IN RE SIERRA PACIFIC INDUSTRIES (ANDERSON PROCESSING FACILITY)

PSD Appeal Nos. 13-01, 13-02, 13-03 & 13-04

ORDER REMANDING IN PART AND DENYING REVIEW IN PART

Decided July 18, 2013

Syllabus

Ms. Celeste Draisner, Mr. Rob Simpson, Ms. Heidi Strand, and Mr. Ed W. Coleman ("Petitioners") each petition the Environmental Appeals Board ("Board") to review a Clean Air Act prevention of significant deterioration ("PSD") permit, PSD Permit No. SAC 12-01, that the United States Environmental Protection Agency ("EPA" or "Agency") Region 9 ("Region") issued to Sierra Pacific Industries ("Sierra Pacific") on February 22, 2013. The permit authorizes Sierra Pacific to construct and operate a new biomass and natural gas boiler in the City of Anderson in Shasta County, California. Both the Region and Sierra Pacific filed responses to the Petitions, and the parties subsequently submitted supplemental briefs in response to a Board order.

All of the Petitioners challenge the Region's decision not to hold a public hearing on the draft permit under 40 C.F.R. § 124.12(a). Collectively, Petitioners also assert that the Region made several other procedural and substantive errors in approving the permit, including: exempting the proposed facility from carbon dioxide limits; improperly paraphrasing submitted comments in the Region's response to comments document; failing to consider comments submitted directly to the permit writer instead of to the address indicated in the Region's public notice; treating Sierra Pacific's proposed new boiler as a modification to its current PSD permit instead of a new PSD source; improperly evaluating the air quality impacts of fine particulate matter emissions; relying on outdated air models; and failing to consider solar energy and variations of the new boiler's fuel mix when determining the best available control technology ("BACT").

Held: The Board grants review of the petitions in part and orders the Region to hold a public hearing. The Board denies review of the various other procedural and substantive challenges that Petitioners raised.

(1) Public Hearing Issue.

The Board holds that the Region clearly erred in failing to grant the requests for a mandatory public hearing under 40 C.F.R. § 124.12(a)(1). Specifically, the Board holds that the Region abused its discretion in determining whether there was a "significant degree of public interest" in the draft permit, the trigger under section 124.12(a)(1) for when a public hearing must be held. The Board concludes that there is no bright-line test for defining this standard but that the requirement for a "significant degree" of public interest means that there must be a showing of more than just "any public interest" to satisfy the standard. The Board examined the degree of public interest in the draft Sierra Pacific permit by considering the following factors identified in EPA rule preambles, prior EPA Administrator and Board decisions, and the Region's Response to the Petition and Supplemental Brief: the materiality of the issues raised in commenters' requests for a public hearing; the number of hearing requests and comments; the degree of public interest in related State or local proceedings; the amount of media coverage; the significance of the permit action; whether any substitute process was provided; and demographic information. The Board concludes that several of these factors indicate that there was a significant degree of public interest in the Sierra Pacific permit proceedings and none of the factors suggest otherwise.

(2) Other Issues.

The Board holds further that the Petitioners failed to demonstrate that review is warranted on any of the other issues they challenged. Specifically, the Board rules that:

(a) The Region did not clearly err or abuse its discretion in paraphrasing or summarizing public comments;

(b) The Region did not clearly err or abuse its discretion in excluding improperly submitted public comments;

(c) The Region did not clearly err or abuse its discretion in categorizing Sierra Pacific's proposed boiler as a "major modification" rather than as a "major stationary source";

(d) The Region did not clearly err or abuse its discretion in its treatment of fine particulate matter emissions issues; and

(e) The Region did not clearly err or abuse its discretion in determining that the addition of a solar energy component or the alteration of the 90% biomass-10% natural gas fuel mix would "redefine the source."

Finally, the Board declines to reach the challenge to the Region's decision to rely on the Agency's carbon dioxide "Deferral Rule," pursuant to which the Region deferred consideration of Sierra Pacific's biogenic carbon dioxide emissions. Instead, the Board expects that the Region will consider this challenge consistent with EPA's decisions on

how to proceed in the wake of the United States Court of Appeals for the District of Columbia Circuit's recent vacatur of this rule.

Before Environmental Appeals Judges Leslye M. Fraser, Randolph L. Hill, and Kathie A. Stein.

Opinion of the Board by Judge Fraser:

I. *STATEMENT OF THE CASE*

Ms. Celeste Draisner, Mr. Rob Simpson, Ms. Heidi Strand, and Mr. Ed W. Coleman ("Petitioners") each petition the Environmental Appeals Board ("Board") to review a Clean Air Act ("CAA") prevention of significant deterioration ("PSD") permit, PSD Permit No. SAC 12-01, that the United States Environmental Protection Agency ("EPA" or "Agency") Region 9 ("Region") issued to Sierra Pacific Industries ("Sierra Pacific") on February 22, 2013. The permit authorizes Sierra Pacific to construct and operate a new biomass and natural gas boiler in the City of Anderson in Shasta County, California. Both the Region and Sierra Pacific have filed responses to the Petitions. For the reasons discussed below, the Board is granting the petitions in part so that a public hearing may be held. The Board also is denying the petitions in part on various procedural and substantive challenges that Petitioners have raised.

II. *ISSUES*

This appeal presents the following issues for resolution by this Board:

(A) Did the Region clearly err or abuse its discretion in declining to hold a public hearing?

(B) Did the Region clearly err or abuse its discretion in choosing to paraphrase or summarize certain public comments in the course of responding to those comments?

(C) Did the Region clearly err or abuse its discretion by declining to include in the administrative record public comments that were mailed to an address other than the ones specified in the public notice?

(D) Did the Region clearly err or abuse its discretion in categorizing the proposed facility as a new "major modification" rather than as a new "major stationary source"?

(E) Did the Region clearly err or abuse its discretion in analyzing and treating fine particulate matter emissions from the proposed facility?

(F) Did the Region clearly err or abuse its discretion in determining that the addition of a solar energy component or alteration of the 90% biomass-10% natural gas fuel mix would "redefine the source" and therefore need not be considered in the best available control technology analyses for the project?

(G) Did the Region clearly err or abuse its discretion in deferring consideration of carbon dioxide emissions from the proposed facility, in accordance with an Agency rule that had been appealed to the United States Court of Appeals for the District of Columbia Circuit?

III. *OVERVIEW OF PSD LEGAL REQUIREMENTS*

Petitioners challenge a PSD permit issued under the CAA. The PSD provisions govern air pollution in certain areas, called "attainment" areas, where the air quality meets or is cleaner than the national ambient air quality standards, as well as in unclassifiable areas that are neither attainment nor "nonattainment." CAA §§ 160-169, 42 U.S.C. §§ 7470-7479; *accord In re RockGen Energy Ctr.*, 8 E.A.D. 536, 541 (EAB 1999). The statutory PSD provisions are largely carried out through a regulatory process that requires new major stationary sources, or modifications of such sources,[1] in attainment (or unclassifiable) areas, such as Sierra Pacific's biomass boiler, to obtain preconstruction permits pursuant to CAA § 165, 42 U.S.C. § 7475. *See* 40 C.F.R. § 52.21; *RockGen*, 8 E.A.D. at 541; *In re Knauf Fiber Glass, GmbH ("Knauf I")*, 8 E.A.D. 121, 123 (EAB 1999).

To obtain a permit, new major stationary sources or modifications of such sources must employ the "best available control technology," or "BACT," to minimize emissions of regulated pollutants. CAA § 165(a)(4), 42 U.S.C.

[1] A "major stationary source" is any of a list of specific types of stationary sources that emit, or have the potential to emit, 100 tons per year or more of any "regulated NSR [(New Source Review)] pollutant," as defined in 40 C.F.R. § 52.21(b)(50). 40 C.F.R. § 52.21(b)(1)(i). A "major modification" is "any physical change in or change in the method of operation of a major stationary source" that would result in: (1) a "significant emissions increase," as defined in 40 C.F.R. § 52.21(b)(40) and (b)(23), of a regulated NSR pollutant; and (2) a "significant net emissions increase of that pollutant from the major stationary source." *Id.* § 52.21(b)(2)(i).

§ 7475(a)(4); 40 C.F.R. § 52.21(j)(2). The statute defines the BACT requirements as follows:

> The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.

CAA § 169(3), 42 U.S.C. § 7479(3); *accord* 40 C.F.R. § 52.21(b)(12) (similar regulatory definition). As the Board explained in *In re Northern Michigan University ("NMU")*, the BACT definition requires permit issuers to "proceed[] on a case-by-case basis, taking a careful and detailed look, attentive to the technology or methods appropriate for the particular facility, [] to seek the result tailor-made for that facility and that pollutant." 14 E.A.D. 283, 291 (EAB 2009) (citations and quotations omitted). BACT is therefore a site-specific determination that results in the selection of an emission limitation representing application of control technology or methods appropriate for the particular facility. *In re Prairie State Generating Co.*, 13 E.A.D. 1, 12 (EAB 2006), *aff'd sub nom. Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007); *In re Three Mountain Power, LLC*, 10 E.A.D. 39, 47 (EAB 2001); *Knauf I*, 8 E.A.D. at 128-29.

Section 165(a) of the CAA provides that a PSD permit may not be issued unless "a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations." 42 U.S.C. § 7475(a)(2). CAA section 160(5) specifies that one purpose of the PSD program is to "assure that any decision to permit increased air pollution * * * is made only after * * * adequate procedural opportunities for informed public participation in the decisionmaking process." 42 U.S.C. § 7470(5). EPA's consolidated permit regulations, which in part implement CAA § 160(5), state that the permit issuer "shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest in a draft permit(s)."[2] 40 C.F.R. § 124.12(a)(1).

[2] The consolidated permit regulations also apply to National Pollutant Discharge Elimination System ("NPDES") permits issued under sections 318, 402, and 405 of the Clean Water Act, 33 U.S.C. §§ 1328, 1342, and 1345; Underground Injection Control

The consolidated permit regulations also give the permit issuer the discretion to hold a public hearing "whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision." *Id*. § 24.12(a)(2).

IV. *PROCEDURAL AND FACTUAL HISTORY*

Currently, Sierra Pacific operates a wood-fired boiler with associated air pollution control equipment and conveyance systems at its lumber manufacturing facility in Anderson, California. Region 9's Resp. to the Petitions for Review ("Reg. 9 Resp.") attach. 1, excerpt ("exc.") 1, at 1 (EPA Region 9, *Prevention of Significant Deterioration Permit for Sierra Pacific Industries, Anderson Facility, PSD Permit No. SAC-01*, at 1 (Feb. 19, 2013)) ("Permit"). The Shasta County Air Quality Management District ("SCAQMD") issued a PSD permit for this boiler in 1994. *See* Reg. 9 Resp. at 2 n.3. On March 29, 2010, Sierra Pacific requested the Region's approval to construct and operate at this same location a new cogeneration unit burning clean cellulosic biomass during normal operations and natural gas for startup and shutdown. *Id*. attach. 1, exc. 2, at 3-4 (EPA Region 9, *Statement of Basis and Ambient Air Quality Impact Report, Sierra Pacific Industries-Anderson, PSD Permit No. SAC 12-01* (Sept. 2013)) ("AAQIR"). Sierra Pacific's proposed new cogeneration unit is to be used for producing steam to heat its existing kilns for drying lumber, and to generate electricity both for use at the Sierra Pacific facility in Anderson and for sale to the electrical grid. Permit at 1; AAQIR at 4. Specifically, Sierra Pacific indicated that the new proposed boiler will have the capacity to consume a maximum of 219,000 bone-dry tons ("BDT")[3] of biomass per year. Approximately 80,000 BDT will be generated by the facility's existing lumber operations at its current output, and additional wood fuel will be transported by truck to the facility from Sierra Pacific's other lumber operations in California. AAQIR at 4.

("UIC") permits issued under Part C of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300h to 300h-8; and hazardous waste management permits issued under section 3005 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6925. 40 C.F.R. § 124.1(a).

[3] A bone-dry ton is 2,000 pounds of wood pulp or residue at zero percent moisture content.

Although the Region has replaced the SCAQMD as the delegated decisionmaker on PSD permits,[4] Shasta County, under the California Environmental Quality Act ("CEQA"), Cal. Pub. Res. Code §§ 21001-21117, is required to evaluate the environmental consequences of certain PSD projects, such as the proposed cogeneration unit at the Sierra Pacific facility. The CEQA required the Shasta County Department of Resource Management to prepare an Environmental Impact Report ("EIR") that considered potential impacts of the Sierra Pacific project on "aesthetics, air quality and greenhouse gases, biological resources, cultural resources, geology and soils, hazards, hydrology and water quality, noise, public services/recreation/utilities, and transportation/circulation." Shasta County Department of Resource Management, *Final EIR for the Sierra Pacific Cogeneration Power Project* (May 2012) (available at http://www.co.shasta.ca.us/index/drm_index/planning_index/eirs/spi/Final_EIR.aspx); *see* Cal. Pub. Res. Code § 21100(a).

