case based on timeliness grounds if the reason for the late filing was "attributable to a CDX malfunction that results in the inability to complete an electronic transmission" in accordance with the Board's policy set forth on its "Electronic Submission" web page. *See* District's Response to Petition 10-04 (Sarvey) at 7-8.[8] The District also notes that the Board has indicated that it is investigating claims by petitioners regarding problems with the CDX system on March 22 that may have prevented timely filing. *See* Order Denying Request For Summary Dismissal of CARE Petition And Requesting Response On The Merits, PSD Appeal No. 10-05 (EAB April 14, 2010) at 2. The District therefore has no objection to further factual submittals from these Petitioners, to the extent that the Board finds that such information will aid in its investigation of this issue.

[8] The District also notes that it filed a Response Requesting Summary Dismissal of Petition No. 10-05 (CARE and Rob Simpson) because it had no indication at the time that Petitioners there were claiming to have encountered problems with CDX. The District did not file a Response Requesting Summary Dismissal in Petition No. 10-05 (Robert Sarvey), and instead made its arguments regarding timeliness in its response on the merits, because it had received information from Petitioner in that case that he claimed to have encountered problems with CDX that he contends should excuse the late filing.

CONCLUSION

For the foregoing reasons, the District respectfully submits that the Board should DENY Petitioners' motions for leave to file reply briefs on the substantive issues raised in their Petitions for Review. Should the Board grant leave to file reply briefs on any substantive issue(s), however, the District respectfully submits that the Board should grant it leave to file a sur-reply on such issue(s), for the reasons explained herein.

The District also has no objection to the Board receiving additional factual information from Petitioners in Petitions Nos. 10-04 and 10-05 regarding the circumstances surrounding their late filings.

Dated: May 18, 2010

Respectfully Submitted

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

/s/

By: Alexander G. Crockett Esq.
Assistant Counsel

PROOF OF SERVICE

I, Mildred Cabato, declare as follows:

I am over the age of 18, not a party to this action, and employed in the City and County of San Francisco, California, at 939 Ellis Street, San Francisco, CA 94109.

On the date set forth below, I served this document, **"RESPONDENT'S CONSOLIDATED OPPOSITION TO MOTIONS REQUESTING LEAVE TO FILE REPLY BRIEFS",** by placing copies of it in sealed envelopes, with First Class postage thereon fully paid, and depositing said envelopes in the United States Mail at San Francisco, California, addressed to the persons set forth below:

Andy Wilson
California Pilots Association
P.O. Box 6868
San Carlos, CA 94070-6868

Jewell J. Hargleroad, Esq.
Law Office of Jewell Hargleroad
1090 B Street, No. 104
Hayward, CA 94541

Helen H. Kang, Esq.,
Kelli Shields, Patrick Sullivan, and
Lucas Williams, Esq.
Environmental Law and Justice Clinic
Golden Gate University School of Law
536 Mission Street
San Francisco, CA 94105

Lynne Brown
California for Renewable Energy, Inc.
24 Harbor Road
San Francisco, CA 94124

Robert Sarvey
501 W. Grantline Rd.
Tracy, CA 95376

Michael E. Boyd, President
CAlifornians for Renewable Energy, Inc.
5439 Soquel Drive
Soquel, CA 95073

Juanita Gutierrez
2236 Occidental Road
Hayward, CA 94545

Karen D. Kramer
2215 Thayer Ave.
Hayward, CA 94545

Kevin P. Poloncarz, Esq.
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA, 94111

Rob Simpson
27126 Grandview Avenue
Hayward, CA 94542

Minane Jameson, Vice-President
Board of Directors
Hayward Area Recreation & Park District
1099 E Street
Hayward, CA 94541-5299

Minane Jameson
31544 Chicoine Avenue
Hayward, CA 94544

Idojine J. Miller
253 Santa Susana
San Leandro, CA 94579

Robert J. Bezemek, Esq.
Law Offices of Robert J. Bezemek
1611 Telegraph Ave., Suite 936
Oakland, CA 94612

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

Executed on May 17, 2010, at San Francisco, California.

/s/
Mildred Cabato