Following submission of its March 29, 2010 application, Sierra Pacific updated its application on July 1, 2010, and September 8, 2010. *See* Reg. 9 Resp. attach. 1, exc. 6 (Letter from Gerardo C. Rios, Chief, Air Div. Permits Office, EPA Reg. 9, to Eric Albright, Senior Mgr., ENVIRON Int'l Corp. (Oct. 4, 2010)). On October 4, 2010, the Region issued a letter to Sierra Pacific determining that its application was administratively complete, *id*.; however, the Region, on several occasions, later requested information from Sierra Pacific to complete its assessment of the permit application. In response, Sierra Pacific submitted additional data related to air quality modeling on May 30, 2012, and additional information regarding air quality impacts in July 2012. *See* Reg. 9 Resp. at 2 & attach. 1, exc. 5 (Letter from Eric Albright, Senior Mgr., ENVIRON Int'l Corp., to Gerardo Rios, EPA Reg. 9 (May 30, 2012)). On September 14, 2012, the Region proposed to issue a PSD permit for Sierra Pacific's new cogeneration unit. *Id*. attach. 1, exc. 3, at 3 (EPA Region 9, *Responses to Public Comments on the Proposed PSD Permit Major Modification for Sierra Pacific Industries - Anderson Division* 3 (Feb. 2013)) ("RTC"). The Region initiated a public comment period on the proposed permit through a public notice published in a local newspaper and a notice on the Region's website. *Id.* Included in the notice was a brief description of the cogeneration unit covered by the proposed permit, and information concerning comment procedures and where documents related to the Region's permit decision could be accessed. The notice also stated:

[4] On March 3, 2003, EPA revoked and rescinded SCAQMD's authority to issue and modify federal PSD permits for new and modified major sources of attainment pollutants in Shasta County, and now EPA issues such permits. *See* AAQIR at 3-4.

> Pursuant to 40 CFR 124.12, EPA has discretion to hold a Public Hearing if we determine there is a significant amount of public interest in the proposed permit. Requests for a Public Hearing must state the nature of the issues proposed to be raised in the hearing. If a Public Hearing is to be held, a public notice stating the date, time and place of the hearing will be made at least 30 days prior to the hearing. Reasonable attempts will be made to notify directly any person who has commented on this proposal of any pending Public Hearing, provided contact information has been given to the EPA contact person listed below.
>
> Any interested person may submit written comments or request a Public Hearing regarding EPA's proposed PSD permit for this modification. All written comments and requests on EPA's proposed action must be received by EPA via e-mail by October 17, 2012, or postmarked by October 17, 2012. Comments or requests must be sent or delivered in writing to Omer Shalev at one of the following addresses:
>
> E-mail: R9airpermits@epa.gov
>
> U.S. Mail: Omer Shalev (AIR-3)
> U.S. EPA Region 9
> 75 Hawthorne Street
> San Francisco, CA 94105-3901
> Phone: (415) 972-3538

Reg. 9 Resp. attach. 1, exc. 8, at 1-2 (EPA Region 9, *Public Notice: Announcement of Proposed Permit Modification and Request for Public Comment on Proposed [PSD] Permit for Sierra Pacific Industries - Anderson Division* 1-2 (Sept. 12, 2012)).

The Region distributed the notice to the parties specified in 40 C.F.R. § 124.10(c), which identifies the parties that must be notified in permit proceedings. It sent approximately 800 notices by U.S. mail and another 650 by electronic mail, although the Region acknowledges that this does not amount to notification of 1,450 parties because there is some overlap between the parties receiving U.S. mail and electronic mail notification. Reg. 9 Resp. at 3. Notified organizations and individuals included state and local government agencies, and parties who had requested to be put on lists created by the Region of parties interested in permit actions in California, or within Shasta County, as well as parties "known to EPA that may have an interest in this action." *Id*. The Region also published the notice in the local paper for Redding, California, the *Record Searchlight*, and on Region 9's website. The Region provided only an English version of the notice because its review of the demographics of Shasta County indicated that only a very small

percentage of residents were "linguistically isolated." RTC at 10. In addition to distributing the notice, the Region made available other documents relating to the proposed permit at the Region's office, the SCAQMD's offices in Redding, the Redding Public Library, and online at www.regulations.gov. *See* Reg. 9 Resp. attach. 1, exc. 8. The Region also published the proposed permit and other major documents related to the permit on its website. *See id*.

In response to the notice, the Region received requests for a public hearing from two individuals on their own behalf, Ms. Patricia Lawrence and Mr. Rob Simpson, and one request from an individual representing a community organization, Ms. Heidi Strand. On September 16, 2012, two days after the notice was published, Ms. Strand made the first of several hearing requests. Reg. 9 Resp. attach. 2, app. A, at 1 (E-mail from Heidi Strand to Omar Shalev, Envtl. Eng'r, EPA Reg. 9 (Sept. 16, 2012)). This request stated it was her "official request for a hearing regarding the PSD change for the proposed Sierra Pacific Cogeneration plant" and included a letter Ms. Strand had sent to Sierra Pacific. *Id*. That letter, sent by Ms. Strand in her capacity as co-chair of an organization named "Citizens for Clean Air," or "CCA," highlighted an EPA policy stressing the need for vigorous public outreach by permitting authorities in "environmental justice" communities[5] and argued that a new permit, not just a permit modification, was needed for Sierra Pacific's proposed new cogeneration unit. *Id*. at 2. The Region responded to this hearing request on October 1, 2012, informing Ms. Strand that it "does not currently plan to hold a public hearing for this proposed action" as the Region had "not received a significant amount of public interest in this project or additional requests for a public hearing." Reg. 9 Resp. attach. 2, app. 1, at 3 (E-mail from Omer Shalev, Envtl. Eng'r, Air Permits Div., EPA Reg. 9, to Heidi Strand (Oct. 1, 2012)). Mr. Shalev's response also noted that, if Ms. Strand still desired a public hearing, she "must state the nature of the issues proposed to be raised at the hearing * * * and [the Region] must receive indications that there is a significant amount of public interest." *Id*.

[5] *See* Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994) (directing federal agencies to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands").

On the same day that she received this e-mail from Mr. Shalev, Ms. Strand made her second request for a public hearing. Reg. 9 Resp. attach. 2, app. A, at 4 (E-mail from Heidi Strand, Co-Coordinator, CCA, to Omar Shalev, Envtl. Eng'r, EPA Reg. 9 (Oct. 1, 2012, 20:04 PDT)). Ms. Strand identified herself as the co-coordinator for CCA. She stated that her organization had "only heard about this project on the day I originally wrote to you." She argued that the "threshold for public interest is lower in Environmental Justice Communities" and listed five issues her "community" intended to raise at the public hearing, including questions regarding the BACT methods to be used by Sierra Pacific and cumulative impacts on air, water, and waste disposal from the cogeneration unit. *Id.* One of the issues identified by Ms. Strand specifically addressed the question of the showing that was necessary to obtain a public hearing: "What are your agenc[y']s procedures for determining the threshold required to hold a public hearing?" *Id.* Ms. Strand's phrasing of her issues for a hearing suggested that she was seeking further information from the Region at a hearing rather than indicating that she had information to present.[6] *Id.*

On October 4, 2013, Mr. Shalev responded to Ms. Strand's second hearing request. Reg. 9 Resp. attach 2, app. A, at 5 (E-mail from Omer Shalev, Envtl. Eng'r, Air Permits Div., EPA Reg. 9, to Heidi Strand (Oct. 4, 2012, 17:08 PDT)). He referred Ms. Strand to a Fact Sheet on the proposed permit, "which explains the basis for the proposed permit * * * and discusses many of the concerns that you raise in your e-mail regarding the project," and encouraged her to submit written comments by the October 17, 2013 deadline. However, he did not respond to her question about the threshold showing needed for obtaining a public hearing. *See id.*

Later that same day, Ms. Strand filed her third request for a hearing. Reg. 9 Resp. attach. 2, app. A, at 6 (E-mail from Heidi Strand, Co-Coordinator, CCA, to Omar Shalev, EPA Reg. 9 (Oct. 4, 2012, 21:52 PDT)). Ms. Strand indicated that the Fact Sheet did not satisfy her organization's concern that a new permit, not a modification, should be required for the Sierra Pacific project. She closed by stating, "Again I am requesting a public hearing." *Id.* The next day, Mr. Shalev

[6] The other four issues listed by Ms. Strand were: "(1) What methods of BACT (Best Available Control Technology) are being utilized by Sierra Pacific in the new construction of this Cogeneration plant? (2) Can you provide us with a discussion of the cumulative impacts of air, water and waste disposal methods proposed for this new project? (3) Can you provide any information regarding Sierra Pacific's environmental violations at their pre-existing Shasta County facilities and operations? * * * (5) Why doesn't EPA Region 9 require Sierra Pacific to secure a new PSD Permit for this new facility?"

responded to Ms. Strand's third e-mail. He explained that Region was proposing "a PSD permit modification [for] an additional cogeneration unit at an existing facility." Reg. 9 Resp. attach. 2, app. A, at 7 (E-mail from Omer Shalev, Envtl. Eng'r, Air Permits Div., EPA Reg. 9, to Heidi Strand (Oct. 5, 2012, 10:06 PDT)). He also referenced an existing cogeneration unit adjacent to the new unit that was being regulated by SCAQMD and he referred her to SCAQMD for more information on this facility. Mr. Shalev did not address Ms. Strand's renewed hearing request. *See id*.

Additional e-mails followed, in which Ms. Strand contended that the new facility was not undergoing the full PSD permitting process. Reg. 9 Resp. attach. 2, app. A, at 8 (E-mail from Heidi Strand, Co-Coordinator, CCA, to Omar Shalev, EPA Reg. 9 (Oct. 5, 2012, 10:39 PDT)). In a final e-mail on October 5, 2012, Mr. Shalev stated: "Thank you again for your interest. Please be sure to submit written comments regarding your concerns by the end of the public comment period on October 17, 2012." Reg. 9 Resp. attach. 2, app. A, at 9 (E-mail from Omer Shalev, Envtl. Eng'r, Air Permits Div., EPA Reg. 9, to Heidi Strand (Oct. 5, 2012, 14:27 PDT)).

Dissatisfied with the Region's preliminary decision not to hold a public hearing, CCA petitioned the Board, on October 16, 2012, seeking review of the Region's "hearing denial." The petition alleged that the Region erred by: (1) asserting [the Region] "had discretion to hold a Public Hearing if [the Region] determined there is a significant amount of public interest," but at the same time not providing any significant details on what the threshold for the public to obtain a public hearing might be; and (2) determining that no significant amount of public interest existed.[7] Resp. to Order to Show Cause at 3, *In re Sierra Pac. Indus.*, PSD Appeal No. 12-03 (EAB Dec. 21, 2012). Noting that 40 C.F.R. § 124.19 does not allow a challenge to a hearing denial until a final permit decision has been issued, the Board dismissed this appeal as premature. *In re Sierra Pac. Indus.*, PSD Appeal No. 12-03, at 5 (EAB Dec. 21, 2012) (Order Dismissing Petition for Review Without Prejudice as Prematurely Filed). The Board pointed out that "the Region

[7] Petitioner also asserted that "since Shasta County is an Environmental Justice community, the standard for review under Environmental Justice Guidelines in such communities is exceptionally low. Region 9 is the lead as well as advisory agency for Executive Orders #12898 and #13563. It is reasonable to expect the highest standards from the Region." Resp. to Order to Show Cause at 3, *In re Sierra Pac. Indus.*, PSD Appeal No. 12-03 (EAB Dec. 21, 2012). Mr. Coleman submitted the petition on behalf of CCA; Ms. Strand and Ms. Draisner also are members of CCA. Reg. 9 Resp. attach. 2, app. A, at 2; Draisner Pet. for Review at 1.

still could decide in response to public comments to hold a public hearing before issuing a final permit decision." *Id*. In dismissing the appeal, the Board expressed no opinion on the merits of CCA's claim but did indicate that the Region should "[i]n its response to comments document, * * * provide a well-reasoned explanation of why it declined the citizen group's request for a public hearing in light of the statute and regulations and how it took the environmental justice Executive Order into account. In particular, see CAA § 165(a)(2), 42 U.S.C. § 7475(a)(2)." *Id*. at 6 n.3.

Ms. Patricia Lawrence also submitted a written request for a public hearing. Reg. 9 Resp. attach. 1, exc. 9 (E-mail from Patricia Lawrence to EPA Reg. 9 (Oct. 17, 2012)). On October 17, 2012, she requested that the Region hold a public hearing on a number of broad issues raised by Sierra Pacific's proposed cogeneration facility. Specifically, Ms. Lawrence suggested that a hearing should be held to address: (1) the adequacy of the evaluation of the cumulative impacts of total air pollution in California's upper central valley; (2) whether a biomass plant should be given preference over a solar panel manufacturer in allocating the clean air in the upper central valley; (3) whether BACT would remove dioxins from household and industrial wastes that can be burned at the facility; and (4) whether burning wood waste would release a huge carbon sink affecting global warming. *Id*. Similar to Ms. Strand's requests, as worded, Ms. Lawrence's hearing request suggested that she also was seeking information on these points from the Region rather than expressing an intent to present information to the Region.

The third requestor was Mr. Simpson, who submitted a request for a public hearing with his written comments. Reg. 9 Resp. attach. 1, exc. 9, at 5. Unlike the other two requestors, Mr. Simpson submitted comments in some detail, including comments on the BACT and air quality impact analyses. *Id*. at 5-8. For example, Mr. Simpson argued that the proposed facility's "fuel mix" (i.e., the ratio of biomass to natural gas burned in the new boiler) should be evaluated as part of the BACT analysis because a higher gas component would burn cleaner and reduce facility emissions. He also stated that a solar energy component and energy efficiency options should be incorporated into the BACT analysis. Mr. Simpson presented a number of other challenges to technical and procedural aspects of Sierra Pacific's permit. In so doing, he did not explicitly list the matters he intended to question at a public hearing, but a fair reading of his comments indicates that he sought further information on and consideration of each of those issues by the Region.

After reviewing these requests, the Region decided not to hold a public hearing. In its Response to Comments document, the Region stated that "[n]one of

the requests for a public hearing demonstrated that there was significant public interest in the Project." RTC at 10, 11, 38. Other than mentioning the extent of its efforts to provide notice of the proposed permit and that there had been fifteen comments on the proposed permit, the Region provided no other explanation for its denial of the hearing and also failed to address the "threshold for holding a public hearing" question that Ms. Strand had raised in her October 1, 2012 e-mail to Mr. Shalev, or the arguments CCA had made challenging the preliminary hearing denial in its premature petition. *Id*. at 10.

As stated above, Ms. Strand, Mr. Simpson, Ms. Draisner, and Mr. Coleman filed petitions appealing the Region's final permit decision to the Board. All four Petitioners challenge the Region's denial of the requests for a public hearing. Petitioners assert that the "significant degree of public interest" standard in 40 C.F.R. § 124.12(a)(1) is "nebulous" and the Region has failed to give "an accurate explanation of its threshold requirements." Simpson Pet. at 5; Coleman 1st Am. Pet. at 4. Petitioners also argue that the Region's Response to Comments document failed to provide an adequate explanation of why the Region denied their hearing requests. Simpson Pet. at 5; Draisner Pet. at 3; Coleman 1st Am. Pet. at 7. Mr. Coleman specifically claims that the Region did not explain the hearing denial "in light of the statute" and references CAA section 165(a)(2), while Mr. Simpson cites CAA section 160(5). Coleman 1st Am. Pet. at 7; Simpson Pet. at 4. Finally, Mr. Coleman asserts that the hearing denial violated Executive Order 12,898 on Environmental Justice and EPA's environmental justice guidelines and policies. Coleman 1st Am. Pet. at 5-6.

In its response brief, the Region argues that it was not required to hold a public hearing under 40 C.F.R. § 124.12(a)(1) because it had "reasonably determined that * * * the Project did not meet the threshold of 'significant' that would mandate a public hearing." Reg. 9 Resp. at 8. The Region judged the public interest in the draft permit to be insignificant because "only a few individuals requested a public hearing, out of literally hundreds of persons who were directly contacted about the Project by Region 9." *Id*. at 8-9. Further, the Region defended not granting a hearing "to clarify the issues" under its discretionary authority in 40 C.F.R. § 124.12(a)(2). The Region argued that because the issues raised by requestors involved "inquiries related to topics already included in the administrative record" or could be addressed by a written response, a hearing was not necessary to clarify the issues. *Id*. at 9-10. As to Mr. Coleman's environmental justice claims, the Region asserts that it adequately took demographic information on the community into account in designing outreach materials. *Id*. at 11-12.

Because neither the Region's Response to Comments document nor its response to the petitions discussed the relevance of CAA section 165 to the hearing denial issue that two of the Petitioners had raised, the Board directed the Region to submit a supplemental brief addressing two questions concerning section 165. *See* Order Directing Supplemental Briefing (May 16, 2013). First, the Board asked how the "significant degree of public interest" standard in 40 C.F.R. § 124.12(a)(1) should be interpreted in light of the requirements on public hearings in CAA section 165. Second, noting that the hearing requestors had, in part, sought a hearing for the purpose of obtaining clarification of certain issues from the Region, the Board asked what weight this fact should be given in light of the public participation policy enunciated in the CAA, and the language in section 165(a)(2) indicating that public hearings presented the "opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations" on considerations relevant to the permit. The Board gave Sierra Pacific and the Petitioners the option of responding to the Region's supplemental brief. The Region, Sierra Pacific, Ms. Strand, and Ms. Draisner submitted briefs addressing the Board's questions.

Petitioners also have raised a variety of other procedural issues, as well as substantive issues, in their appeals. To promote efficiency in the permit appeal process, the Board has decided a number of these issues in Part VII.C below. Additionally, in Part VI below, the Board addresses motions filed by three of the petitioners – Mr. Coleman, Ms. Strand, and Ms. Draisner – requesting that the Board accept late filings.

V. *PRINCIPLES GOVERNING BOARD REVIEW*

Section 124.19 of Title 40 of the Code of Federal Regulations governs Board review of a PSD permit. In any appeal from a permit decision issued under part 124, the petitioner bears the burden of demonstrating that review is warranted. *See* 40 C.F.R. § 124.19(a)(4).

A. *Standard of Review*

The Board has discretion whether to review a PSD permit. *In re Avenal Power Ctr., LLC*, 15 E.A.D. 384, 394 (EAB 2011), *appeal docketed sub nom. Sierra Club v. EPA*, No. 11-73342 (9th Cir. Nov. 3, 2011). Ordinarily, the Board will not review a PSD permit unless the permit decision either is based on a clearly erroneous finding of fact or conclusion of law, or involves a matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a)(4)(A)-(B); *accord, e.g., In re Prairie State Generating Co.*, 13 E.A.D. 1, 10 (EAB 2006), *aff'd sub nom. Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007).

When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit to determine whether the permit issuer exercised his or her "considered judgment." *See In re Steel Dynamics, Inc.*, 8 E.A.D. 165, 191, 224-25 (EAB 2000); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997). The permit issuer must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied upon when reaching its conclusion. *E.g.*, *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 386 (EAB 2007). As a whole, the record must demonstrate that the permit issuer "duly considered the issues raised in the comments" and ultimately adopted an approach that "is rational in light of all information in the record." *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002); *accord In re City of Moscow*, 10 E.A.D. 135, 142 (EAB 2001); *In re NE Hub Partners, LP*, 7 E.A.D. 561, 567-68 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3rd Cir. 1999). On matters that are fundamentally technical or scientific in nature, the Board typically will defer to a permit issuer's technical expertise and experience, as long as the permit issuer adequately explains its rationale and supports its reasoning in the administrative record. *See In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 510 (EAB 2006); *see also, e.g.*, *In re Russell City Energy Ctr.*, 15 E.A.D. 1, 66 (EAB 2010), *petition denied sub nom. Chabot-Las Positas Cmty. Coll. Dist. v. EPA*, No. 10-73870 (9th Cir. May 4, 2012); *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 40-41, 46, 51 (EAB 2005); *NE Hub*, 7 E.A.D. at 570-71.

In reviewing an exercise of discretion by the permitting authority, the Board applies an abuse of discretion standard. *See In re Guam Waterworks Auth.*, 15 E.A.D. 437, 443 n.7 (EAB 2011). The Board will uphold a permitting authority's reasonable exercise of discretion if that decision is cogently explained and supported in the record. *See Ash Grove*, 7 E.A.D. at 397 ("[A]cts of discretion must be adequately explained and justified."); *see also Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner * * *.").

B. *Petitioner's Burden on Appeal, Including Threshold Requirements*

In determining whether to review a petition filed under 40 C.F.R. § 124.19(a), the Board first considers whether the petitioner has met threshold

procedural requirements such as timeliness,[8] standing,[9] issue preservation,[10] and specificity.[11] *See* 40 C.F.R. § 124.19; *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006). Assuming that a petitioner satisfies all threshold procedural obligations, the Board then evaluates the petition to determine if it warrants review. *Indeck*, 13 E.A.D. at 143.

As noted above, in any appeal from a permit under part 124, the petitioner bears the burden of demonstrating that review is warranted. *See* 40 C.F.R. § 124.19(a)(4). Thus to the extent a petitioner challenges an issue the permit issuer addressed in its response to comments, the petitioner must provide a record citation to the comment and response and also must *explain why* the permit issuer's previous response to those comments was clearly erroneous or otherwise warrants review.[12]

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[8] For example, a petition for review ordinarily must be filed with the Board within 30 days of service of notice of the final permit decision by the permitting authority. 40 C.F.R. § 124.19(a)(3). The 30-day period within which a person may request review begins with the service of notice unless the permitting authority specifies a later date. *Id*. In cases where the filing date falls on a weekend or legal holiday, a petitioner has until the next working day to file the petition. *Id*. § 124.20(c).

[9] In general, a petitioner must establish standing to appeal by demonstrating prior involvement in the public review process, either by filing written comments on the draft permit or by participating in a public hearing. 40 C.F.R. § 124.19(a)(2).

[10] For example, a petitioner must demonstrate that any issues and arguments it raises on appeal have been preserved for Board review (i.e., were raised during the public comment period or public hearing on the draft permit), unless the issues or arguments were not reasonably ascertainable at the time. 40 C.F.R. §§ 124.13, .19(a)(4)(ii); *see, e.g., In re City of Attleboro*, 14 E.A.D. 398, 406, 441-42 (EAB 2009); *In re City of Moscow*, 10 E.A.D. 135, 141, 149-50 (EAB 2001).

[11] For example, a petitioner must not only generally object to the permit, but also must "clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed." 40 C.F.R. § 124.19(a)(4). Thus, a petition must be specific and contain, at a minimum, two essential components: (1) clear identification of the conditions in the permit that are at issue, and (2) an argument that the conditions warrant review. 40 C.F.R. § 124.19(a)(4)(i); *In re Puna Geothermal Venture*, 9 E.A.D. 243, 274 (EAB 2000) (citing *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 18 (EAB 1994)).

[12] Federal circuit courts of appeal have upheld this Board requirement that a petitioner must substantively confront the permit issuer's response to the petitioner's previous objections. *City of Pittsfield v. EPA*, 614 F.3d 7, 11-13 (1st Cir. 2010), *aff'g In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review); *Mich. Dep't of Envtl. Quality v. EPA*, 318 F.3d 705, 708 (6th Cir. 2003) ("[Petitioner] simply repackag[ing] its comments and the EPA's response as unmediated

Id. § 124.19(a)(4)(ii); *see, e.g.*, *In re Teck Cominco Alaska, Inc.*, 11 E.A.D. 457, 494-95 (EAB 2004); *In re Westborough*, 10 E.A.D. 297, 305, 311-12 (EAB 2002); *In re City of Irving*, 10 E.A.D. 111, 129-30 (EAB 2001), *review denied sub nom. City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003). The Board consistently has denied review of petitions that merely cite, attach, incorporate, or reiterate comments previously submitted on the draft permit. *E.g.*, *In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review), *aff'd*, 614 F.3d 7, 11-13 (1st Cir. 2010); *In re Knauf Fiber Glass, GmbH ("Knauf II")*, 9 E.A.D. 1, 5 (EAB 2000) ("Petitions for review may not simply repeat objections made during the comment period; instead they must demonstrate why the permitting authority's response to those objections warrants review."); *In re Hadson Power 14*, 4 E.A.D. 258, 294-95 (EAB 1992) (denying review where petitioners merely reiterated comments on draft permit and attached a copy of their comments without addressing permit issuer's responses to comments).

When petitions are filed by persons who are unrepresented by legal counsel, like the petitions here, the Board endeavors to liberally construe the petitions to fairly identify the substance of the arguments being raised. *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999); *see also In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254, 292 n.26 (EAB 2005); *In re Envotech, LP*, 6 E.A.D. 260, 268 (EAB 1996). While the Board "does not expect such petitions to contain sophisticated legal arguments or to employ precise technical or legal terms," the Board nevertheless "does expect such petitions to provide sufficient specificity to apprise the Board of the issues being raised." *Sutter*, 8 E.A.D. at 687-88; *accord In re P.R. Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995). "The Board also expects the petitions to articulate some supportable reason or reasons as to why the permitting authority erred or why review is otherwise warranted." *Sutter*, 8 E.A.D. at 688; *accord In re Beckman Prod. Servs.*, 5 E.A.D. 10, 19 (EAB 1994). Thus, the burden of demonstrating that review is warranted still rests with the petitioner challenging the permit decision. *In re New Eng. Plating Co.*, 9 E.A.D. 726, 730 (EAB 2001); *Encogen*, 8 E.A.D. at 249-50.

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appendices to its Petition to the Board * * * does not satisfy the burden of showing entitlement to review."), *aff'g In re Wastewater Treatment Fac. of Union Twp.*, NPDES Appeal Nos. 00-26 & 00-28 (EAB Jan. 23, 2001) (Order Denying Petitions for Review); *LeBlanc v. EPA*, No. 08-3049, at 9 (6th Cir. Feb. 12, 2009) (concluding that the Board correctly found petitioners to have procedurally defaulted where petitioners merely restated "grievances" without offering reasons why the Region's responses were clearly erroneous or otherwise warranted review), *aff'g In re Core Energy, LLC*, UIC Appeal No. 07-02 (EAB Dec. 19, 2007) (Order Denying Review).

VI. *PENDING PROCEDURAL MOTIONS*

Three of the Petitioners, Mr. Coleman, Ms. Strand, and Ms. Draisner, have filed motions requesting that the Board accept late filings. Mr. Coleman's motion asks the Board to accept a late petition for review. Mr. Coleman submitted three petitions for review. He filed his original petition and a first amended petition before the filing deadline of March 26, 2013, and his second amended petition four days after the filing deadline, on March 30, 2013. On April 9, 2013, the Board issued an order indicating, among other things, that Mr. Coleman's second amended petition was late and that it "was not accompanied by a motion, did not identify the changes made from the previous two petitions, and did not provide any justification for the Board's acceptance of this amended petition after the deadline passed." Order Concerning Board Procedures 1-2 (Apr. 9, 2013). In response to this Order, Mr. Coleman filed the motion now before the Board requesting that the Board accept his second amended petition. Mr. Coleman states that the "main purpose of Ed W. Coleman's '2nd Amended Petition' is to present a clean and professional document for EPA review" and argues that acceptance of this late petition would not be an "undue burden" on the Board or the Region.

The Board denies Mr. Coleman's motion. Mr. Coleman's second amended petition contains a substantive argument not included in his first two petitions (that the Region had erroneously treated Sierra Pacific's proposal as a permit modification), and Mr. Coleman has not justified why that argument could not have been included in a timely petition. Although the Board has permitted late filings in "special circumstances," Mr. Coleman has not offered any special circumstances as a reason for the late filing. *See In re AES P.R. LP*, 8 E.A.D. 324, 328-29 (EAB 1999) (late filing allowed when aircraft problems experienced by overnight delivery service resulting in one-day delay); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 123-24 (EAB 1997) (late filing allowed when delay was attributable to permitting authority as it mistakenly instructed petitioners to file appeals with EPA Headquarters Hearing Clerk).

The Board's April 9, 2013 Order also noted that Ms. Strand had submitted supplemental documents after the filing deadline without a motion justifying the late filing. Order Concerning Board Procedures at 2. On April 22, 2013, Ms. Strand filed a motion requesting that the Board accept her late filing. On the same day, Ms. Draisner also filed a motion requesting that the Board accept documents that were not timely submitted. Both Ms. Strand and Ms. Draisner argue that the Board should accept the documents because they would "assist the Board" and considering them would not be an "undue burden." The Board denies both motions. Neither Petitioner has advanced any explanation as to why these

documents could not have been filed in a timely manner. That the documents may be relevant and not time-consuming to review does not justify filing them late.[13]

VII. *ANALYSIS*

A. *The Region Abused Its Discretion in Determining That There Was Not a Significant Degree of Public Interest in the Sierra Pacific Draft Permit and Thus Clearly Erred in Failing to Hold a Mandatory Public Hearing Under 40 C.F.R. § 124.12(a)(1)*

1. *The Specific Issue Presented Under 40 C.F.R. § 124.12(a)(1)*

Under 40 C.F.R. § 124.12(a), the Region is *required* to hold a public hearing on draft PSD, NPDES, and UIC permits if the Region finds there is a "significant degree of public interest," and, in its discretion, also *may* decide to hold a public hearing "if such a hearing might clarify one or more issues involved in the permit decision." Thus, the regulations provide both a mandatory duty to hold a hearing in certain circumstances, and a discretionary option to hold a hearing should the permitting authority deem one appropriate. Petitioners primarily have focused their challenge to the Region's hearing denial on the mandatory requirement to hold a hearing under section 124.12(a)(1) if the Region finds there is a "significant degree of public interest." Mr. Coleman, however, also appears to argue that the Region erred by not exercising its discretion to grant a public hearing under section 124.12(a)(2). Accordingly, the Board first turns to the question of whether the Region clearly erred in determining there was not a "significant degree of public interest" in a public hearing on the draft PSD permit for Sierra Pacific. In Part VII.B below, the Board addresses Mr. Coleman's argument concerning a discretionary public hearing under section 124.12(a)(2).

2. *The "Significant Degree of Public Interest" Standard*

a. *Regulatory Clarification*

EPA's regulations do not define the "significant degree of public interest" standard in 40 C.F.R. § 124.12(a)(1), nor does the preamble to the final rule provide much clarification. In the preamble, the Agency responded to a commenter's

[13] Despite the Board's admonition to Petitioners not to file a document with the Board absent "a proper motion seeking leave of the board to file such document," Order Concerning Board Procedures at 1-2, Mr. Coleman and Ms. Strand have continued to file documents with the Board without requesting permission by motion. The Board has not considered these documents.

description of the standard as "vague" by noting that "[o]ne of the purposes of having a public hearing is to respond to public interest, which is not subject to precise measurement."[14] 45 Fed. Reg. 33,290, 33,409 (May 19, 1980). Later repromulgations of this standard provide more definition. In 1984, in amendments to its regulations governing state programs administering section 404 of the Clean Water Act, EPA explained that under the "significant degree of public interest" standard, "[i]f the issues sought to be raised are immaterial, the [permit issuer] may conclude that the degree of public interest is not 'significant.'" 49 Fed. Reg. 39,012, 39,015 (Oct. 2, 1984) ("404 Program Regulation"). Five years later, in explaining its choice of the "significant degree of public interest" standard in the NPDES Sewage Sludge Permit Regulations, EPA noted that EPA "strongly encourages public hearings whenever public interest has been shown." 54 Fed. Reg. 18,716, 18,776 (May 2, 1989). Nonetheless, EPA made clear it disfavored "automatic triggers," such as a "single request," and preferred "to give the Regional Administrator flexibility to exercise judgment in this regard." *Id*.

b. *Interpretations of the "Significant Degree of Public Interest" Standard by the EPA Administrator and the Board*

Prior decisions by the EPA Administrator and the Board recognize that the permit issuer has a degree of discretion in determining whether to hold a hearing under section 124.12(a)(1)'s "significant degree of public interest" standard. For example, in *In re Noranda Alumina, LLC*, the Administrator recently opined that "the EPA has recognized some discretion in the permitting authority to not hold a public hearing for every PSD permit proceeding." Title V Pet. No. VI-2011-04, at 24 (Adm'r Dec. 14, 2012) (Order Denying Petition for Objection to Permit). Other cases have described the determination as to whether to hold a public hearing as "largely discretionary." *In re City of Fort Worth*, 6 E.A.D. 392, 407 (EAB 1996) ("The decision to hold a public hearing under 40 C.F.R. § 124.12(a) is 'largely discretionary.'" (quoting *In re Avery Lake Prop. Owners Assoc.*, 4 E.A.D. 251, 252 (EAB 1992))); *see In re Weber* #4-8, 11 E.A.D. 241, 246 (EAB 2003) (Agency is afforded "broad discretion" in deciding whether to hold a public hearing).

Taking into account the discretion accorded permit issuers on the finding of whether there is a "significant degree of public interest" in the draft permit, the Administrator and the Board generally have upheld decisions by permit issuers to

[14] To take into account "the permit applicant's interest (or someone else's interest) in using the hearing to explore issues further," 45 Fed. Reg. at 33,409, EPA did, however, add the discretionary authority to hold hearings to "clarify one or more issues." 40 C.F.R. § 124.12(a)(2).

deny requests for public hearings. Two of these cases concerned a PSD permit, *Noranda* and *In re Spokane Regional Waste-to-Energy Project*, 3 E.A.D. 68 (Adm'r 1990). In *Noranda*, a petition had been filed with EPA requesting that the Administrator object to a Title V permit granted by the State of Louisiana that included a modification to an existing PSD permit. One of the reasons the petitioners claimed the permit was objectionable was that Louisiana had denied their request for a public hearing. Because this was a state-issued permit, 40 C.F.R. § 124.12(a) did not govern Louisiana's decision on the hearing request; however, Louisiana applied a "significant degree of public interest" test in determining whether to grant a public hearing under its regulations implementing the PSD requirements. The Administrator upheld Louisiana's denial of two public hearing requests under this standard, focusing primarily on the insignificance of the PSD permit modification. Title V Pet. No. VI-2001-04, at 25-26. Specifically, the Administrator concluded that it was not "unreasonable" to deny a hearing given that:

> [T]he 2011 PSD permit was a revision of a previously issued PSD permit and not an authorization for a major modification of the source. Furthermore, based on the stack tests, the maximum allowable NO[x] emissions from the five emissions units tested decreased, while increases in NO[x] emissions due to the Yield Improvement Project were only 23.33 tpy NO[x].

Id. at 26.

In the *Spokane* decision, the Administrator upheld a hearing denial emphasizing both the narrowness of the matter at issue and the failure of the hearing requestors to address that narrow issue. There, the Administrator reviewed the Washington State Department of Ecology's ("WSDE") denial of a public hearing on WSDE's proposed revisions to a PSD permit. The Administrator previously had remanded the permit to WSDE specifically for a determination of the appropriate nitrogen oxide ("NO_x") limitation for the permitted facility's control technology. In denying a hearing request of its revisions to the NO_x limitation, WSDE acknowledged that there was public interest in the permit but "found there was little expression of interest in the specific issue raised by the remand." *Spokane*, 3 E.A.D. at 69. The Administrator found these facts to be critical and upheld WSDE's denial of a public hearing because "the scope of the permit revision was narrow" and there was no significant public interest in the subject of the revision. *Id*. at 70. Another factor that appeared to play a role in the Administrator's decision was that although a public hearing fulfilling all the requirements of 40 C.F.R. § 124.12 was not held, the WSDE did actually meet with interested parties concerning the permit revision. *Id*. at 69 & n.1.

The Board also has upheld hearing denials in several cases involving NPDES or UIC permits. Invariably, these cases involved a single hearing request and, in most cases, no more than two public comments. *In re City of Attleboro*, 14 E.A.D. 398, 467 (EAB 2009), (one hearing request, "limited comments"); *In re Sunoco Partners Mktg. & Terminals, LP*, UIC Appeal No. 05-01, at 13 (EAB June 1, 2006) (one hearing request, two public comments); *Fort Worth*, 6 E.A.D. at 407 (one hearing request, no other public comments); *In re Osage (Pawhuska, Okla.)*, 4 E.A.D. 395, 399 (one hearing request, one adverse public comment);[15] *see also In re Core Energy, LLC*, UIC Appeal No. 07-02, slip op. at 7 n.7 (Dec. 19, 2007) (noting in dicta that Board sees no error in denial of public hearing in UIC permit proceeding where there was a single hearing request and only one adverse comment).

c. *The PSD Statutory Public Participation Requirements and the "Significant Degree of Public Interest" Standard*

An additional potential reference point for interpreting 40 C.F.R. § 124.12(a) is the CAA, particularly the portion establishing the Prevention of Significant Deterioration of Air Quality program, 42 U.S.C. §§ 7470-7479. Just as a regulation must be consistent with the underlying statute to be upheld, interpretation of the regulation must be faithful to the statutory text. *See United States v. Larionoff*, 431 U.S. 864, 873 (1977) ("[R]egulations, in order to be valid, must be consistent with the statute under which they are promulgated."). Thus, courts have emphasized that "a regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements.'" *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984) (quoting *Trustees of Ind. Univ. v. United States*, 618 F.2d 736, 739 (Ct. Cl. 1980)); *accord Carmichael v. The Payment Ctr., Inc*., 336 F.3d 636, 640 (7th Cir. 2003) ("A statute and its implementing regulations should be read as a whole and, where possible, afforded a harmonious interpretation."); *Powell v. Heckler*, 789 F.2d 176, 179 (3rd Cir. 1986) ("[S]tatutes and regulations should be read and construed as a whole and, wherever possible, given a harmonious, comprehensive meaning."). *But see Envtl. Def. v. Duke Energy Corp*., 549 U.S. 561, 573 (2007) (observing that the obligation to construe a regulation consistent with its authorizing statute does not confer the power to rewrite the regulation). In fact, the Board previously has relied on public participation provisions in the CAA to guide its application of the procedural requirements in 40 C.F.R. part 124 to PSD permit proceedings. *In re RockGen Energy Ctr.*, 8 E.A.D. 536, 557 (EAB 1999) ("The failure of [a permit

[15] This case involved application of 40 C.F.R. § 147.2929(f), which contains identical language to 40 C.F.R. § 124.12(a)(1).

issuer] to comply fully with the public participation requirements of the regulations implementing this statutory requirement * * * undermines the statutory objective and should be rectified.").

The PSD program not only provides a broad instruction regarding public participation in permit decisions, but specifically addresses public hearings. The importance of adequate public participation is emphasized in one of the five enumerated purposes of the PSD program in section 160. 42 U.S.C. § 7470. That purpose statement reads:

> [T]o assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

42 U.S.C. § 7470(5). As to public hearings on permits, section 165 bars construction on major emitting facilities unless:

> (1) a permit has been issued for such proposed facility * * *; [and] (2) the proposed permit has been subject to a review in accordance with this section * * * and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations.

Id. § 7475(a). The public hearing is well-integrated into the PSD permit process with requirements for the collection of monitoring data being coordinated with the timing of the public hearing on the permit. *See id.* § 7475(e)(2) (requiring results of air quality monitoring data and analysis to be "available at the time of the public hearing"); *id*. § 7475(e)(3)(C) (same).

Because the Region did not address the relevance of sections 160 and 165 to the interpretation of 40 C.F.R. § 124.12(a)(1) in its Response to the Petitions, the Board requested supplemental briefing on the issue. In response, the Region, in conjunction with EPA's Office of General Counsel, Office of Air and Radiation, and Office of Environmental Justice, argues that these provisions should not be relied upon "to establish a reading of section 124.12 that is unique to PSD permits." Reg. 9 Suppl. Br. at 17. The Region explains that EPA, in promulgating 40 C.F.R. § 124.12, had interpreted sections 160 and 165 as requiring no more than "an opportunity for a hearing," and EPA had determined that the statutory requirements of the PSD provisions did not require a PSD-specific approach to the "significant

degree of public interest" standard for instances in which section 124.12(a) was applied to PSD permits. *Id*. at 18. According to the Region, "[t]here is no indication that EPA intended to apply different interpretations of the same language in section 124.12(a)(1) under different statutory contexts and different permitting programs." *Id*. at 18-19. Further, the Region argues that appeal of a permit decision is not the appropriate venue for reconsideration of a prior rulemaking. *Id*. at 17-18.

Sierra Pacific's supplemental response largely tracks the arguments made in the Region's brief. Sierra Pacific Reply to Reg. 9 Suppl. Br. at 1-4. In addition, Sierra Pacific emphasizes that reconsidering section 124.12(a)'s validity is inappropriate because it would delay a project that has positive environmental and economic benefits. *Id*. at 5-6. Ms. Draisner, in her response, disputes the Region's and Sierra Pacific's claims that it is not appropriate to evaluate whether the "significant degree of public interest" standard is consistent with the CAA. Draisner Reply to Sierra Pacific Reply to Reg. 9 Suppl. Br. at 1. In her response to the Region's Supplemental Brief, Ms. Draisner asks: "If permit proceedings before the Board are not the place for a challenge to an unlawfully promulgated regulatory standard, then which environmental court would be the correct one?" *Id*. As to Sierra Pacific's concern with delays in the PSD permitting process for its proposed cogeneration boiler, Ms. Draisner asserts the fault for that delay lies with the Region and does not justify denying the public's right to a public hearing. *Id*. at 2. Finally, Ms. Draisner also argues that the history of Shasta County's preparation of its EIR shows there was a significant degree of public interest. *Id*. Ms. Strand uses her supplemental response to reiterate her claims regarding Shasta County as an environmental justice community and to dispute the adequacy of the notice the Region provided on the draft permit. Strand Resp. to Reg. 9 Suppl. Br. at 1-2.

The Board generally will not entertain a challenge to the validity of a regulation in a permit appeal. *In re City of Irving*, 10 E.A.D. 111, 123-25 (EAB 2001), *review denied sub nom. City of Abilene v. EPA*, 325 F.23 657 (5th Cir. 2003); *In re Tondu Energy Co.*, 9 E.A.D. 710, 715-16 (EAB 2001). In fact, the "presumption of nonreviewability in the administrative context is especially appropriate when Congress * * * has set precise limits on the availability of a judicial forum for challenging particular kinds of regulations." *In re Woodkiln, Inc*., 7 E.A.D. 254, 269 (EAB 1997) (citing *In re Echevarria*, 5 E.A.D. 626, 634-35 (EAB 1994)). In this instance, section 307(b) of the CAA expressly limited challenges to this regulation to within sixty days of promulgation, 42 U.S.C. § 7607(b), which was decades ago. As the Board has made clear, "[o]nce [a] rule is no longer subject to court challenge by reason of the statutory preclusive review provision, the Agency is entitled to close the book on the rule insofar as its validity is concerned." *Echevarria*, 5 E.A.D. at 635. The Board only will entertain a

challenge to a regulation subject to a preclusive judicial review provision in "exceptional" circumstances where an "extremely compelling argument" is made in support of review. *In re USGen New Eng., Inc. Brayton Point Station*, 11 E.A.D. 525, 557 (EAB 2004). The only circumstance identified by the Board to date as possibly meriting the extraordinary step of entertaining a challenge to a regulation precluded from judicial review is if the regulation "has been effectively invalidated by a court but has yet to be formally repealed by the Agency." *Id*.

As discussed in Part VII.A.2.g below, the Board has concluded that the Region clearly erred under the plain language of 40 C.F.R. § 124.12(a)(1) – the regulation implementing CAA sections 160(5) and 165(a)(2) – in denying the requested public hearing. Because the Board is ordering the Region to hold a public hearing consistent with the regulation, there is no reason for the Board to address Ms. Draisner's request that the Board examine whether the regulation itself is consistent with the CAA, particularly given the preclusive judicial review provision in 42 U.S.C. § 7607(b). Further, given that no party advocates that the CAA provisions support even greater discretion for the permit issuer in denying a hearing, the Board has determined it need not resolve in this case whether the PSD statutory public participation provisions provide a gloss on the interpretation of the "significant degree of public interest" test in the context of PSD permit proceedings.

d. *Environmental Justice and the "Significant Degree of Public Interest" Standard*

Three of the Petitioners cite the President's Executive Order on Environmental Justice and EPA policies on this subject as supporting their request for a public hearing.[16] Although Ms. Strand and Ms. Draisner do not explain what role environmental justice precepts should have under the regulatory requirements pertaining to hearing requests on permits, Mr. Coleman appears to argue that these orders and guidelines lower the standard for granting a public hearing under 40 C.F.R. § 124.12(a)(1). Coleman Pet. at 3. The Board disagrees.

Executive Order 12,898, entitled "*Federal Actions to Address Environmental Justice in Minority and Low-Income Populations*," is a directive to each federal agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." Exec. Order 12,898 § 1-101,

[16] Mr. Coleman also cites Executive Order 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011), which addresses, among other things, public participation in rulemaking. Because this case involves a permit proceeding and not a rulemaking, that Executive Order is inapposite.

59 Fed. Reg. 7629 (Feb. 16, 1994). To implement the Executive Order, EPA has issued policy statements such as "Plan EJ 2014," U.S. EPA, Plan EJ 2014 (Sept. 2011) (available at http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-2011-09.pdf), and "EPA Activities to Promote Environmental Justice in the Permit Application Process," 78 Fed. Reg. 27,220 (May 9, 2013).

Neither the Executive Order nor EPA policy statements, however, amend EPA's statutory or regulatory requirements and obligations. The Executive Order emphasizes that all of its directives to agencies are to be implemented "[t]o the greatest extent practicable and permitted by law." Exec. Order 12,898 § 1-101. Further, the Order concludes by stating that "[t]his order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person." *Id*. § 6-609. EPA also recently explained that its environmental justice policies are discretionary actions that do not amend substantive law:

> EPA [policies] are not an interpretation of environmental statutes, nor do they add to or change interpretations of statutory obligations regarding permitting contained in existing regulations. They create no legal obligations and in no way change the legal landscape of the EPA permitting process. To the contrary, the only legal requirements applicable to EPA regional offices and permit applicants throughout the permitting process are those contained in the EPA's environmental statutes, implementing regulations, the Administrative Procedure Act, applicable anti-discrimination laws and other applicable statutes and regulations.

78 Fed. Reg. at 27,221. Further, EPA has noted that its "ability to perform outreach [to promote environmental justice] is constrained by its resources." *Id*. Accordingly, the Board does not agree with Mr. Coleman's assertion that the Executive Order and EPA environmental justice policies amend the standard for granting a public hearing under 40 C.F.R. § 124.12(a)(1).[17]

[17] The Board addresses the applicability of Executive Order 12,898 to the Region's determination of when to hold a public hearing under 40 C.F.R. § 124.12(a)(1) and (a)(2) in Parts VII.A.2.g and VII.B below, respectively.

e. *The Region's Contentions as to the Meaning of the "Significant Degree of Public Interest" Standard*

The Region contends that the "significant degree of public interest" standard requires a "qualitative judgment" taking into consideration "multiple factors," including the number of hearing requests, the number of comments, media reports on the project, and other information that indicates the level of public interest. Reg. 9 Suppl. Br. at 19-20. These other factors, the Region states, include "considerations of environmental justice, demographic and socioeconomic information, as well as additional factors, including those raised by stakeholders, that indicate whether there is significant interest in a PSD permitting decision within potentially affected communities." *Id*. at 20. More specifically, the Region indicates that it has considered, in appropriate instances, "public participation and engagement in the area regarding air/environmental issues, interest in local public meeting and/or publications regarding to the proposed project, socioeconomic status, linguistic isolation, education levels, minority population, and other factors as a particular case may warrant." *Id*. at 12-13. The Region emphasizes that "[n]o one factor is dispositive, and there is no exclusive list of factors that can or must be considered." *Id*. at 20. In particular, the Region makes clear that the decision "should not be based simply on the number of requests for hearing received or any other mechanical criteria." *Id*.

f. *Relevant Considerations*

The Board agrees with the Region that the "significant degree of public interest" standard "suggests that more than any public interest at all is needed to trigger a mandatory requirement to hold a permit hearing on a PSD permit application," and that there is "no 'bright line' test" for defining" this standard. Reg. 9 Suppl. Br. at 19. The Board further agrees with the Region that multiple factors should be considered in determining if there is a significant degree of public interest in a draft permit. The Region, with the concurrence of the Office of General Counsel, the Office of Air and Radiation, and the Office of Environmental Justice, has identified in its Supplemental Brief many appropriate factors for consideration. Other considerations are discussed in prior Board and Administrator decisions and EPA rulemakings. Relevant considerations include:

Materiality of Issues. Both EPA's interpretative statements in the preamble to the 404 Permit Regulation and the *Spokane* decision indicate that if requestors raise only immaterial issues, they have not demonstrated a significant degree of public interest in the draft permit. By implication, a requestor that identifies material issues to be raised at a public hearing has provided an indication that there is a significant degree of interest in the draft permit. Thus, the materiality or

relevance of the issues identified for the hearing is a key consideration in determining if a hearing is required.

Number of Hearing Requests and Comments. Although gauging the degree of public interest is not simply a numbers game, consideration of the number of hearing requests and comments obviously is relevant. The Board frequently has upheld the denial of public hearing requests where there has been a single hearing request and only one or two comments. However, the quantitative exercise of counting hearing requests and comments cannot be separated from the qualitative examination of the substance of the requests and comments. Further, it is also important to evaluate the number of requests and comments in the context of the size of the affected community.

Degree of Public Interest in Related State or Local Proceedings. The Region in its Supplemental Brief proposes that "public participation and engagement in the area regarding air/environmental issues [and] interest in local public meeting and/or publications regarding the proposed project" are relevant when assessing the degree of public interest. Reg. 9 Suppl. Br. at 12-13. Similarly, in its Response to the Petitions for Review, Sierra Pacific argues that the Board should consider the public interest in its proposed cogeneration unit by examining public participation in proceedings conducted by Shasta County under California law on the proposed unit. Sierra Pacific Resp. at 7. The Board agrees that where state and local proceedings involve related issues, they may provide relevant information concerning the degree of public interest in the draft federal permit.

Media Reports. The Region has suggested that media coverage of a project that is the subject of a draft permit is an appropriate consideration in measuring the degree of public interest. Reg. 9 Suppl. Br. at 20. The Board agrees that this is a factor that can be given some weight in examining the importance or significance of the issue to the affected community.

Significance of the Permit Action. In the *Noranda* decision, the Administrator relied on the minor nature of the permit modification as weighing against a determination that there was a significant degree of public interest in a draft permit. In *Spokane*, the narrowness of the issue involved in the remanded permit proceeding played a similar role. Conversely, new permits or major modifications to existing permits may carry the opposite implication.

Substitute Process Provided. The provision of a substitute for a "full-dress" public hearing may act to satisfy public interest in a draft permit and thus make that interest less significant for purposes of deciding whether to hold a hearing. This factor was cited by the Administrator in *Spokane* (the Region held a public

"meeting" rather than a public "hearing")[18] and the Board in *Osage* (the Region met in person with the hearing requestor and allowed the requestor to make oral comments for the record).

Demographic Information. The Region argues that environmental justice considerations, and demographic and socioeconomic information, are important factors to consider when determining whether to grant a hearing under 40 C.F.R. § 124.12(a)(1). Petitioners similarly argue that permitting authorities should consider environmental justice when deciding whether to hold a public hearing. The Board agrees that, when applicable, these are factors that permitting authorities should consider when determining the degree of public interest in a given permit proceeding. Further, as the Board makes clear in Part VII.B below, environmental justice considerations also are plainly relevant to a permit issuer's decision as to whether to exercise its discretion to hold a public hearing under 40 C.F.R. § 124.12(a)(2).

g. *The Degree of Public Interest in the Draft Sierra Pacific Permit*

As stated above, the decision *whether* to hold a public hearing to "clarify one or more issues involved in the permit decision" is within the permit issuer's discretion, 40 C.F.R. § 124.12(a)(2); however, the permit issuer *must* hold a hearing whenever there is a "significant degree of public interest" in the draft permit, *id*. § 124.12(a)(1). Even so, a permit issuer has "some discretion" in making the factual finding of whether the standard mandating a hearing under section 124.12(a)(1) has been met. That discretion, however, is not limitless. Even where the Board has granted a permit issuer broad discretion in resolving factual issues, the Board has placed limits on that discretion. *See In re Russell City Energy Ctr., LLC*, 15 E.A.D. 1, 73 (EAB 2010) (noting that although "the permit issuer has broad discretion in determining whether a control option would redefine the source, * * * [s]uch discretion * * * is not unlimited"); *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 98 (EAB 1998) ("Generally, the choice of appropriate data sets for the air quality analysis is an issue largely left to the discretion of the permitting authority. * * * However, that discretion is not unlimited.") (citation omitted). The Board has reviewed the Region's discretionary determination regarding the degree of public

[18] As a general matter, public meetings are more informal gatherings than nonadjudicatory public hearings. Part 25 of Title 40 of the Code of Federal Regulations describes the way a "public meeting" differs from a "public hearing," for the purposes of public participation requirements in CWA, SDWA, and RCRA administrative proceedings, as that public meetings "do not require formal presentations, scheduling of presentations and a record of proceedings." 40 C.F.R. § 25.6.

interest in the draft Sierra Pacific permit under the factors suggested in the Region's Supplemental Response, Agency rulemakings, and prior decisions by the EPA Administrator and the Board. That review leads the Board to two conclusions: first, the Region did not follow such a multifactor approach in denying the hearing requests in this case; and second, the Region abused its discretion in determining that there was not a significant degree of public interest in the Sierra Pacific draft permit.

Notwithstanding the Region's statements in its Supplemental Brief that there is no "bright line" for defining the "significant degree of public interest" standard, and that application of this standard "should not be based simply on the number of requests for hearing received," Reg. 9 Suppl. Br. at 19-20, the Region appears to have followed precisely that approach. In the Response to Comments document, the Region simply cited to the hundreds of persons notified of the draft permit, related that it had received three hearing requests and fifteen comments, and then concluded that "[n]one of the requests for a public hearing demonstrated that there was a significant degree of public interest in the project" as the justification for its decision not to hold a public hearing.[19] RTC at 10. The Region followed a similar approach in its Response to the Petitions for Review. There, the Region noted that it "disseminated the public notice for our proposed action to over 800 groups and individuals using U.S. mail and to approximately 650 individuals and groups using electronic mail; we also published notices in the local paper, the *Record Searchlight*, and on the Region 9 Web site." Reg. 9 Resp. at 8. The Region then contrasted these numbers with the numbers of hearing requests (requests from three individuals, one of whom represented a group) and comments (twelve adverse comments) and concluded "we received very little indication that the public at large was interested in this permit decision." *Id*. The Board agrees with the Region's position in its Supplemental Response that a more nuanced and multifactored approach is necessary.[20]

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[19] In the same section of the Response to Comments document, the Region mentioned that it examined demographic data on Shasta County. RTC at 10. However, this discussion came in response to a comment that the Region was "violating the intent of Executive Order #12,898 with regard to Environmental Justice by circumventing the entire PSD permitting process," *id*. at 9, and the Region's discussion of the demographic data was directed at justifying the Region's determination "that outreach materials would not be translated into another language," *id*. at 10.

[20] To the extent the Region's Response suggests that a public hearing can be denied "[b]ecause Region 9 could provide a detailed and thorough response to all public comments," Reg. 9 Resp. at 10, the Board must disagree. If that was an appropriate

The Board's examination of the factors relevant to assessing the degree of public interest in the Sierra Pacific draft permit satisfy the Board that the public interest was significant. First, each of the requests raised issues that were material to the permit proceeding. Mr. Simpson supplied comments in some detail in his hearing request addressing the question of BACT. Reg. 9 Resp. attach. 2, app. B, at 3 (E-mail from Rob Simpson to Reg. 9 Air Permits Docket (Oct. 17, 2012)). Although the issues described in Ms. Lawrence's and Ms. Strand's hearing requests were more broadly framed, they clearly raised concerns regarding the cumulative air quality impacts of the Sierra Pacific facility, suggested alternatives to a cogeneration facility, and argued for consideration of environmental justice issues. *See* Reg. 9 Resp. attach. 1, exc. 9 & attach. 2, app. A. Thus, each of the hearing requests put forward issues well within the considerations the statute has denoted as appropriate for a PSD public hearing – namely, "the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations." 42 U.S.C. § 7475(a)(2). The Region's Response and Supplemental Response concede this issue. Reg. 9 Suppl. Br. at 15; Reg. 9 Resp. at 9-10. Where, as here, there are several hearing requests, each raising issues the statute has defined as material to the hearing, the Region has an obligation to consider them as a factor in deciding that there may be a significant degree of public interest, not just determining that commenters can submit those concerns in writing *in lieu of* having a public hearing under 40 C.F.R. § 124.12(a)(1).

Second, although the number of hearing requests was not overwhelming, neither was it insubstantial. Here, as noted above, each of the individuals filing hearing requests identified issues relevant to the draft permit. One of the requestors, Mr. Simpson, raised issues in some detail. Another requestor, Ms. Strand, was particularly insistent. Ms. Strand did not merely file one hearing request, she filed three. When the Region indicated it was not inclined to grant her requests, Ms. Strand would not take "no" for an answer and challenged the Region to explain the basis for its denial. Further, the Region's preliminary denial of Ms. Strand's hearing request led CCA, an organization to which Ms. Strand and two of the other Petitioners belong, to immediately petition the Board for review of that "denial." Finally, given that Ms. Strand had signed her requests as the co-chair of CCA and CCA had challenged the Region's denial of Ms. Strand's hearing request, it would be unfair to characterize Ms. Strand's hearing request as only representing a single

consideration, it is difficult to imagine when the permit issuer could not use such a factor to deny a public hearing. The Region is obligated to provide a response to comments by regulation, irrespective of whether the comments are received orally or in writing. *See* 40 C.F.R. § 124.17(a)(2).

individual. Collectively, these circumstances strike the Board as distinctly different than the several instances in which the Board has upheld a hearing denial in the face of a single hearing request. *See Attleboro*, 14 E.A.D. at 467 (one hearing request); *Sunoco*, UIC Appeal No. 05-01, at 13 (one hearing request); *City of Fort Worth*, 6 E.A.D. at 407 (one hearing request); *Osage*, 4 E.A.D. at 399 (one hearing request).

Turning to the number of public comments, the distinction between the present case and prior decisions upholding hearing denials becomes even more clear. The Region received fifteen comments on the Sierra Pacific draft permit, twelve of which were adverse. In comparison, in the prior permit cases in which the Administrator or the Board upheld hearing denials, there generally were only one or two public comments filed. *See Sunoco*, UIC Appeal No. 05-01, at 13 (two public comments); *City of Fort Worth*, 6 E.A.D. at 407 (one public comment); *Osage*, 4 E.A.D. at 399 (one adverse public comment); *see also Attleboro*, 14 E.A.D. at 467 ("limited comments"). Moreover, it is important to not just focus on the raw numbers. Context is relevant. The Sierra Pacific facility is not located in a major urban or suburban area. The City of Anderson has a population of approximately 10,000. U.S. Census Bureau, State and County Quick Facts (June 6, 2013). Shasta County itself is relatively sparsely settled, having a population of approximately 177,000 spread over nearly four million square miles.[21] *Id.* The Region, however, failed to provide any metric to evaluate the level of the response to the Sierra Pacific draft permit, such as examples of the level of the public response seen in other communities of comparable size when presented with a notice of draft PSD permits. Instead, the Region simply compared the number of responses to the permit notice (fifteen comments including three hearing requests) to the number of notices sent (over 1,000). Even as to these numbers, the Region presented no comparative analysis data to support its conclusion that this response rate was insignificant.

Additionally, the Board finds this comparison of limited value because the Region did not identify, with any specificity, the geographic distribution of the notices. The Region's Response merely states that the notices were mailed and e-mailed to "agencies, organizations, and public members for whom contact

[21] For comparison, Los Angeles County and San Diego County, two more urban/suburban California counties of roughly comparable area to Shasta County, have populations of 9,818,000 and 3,095,000, respectively. U.S. Census Bureau, State and County Quick Facts (June 6, 2013). The population per square mile for Los Angeles County, San Diego County, and Shasta County is 2,419.6, 735.8, and 46.9, respectively. *Id.*

information was obtained through a number of different methods, including requests made directly to EPA through Region 9's website (or through other means) from parties seeking notification regarding permit actions in California, within the SCAQMD, and other parties known to EPA that may have an interest in this action." Reg. 9 Resp. at 3. Given that parties receiving notices included not just individuals in the most directly affected community, but also persons throughout California who have expressed interest in PSD permits, it is possible that the majority of these notices went to individuals or organizations outside of Shasta County.[22]

In sum, absent some contextual analysis of the response rate to the Sierra Pacific draft permit notice, it is hard for the Board to determine what basis the Region had for its conclusion that "we received very little indication that the public at large was interested in this permit decision." Reg. 9 Resp. at 8. Notably, as discussed below, Shasta County reached precisely the opposite conclusion on the degree of public interest in the Sierra Pacific project in its EIR proceeding, where it received a similar number of comments.

Third, the level of public participation in local proceedings on the Sierra Pacific project indicates that the degree of public interest in the project was significant. Pursuant to the CEQA, the Shasta County Department of Resource Management ("SCDRM") prepared an EIR on the proposed Sierra Pacific cogeneration unit. The public participation process for production of the EIR involved circulation of a draft EIR for comment on August 6, 2010, two subsequent circulations of a revised draft EIR in response to public comments and new information pertaining to the potential greenhouse gas impacts of the project, and release of the final EIR in May 2012. The SCDRM received fourteen comments on the first draft report and four additional comments on each of the recirculated draft EIRs. In total, the SCDRM received comments from sixteen different parties (three of the commenters commented on each of the drafts). In its final EIR, the SCDRM explained that it had released a revised EIR for comment (the first revised EIR) because of "the relatively high public interest in the [greenhouse gas] topic." Final EIR § 1.0-3. In other words, the SCDRM concluded that fourteen public comments on the Sierra Pacific project showed "relatively high public interest."[23]

[22] In its Supplemental Response, the Region describes the number of notices that went to residents of Shasta County as "many." Reg. 9 Suppl. Resp. at 13. No citation to the record is provided to support this assertion.

[23] The Region claims in its Supplemental Response that it consulted with the SCAQMD "about the level of public interest." The Region, however, has not cited to any

Id. Although the Region is charged with making its own assessment as to the degree of public interest under section 124.12(a)(1), the Region fails to explain why it reached a different conclusion than the SCDRM when faced with a similar number of commenters.

Sierra Pacific argues that "the administrative record shows there was little public interest in the Project throughout the permitting process, including during the CEQA review." Sierra Pacific Resp. at 7. As support, Sierra Pacific cites to a June 15, 2012 e-mail that a Sierra Pacific executive sent to the Region describing a public hearing before the Shasta County Planning Commission on the Final EIR. That e-mail reads:

> The SPI Anderson EIR and Special Use Permit was approved at the Planning Commission yesterday with a 4-0 vote. The audience had two citizens that spoke against the project and had received two letters prior to the meeting: one from [the Center for Biological Diversity ("CBD")], another from Caltrans [State of California, Department of Transportation]. One of the citizens was suggesting that the project look into solar "cones" as the latest nano-technology for energy production; the other citizen was concerned that the project showed 330,000 tons of [carbon dioxide] left unmitigated and compared this to 63,000 cars. I'll forward the CBD letter – it was primarily focused and reiterated the same prior comments on [greenhouse gases] and carbon neutrality towards biomass.
>
> Overall, it was very positive with the local support on the project and lack of attendees. * * *
>
> As this relates to the PSD permit, having no public meeting still looks appropriate and we should focus on completing the draft of the permit * * *.

E-mail from David C. Brown, Envtl. Affairs & Compliance Mgr., Sierra Pac. Indus., to Omer Shalev & Gerardo Rios, EPA Reg. 9 (June 15, 2012) (Admin. Rec. I.32). Sierra Pacific argues that the fact that there were only two speakers at the hearing (neither of whom are petitioners in this appeal) and two opposition letters received demonstrates a lack of significant public interest. Sierra Pacific Resp. at 6. In the Board's view, this evidence shows the contrary. It demonstrates that, even prior to the initiation of the Region's public participation procedures on the federal permit, citizens attending a public hearing, a public interest group, and a state

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documentation of this consultation in the administrative record nor provided any information regarding what was learned.

government agency were raising issues – issues on air quality impacts and alternative power technologies – that are relevant to a PSD permit hearing. Further, while, as discussed below, it was up to the Region to make its own independent judgment on the degree of public interest, the Board places greater weight on SCDRM's judgment on the degree of public interest as expressed in its published EIR than on the judgment of the permit applicant as expressed in an e-mail, which, on its face, advocates a certain position ("having no public meeting still looks appropriate").

Fourth, as suggested by the Region, the Board has evaluated media reports on the project as an indicator of the degree of public interest. Although the Region did not include any analysis of the media coverage of the Sierra Pacific cogeneration unit, the Board can take official notice of items appearing in the public press to show what information is in the public realm. *In re Stonehaven Energy Mgmt., LLC*, 15 E.A.D. 817, 832 n.11 (EAB 2013); *cf. Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016, 1022 (9th Cir. 2009) ("Courts may take judicial notice of publications introduced to 'indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.'" (quoting *Benak v. Alliance Capital Mgmt., LP*, 435 F.3d 396, 401 n.15 (3d Cir. 2006))). A search of a commercial database disclosed nearly a dozen articles in local papers about the Sierra Pacific project in the months leading up to and following the comment period. The *Record Searchlight* carried four news articles chronicling the dispute over the CEQA review process for the Sierra Pacific project before the Shasta County Supervisors and the Shasta County Planning Board[24] and three opinion pieces on the merits of the project.[25] In one instance, a *Record Searchlight* news article on the Sierra Pacific project was picked up by other newspapers in the region, the *Chico Enterprise-Record* and the *Oroville Mercury*

[24] Alayna Shulman, *Activists Lose Bid to Stop Plant, Sierra Pacific Gets OK from Shasta County*, Rec. Searchlight (Redding, Cal.), July 18, 2012, at A001; Alayna Shulman, *Group Objects to New Power Plant, Sierra Pacific's Burn Plan Contested*, Rec. Searchlight (Redding, Cal.), July 15, 2012, at B001; Damon Arthur, *Power Plant Near Anderson OK'd, Facility Would Emit 330,000 Tons of Gases, Report Says*, Rec. Searchlight (Redding, Cal.), June 15, 2012, at A001; Damon Arthur, *Plant to Have Minor Impact, New Report Calls Facility "Carbon Neutral,"* Rec. Searchlight (Redding, Cal.), Feb. 19, 2012, at A001.

[25] Editorial, *When Convenient, Environmentalists Ignore the Long Run*, Rec. Searchlight (Redding, Cal.), July 18, 2012, at A006; Editorial, *Renewable Power Isn't Green Enough for Enviro Group*, Rec. Searchlight (Redding, Cal.), June 14, 2012, at A006; Editorial, *Without Clarity, Greenhouse-Gas Crusade Is Futile*, Rec. Searchlight (Redding, Cal.), Feb. 23, 2012, at A004.

Register.[26] The *Record Searchlight* also published a news article on the Region's request for comments on the federal PSD permit and, on April 27, 2013, ran an article on biomass power plants that discussed the proposed Sierra Pacific cogeneration boiler.[27] This level of media coverage suggests that, in fact, there was a fair amount of public interest in the draft permit.

The fifth factor mentioned above is the significance of the proposed action. Unlike in *Noranda*, the permit at issue here is not a minor modification to the existing PSD permit resulting in little-to-no change in emissions, but a major modification to a permit involving construction of a new boiler. Similarly, inapposite to *Spokane*, the permit review does not concern a single, narrow issue. Thus, there is no reason to discount the degree of public interest due to the insignificance of the action covered by the permit.

Finally, the Board considered whether the Region provided a substitute opportunity to the hearing requestors to participate in the proceeding as occurred in *Spokane* and *Osage*. The Region did communicate by e-mail with Ms. Strand and Mr. Simpson. These communications did serve a public participation purpose by providing information relevant to some of their stated inquiries. However, for two reasons, the Board concludes that these communications have, at best, a marginal impact on determining the degree of public interest.

First, the interaction here falls far short of what occurred in *Spokane* (public meeting) and *Osage* (face-to-face meeting with hearing requestor in which the requestor was permitted to submit oral comments for the record). Mr. Simpson's questions were of a non-substantive nature (e.g., what is the contact information for the applicant; what are the most relevant portions of the record to consider) and thus the Region's response to them cannot, in any way, be described as providing a substitute process for an interested party to have its views heard. With regard to the communications with Ms. Strand, the Region did not provide a full response to the questions of Ms. Strand that the Region did address; rather, it mainly directed her to documents in the record. Although this interchange did permit Ms. Strand to identify documents relevant to some of the questions she had raised, the limited

[26] Damon Arthur, *Use Permit Approved for Anderson Cogeneration Plant*, Chico Enter.-Rec. (Cal.), June 15, 2012; Damon Arthur, *Use Permit Approved for Anderson Cogeneration Plant*, Oroville Mercury Reg. (Cal.), June 15, 2012.

[27] Damon Arthur, *Biomass Plant's Environmental Benefits Up for Debate*, Rec. Searchlight (Redding, Cal.), Apr. 27, 2013; Damon Arthur, *EPA Seeking Public Comment on SPI Plant Near Anderson*, Rec. Searchlight (Redding, Cal.), Sept. 22, 2012.

nature of the communications from the Region makes it difficult to conclude that the communications provided a substitute participation process qualitatively different than a standard request for written comments.

Second, and more important, the Region failed to respond to Ms. Strand's demand that the Region spell out how it would determine whether the "significant degree of public interest" standard was met. *See* Reg. 9 Resp. attach. 2, app. A, at 4 ("What are your agenc[y']s procedures for determining the threshold requirement to hold a public hearing?"). Ms. Strand's query was made early enough in the comment period that a prompt response from the Region could have made a difference in how Ms. Strand framed her subsequent requests. Yet, instead of providing further information on how the Region evaluated the degree of public interest in a hearing, the Region simply referred Ms. Strand to the AAQIR on the draft permit and repeatedly urged her to submit written comments. The AAQIR mentions the regulatory test of "significant degree of public interest" but does not further explain that standard. AAQIR at 46.

The Board concludes that this factor supports no greater than a negligible reduction in characterization of the degree of public interest in a hearing on the draft permit.[28] Although the Board is willing to consider the impact of forms of substitute process different than were used in *Spokane* and *Osage*, the truncated and selective e-mail communications in this case do not rise to the level of a substitute means of public participation.

After weighing each of these factors, the Board holds that the Region abused its discretion in determining the degree of public interest. Most of the factors support the conclusion that there is a significant degree of public interest in a public hearing and none of the factors support the opposite conclusion in a meaningful manner. Most influential in this weighing process is that three parties identified multiple issues relevant to the PSD permit to be raised at a public hearing, a total of fifteen comments were received on the draft permit for a facility in a relatively

[28] The Board also considered the parties' contentions about the demographic factors bearing on environmental justice. However, because none of the parties have clearly articulated the manner in which such information should be relied upon in determining whether any particular set of facts amounts to a significant degree of public interest, the Board has given demographic information and environmental justice considerations no weight in determining whether the Region erred in denying the hearing requests in this case.

sparsely populated county, and the local government has described the public interest in the Sierra Pacific project as "relatively high."[29]

The Board's holding in this case is not intended to turn the "significant degree of public interest" standard into an evaluation of whether there is any public interest. Neither is it intended to reduce a permit issuer's discretion in making the "significant degree of public interest" determination. As this decision recognizes, the factors the Region put forward in this case in its Supplemental Brief are relevant to that determination. Additionally, the Board is not suggesting that the factors considered in this case are preclusive of the consideration of other factors bearing on the degree of public interest that may be identified under a different set of circumstances. Nonetheless, there are limits to the permit issuer's exercise of its discretion in evaluating the degree of public interest. If a permit issuer decides not to hold a public hearing under 40 C.F.R. § 124.12(a)(1), it must clearly articulate

[29] The Board also is troubled by various statements in the administrative record that raise questions as to whether the Region approached the public hearing issue with an open mind. In an e-mail sent months before the comment period opened on the draft federal permit, a Sierra Pacific executive reports to the Region on the public hearing before local governmental officials and states that "*having no public meeting still looks appropriate*." E-mail from David C. Brown, Envtl. Affairs & Compliance Mgr., Sierra Pac. Indus., to Omer Shalev & Gerardo Rios, EPA Reg. 9 (June 15, 2012) (Admin. Rec. I.32) (emphasis added). Viewed even in the best light, this highlighted phrase could be construed as part of Sierra Pacific's on-going suggestions to the Region that a public hearing was not needed. Alternatively, the highlighted phrase could be read as suggesting that the Region already had made this determination at least three months before the public comment period opened on the draft permit – and before some citizens had notice of the project – and communicated with Sierra Pacific at some point before or after making this decision. Later, the Region responded to Ms. Strand's request, early in the comment period, for a public hearing by advising her that "EPA does not currently plan to hold a public hearing for this proposed action," Reg. 9 Resp. attach. 2, app. A, at 3, and pointedly ignored her request for an explanation of what threshold showing she needed to make to obtain a hearing. This failure to respond to Ms. Strand's request for clarification is particularly glaring in light of Ms. Strand's prompt attempt to rectify the deficiency in her hearing request that the Region had identified (i.e., failure to specify a list of issues for the hearing), and her insistent and repeated demands for a public hearing. Rather than respond to Ms. Strand's request for clarification on the threshold for obtaining a hearing, the Region repeatedly urged her to submit written comments. Although when viewed independently these statements may be of no moment, in combination, they create the appearance that the Region had prejudged the need for a hearing and refused to reconsider this position in light of later circumstances with an open mind.

its reason for that decision based on the type of factors discussed in this opinion in light of the circumstances of that case.

The remand for a public hearing in this case is consistent with the Board's repeated emphasis on "the importance of ensuring that Agency decisionmakers adhere fully to the public participation requirement of [the Part 124] regulations." *In re Chevron Mich., LLC*, 15 E.A.D. 799, 808 (EAB 2013). The Board repeatedly has remanded permit decisions for failure to comply fully with these requirements. *E.g.*, *id.* (considering and remanding permit because it was unclear in the administrative record whether the Region had completed responding to comments prior to issuance of the final permit decision); *In re Weber* #4-8, 11 E.A.D. 241, 244-46 (EAB 2003) (considering and remanding permit because the permit issuer signed and mailed the response to comments letter three days after signing the final permit); *In Russell City Energy Ctr.*, 14 E.A.D. 1, 27-30 (EAB 2008) (considering and remanding permit because of procedural problems with the public notice of the draft permit); *see also In re Shell Offshore, Inc.*, 15 E.A.D. 536, 603-10 (EAB 2012) (considering alleged irregularities at the public hearing and in the length of public comment period). Moreover, as noted above, the Board specifically has taken into account the statutory objectives behind the public participation provisions of the CAA in remanding a PSD permit for failure to comply with part 124 regulations. *In re RockGen Energy Ctr*., 8 E.A.D. 536, 557 (EAB 1999). The Board's view is that adherence to procedural requirements is critical to upholding the "integrity" of the permit review process. *In re ConocoPhillips Co.*, 13 E.A.D. 768, 776 (EAB 2008); *see Weber*, 11 E.A.D. at 246 ("Although this remand may not result in any change in the Region's ultimate permit decision, remand is nonetheless appropriate to ensure that the permit issuer fully complies with the requirement to give adequate and timely consideration to public comments at the time of issuing a final permit decision."). A remand for a public hearing on the Sierra Pacific permit will both support the integrity of that permit proceeding and further the CAA's statutory objective of adequate public participation in permit decisionmaking.

B. *The Board Need Not Resolve Whether the Region Abused Its Discretion in Denying a Public Hearing Under 40 C.F.R. § 124.12(a)(2)*

Mr. Coleman argues that the Region also abused its discretion by not granting a public hearing under its discretionary authority under 40 C.F.R. § 124.12(a)(2). Coleman 1st Am. Pet. at 7. Mr. Coleman's claim here is that the Region should have exercised its discretion to hold a public hearing because Shasta County is an environmental justice community.[30] Environmental justice considerations may be a factor that a permit issuer considers when deciding whether to hold a *discretionary* public hearing under 40 C.F.R. § 124.12(a)(2) or conduct some other form of public outreach to overburdened communities.[31] In its recent environmental justice notice, EPA stated that it "does not intend for its regional offices to enhance engagement opportunities in every instance" where a permit may affect an overburdened community; however, among the examples of the types of permits that may lead a permit issuer to decide to hold enhanced outreach were "[c]onstruction permits under the [CAA], especially new major sources (or major modification of sources) of criteria pollutants" if the permits involve significant public health or environmental impacts and the community already was overburdened. EPA Activities to Promote Environmental Justice in the Permit Application Process, 78 Fed. Reg. 27,220, 27,223 (May 9, 2013). EPA further noted that:

> EPA regional offices have the discretion to use other considerations to prioritize EPA-issued permits for enhanced outreach that do not meet either or both of those criteria. One important consideration would be whether a community has expressed concerns over a permit application or renewal. * * * EPA expects that it will only infrequently provide enhanced outreach for permitted activities in response to public concerns in the absence of information about potential significant public health or environmental impacts.

[30] Ms. Strand and Ms. Draisner appear to make the same argument, although not with explicit references to the regulatory provision.

[31] EPA stated that "Plan EJ 2014 uses the term 'overburdened' to describe the minority, low-income, tribal and indigenous populations or communities in the United States that potentially experience disproportionate environmental harms and risks due to exposures or cumulative impacts or greater vulnerability to environmental hazards." 78 Fed. Reg. 27,220, 27,220 (May 9, 2013).

Id. at 27,224.[32]

For two reasons, however, the Board does not need to reach this question. First, the Board has concluded above that the Region should have held a public hearing under the mandatory hearing provision in 40 C.F.R. § 124.12(a)(1). Second, Petitioners have not credibly alleged that Shasta County is an environmental justice community. Their comments on the draft permit contained only unsupported assertions that Shasta County is an environmental justice community or elliptical references to environmental justice. Reg. 9 Resp. attach. 1, exc. 9, at 2 (Mr. Coleman: "If the US EPA uses the proper pollution scale, we feel that Environmental Justice is served."); *id.* at 7 (Mr. Simpson: "The EPA failed to identify the Environmental Justice community in the vicinity of the proposed project."); *id*. at 13 (Ms. Strand: "This [project] is clearly in violation of the intent of Environmental Justice in which your agency is the lead federal agency."). These statements do not raise the question of whether Shasta County is an environmental justice community with sufficient specificity to preserve that issue for review by the Board. 40 C.F.R. § 124.19(a)(4)(ii); *see RockGen*, 8 E.A.D. at 548 (concluding that the issue "was not raised with sufficient specificity during the comment period and thus was not preserved for review by the Board"); *see also In re EcoEléctrica, LP*, 7 E.A.D. 56, 69 & n.17 (EAB 1997) (noting that the Region should "examine any 'superficially plausible' claim that a minority or low-income population may be disproportionately affected by a particular facility," but rejecting a claim of noncompliance with the Executive Order on environmental justice because the party made no "showing" of a disproportionate impact on a minority or low-income community or "even explain[ed] how or why an examination of additional data would be expected to reveal such an impact").[33]

[32] Moreover, under 40 C.F.R. § 124.12(a)(2), the Region has broad latitude when deciding whether to hold a public hearing to "clarify one or more issues involved in the permit decision," because the regulation explicitly commits such a decision to the permit issuer's "discretion." Petitioners would have a high bar to succeed on a challenge to a permit issuer's decision *not* to hold a discretionary hearing. *See* 6 Jacob A. Stein et al., Admin. Law § 51-03, at 51-243 (2013) ("The narrowest scope of judicial review of an agency fact finding is afforded by the arbitrary, capricious, or abuse of discretion test.").

[33] One of Ms. Draisner's supplemental responses contains undocumented allegations to the effect that Shasta County is a low-income community. E-mail from Celeste Draisner, CCA, to Victoria Robinson, Office of Envtl. Justice, EPA (June 13, 2013). However, the failure to present these factual allegations to the Region cannot be cured by including them in a petition for review, and certainly not by including them for the first time in supplemental briefing on a legal question. *See, e.g.*, *In re City of Palmdale*,

In his Petition, however, Mr. Coleman asserts that Shasta County already has been identified as an environmental justice community by the Board in its decision in *Knauf I*. Coleman 1st Am. Pet. at 6. Mr. Coleman is mistaken; he has misread the Board's decision in *Knauf I*. In that case, the Board remanded a PSD permit because there was not a sufficient response in the record to environmental justice concerns raised by a commenter. *Knauf I*, 8 E.A.D. 121, 175 (EAB 1999). The Board did not make a finding regarding whether an environmental justice community in Shasta County was affected by the permit in that case. When the case later returned to the Board, the Board again did not reach the factual issue of whether an environmental justice community was affected by the permit. *See Knauf II*, 9 E.A.D. 1 (EAB 2000). Rather, the Board upheld the Region's conclusion that no one in Shasta County, including anyone in any environmental justice communities, would be adversely affected by the permit because "the additional [particulate matter] from the proposed Knauf facility will not exceed the federal NAAQS [National Ambient Air Quality Standards] or PSD increment for [particulate matter]." *Id.* at 16. The Board expressly refused to consider the petitioners' challenge to the Region's demographic analysis of Shasta County. *Id*. at 17.

Accordingly, the Board has not considered whether the Region abused its discretion in not holding a public hearing under 40 C.F.R. § 124.12(a)(2).

C. *The Board Denies Review of a Number of Petitioners' Challenges as a Matter of Law*

A number of issues raised by the Petitioners do not, as a matter of law, meet the threshold requirements for review by the Board and/or fail to demonstrate that the Region erred. The Board addresses these challenges in the following pages, with the hope and intent that their inclusion in this Order will assist in clarifying and streamlining future proceedings for this PSD permit.

1. *The Region Did Not Clearly Err or Abuse Its Discretion in Paraphrasing or Summarizing Public Comments*

Mr. Simpson and Ms. Strand each suggest that in responding to public comments on the draft permit, the Region improperly paraphrased or incompletely summarized their comments or the comments of others. *See* Simpson Pet. at 7-8;

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15 E.A.D. 700, 721 (EAB 2012) ("The Board frequently has rejected appeals where issues that were reasonably ascertainable during the comment period were not raised at that time, but instead were presented for the first time on appeal."), *appeal docketed sub nom. Simpson v. EPA*, No. 12-74124 (9th Cir. Dec. 18, 2012); *RockGen*, 8 E.A.D. at 546-48.

Strand Pet. at 1. They imply that this action, by itself, supplies a basis for remanding Sierra Pacific's permit.

The law is to the contrary. Permit issuers are required to "[b]riefly describe and respond to all significant comments" submitted during the public comment period, including at any public hearing. 40 C.F.R. § 124.17(a)(2). In fulfilling this obligation, permit issuers are not required to respond on an individualized basis to each discrete comment submitted by members of the public, in the same length and level of detail as the comment itself. *See, e.g.*, *In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 587 (EAB 2004); *In re Hillman Power Co.*, 10 E.A.D. 673, 695-97 & n.20 (EAB 2002); *Knauf I*, 8 E.A.D. at 134-42. Instead, permit issuers are allowed to paraphrase or summarize public comments, group similar comments together, and provide unified responses thereto. *See, e.g.*, *In re Envtl. Disp. Sys., Inc.*, 12 E.A.D. 254, 286-87 (EAB 2005) (combination and paraphrase of public comments is acceptable where permit issuer's responses "give 'thoughtful and full consideration' to public comments * * * and are 'clear and thorough enough to adequately encompass the issues raised'" (quoting *RockGen*, 8 E.A.D. at 557, and *Wash. Aqueduct*, 11 E.A.D. at 585)).

Accordingly, in a case where, as here, petitioners claim that a permit issuer paraphrased or summarized a public comment, such claims are not, by themselves, sufficient to trigger a remand. If, by making this kind of claim, the petitioners intend to question the adequacy of the permit issuer's response to comments, the petitioners must explain what the permit issuer overlooked, omitted, misunderstood, or otherwise did wrong in its response, as required by the permitting regulations. *See* 40 C.F.R. § 124.19(a)(4). Otherwise, the mere fact that a permit issuer did not fully quote a party's entire comment does not, by itself, indicate that the permit issuer failed to respond adequately to that comment. *E.g.*, *Envtl. Disp. Sys.*, 12 E.A.D. at 286-87; *Hillman*, 10 E.A.D. at 696-97 & n.20. Because neither Mr. Simpson nor Ms. Strand provided more than a bare assertion of improper paraphrase, the Board denies review of the petitions on this basis.

2. *The Region Did Not Clearly Err or Abuse Its Discretion in Excluding Improperly Submitted Public Comments*

Ms. Draisner argues that the Region erred by failing to include her comments in the administrative record for Sierra Pacific's permit decision. She is incorrect. The public notice documents clearly instructed interested parties to send written comments to Mr. Omer Shalev at one of two possible addresses: (1) the Region's air permits electronic mail address at R9airpermits@epa.gov; or (2) the Region's physical office on 75 Hawthorne Street in San Francisco, California. *See*

AAQIR at 46-47; Region 9, U.S. EPA, *Public Notice of Proposed Permit Modification and Request for Public Comment, Sierra Pacific Industries – Anderson Division* 2 (Sept. 2012). Instead of complying with these clear instructions, Ms. Draisner sent her comments to Mr. Shalev's personal EPA electronic mail account. *See* Letter from Deborah Jordan, Dir., Air Div., EPA Reg. 9, to Celeste Draisner 1 (Mar. 16, 2013) ("Jordan Letter").

The Region explains that it has a long-standing practice of using a distinct electronic mail account for receiving public comments on official PSD permitting actions, precisely so that it can avoid the situation that arose here – i.e., comments that should have been part of the Agency's decisionmaking process are overlooked amidst the dozens of unrelated electronic mails an individual EPA employee might receive on any given day. Reg. 9 Resp. at 15. Such a practice is entirely reasonable, and the Region has no duty to accept misdirected comments from any party. *See* 40 C.F.R. §§ 124.10(d), .11, .13. To find otherwise would undermine the smooth and timely processing of permit applications and inject needless confusion and uncertainty into the public comment and response process.

The Region actually went to extra lengths in this case to track down Ms. Draisner's comments and provide a public response. *See* Jordan Letter at 1 & encl. In so doing, the Region appropriately did not include its response in the administrative record, since the permit decision was not based on those comments. Instead, the Region categorized the comments and Agency response in the public permit record as "Post-Final Decision Material Not Included in the Administrative Record." *See* http://www.regulations.gov/#!document Detail;D=EPA-R09-OAR-2012-0634-0014. The Board denies review of the petition on this issue.

3. *The Region Did Not Clearly Err or Abuse Its Discretion in Categorizing Sierra Pacific's Proposed Boiler as a "Major Modification" Rather Than as a "Major Stationary Source"*

Ms. Strand suggests that the Region erred by categorizing Sierra Pacific's proposed facility as a new "major modification" rather than as a new "major stationary source" of air pollution. *See* Strand Pet. at 1 (citing community's "great confusion" on this question); *see also* Letter from Kevin P. Bundy, Senior Att'y, CBD, to Omar Shalev, EPA Reg. 9, at 10 (Oct. 17, 2012) ("CBD Comments"); RTC at 34. She implies that the Region's decision to categorize the facility in this way resulted in Sierra Pacific receiving a less rigorous, less protective air emissions permit than otherwise would have been the case.

Section 165(a) of the CAA provides that "[n]o major emitting facility * * * may be constructed in any area" subject to the PSD program unless the proposed

facility first undergoes an air quality review process and obtains a PSD permit that imposes limits on air pollution emissions from the facility. CAA § 165(a)(1), 42 U.S.C. § 7475(a)(1). Both new "major stationary sources" and new "major modifications" of such sources can qualify as "major emitting facilities." *See* CAA § 169(1), 42 U.S.C. § 7479(1) (definition of "major emitting facility"); 40 C.F.R. § 52.21(b)(1)(i) (definition of "major stationary source"); 40 C.F.R. § 52.21(b)(1)(i) (definition of "major modification").

Accordingly, both types of sources must employ BACT to minimize emissions of regulated pollutants, conduct source impacts and air quality analyses, and comply with other preconstruction review requirements. *See* CAA § 165, 42 U.S.C. § 7475; 40 C.F.R. § 52.21(a)(2), (j), (k), (m); *see also NMU*, 14 E.A.D. at 288 (holding that a proposed new boiler at an existing heating plant was a "major modification" that would result in "a significant net increase" of certain air contaminants and thus required a PSD permit); *In re Deseret Power Elec. Coop.*, 14 E.A.D. 212. 219-20 (EAB 2008), (holding that a proposed new waste-coal combustion unit qualified as a "major modification" of an existing major stationary source and as such required a PSD permit).

Ms. Strand did not provide any specific legal reasons to explain why the chosen categorization is erroneous or otherwise problematic. *See* Strand Pet. at 1-2. Ms. Strand similarly did not identify any specific differences in outcome that resulted from the allegedly erroneous categorization. *See id*. Because Ms. Strand's arguments on this topic lack sufficient specificity, the Board denies review of the petition on this issue. *See Knauf II*, 9 E.A.D. at 5-6 (denying *pro se* petitions for lack of sufficient specificity).

4. *The Region Did Not Clearly Err or Abuse Its Discretion in Its Treatment of Fine Particulate Matter Emissions Issues*

Mr. Simpson argues that the Region erred in evaluating the air quality impacts of fine particulate matter ("$PM_{2.5}$") emissions from Sierra Pacific's proposed facility. He claims the Region: (1) lacked authority to waive a purported "on-site monitoring requirement" for $PM_{2.5}$; (2) used a "Significant Impact Level" ("SIL") for $PM_{2.5}$ averaged on an annual basis ("$PM_{2.5}$ (annual)") to determine that a cumulative air quality impacts analysis for $PM_{2.5}$ (annual) was not necessary; and (3) relied on outdated or inapplicable air quality modeling programs to analyze $PM_{2.5}$ impacts. Simpson Pet. at 1-3. None of these arguments were raised in the public comment period, but Mr. Simpson claims they were not "reasonably ascertainable" at that time and therefore may properly be raised for the first time in this appeal. *See id*. at 1-2.

Mr. Simpson points out that the Region augmented its $PM_{2.5}$ analysis after the close of public comment in this case to ensure its permit decision accorded with a January 2013 ruling in *Sierra Club v. EPA*, 705 F.3d 458 (D.C. Cir. 2013). *See* Simpson Pet. at 1-2; RTC at 3-5. In that ruling, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit" or "Court") vacated and remanded final PSD regulations that governed the use of $PM_{2.5}$ SILs. 705 F.3d at 463-66. The court also vacated PSD regulations that established a $PM_{2.5}$ "Significant Monitoring Concentration" ("SMC").[34] *Id*. at 466-69.

a. *The Region Did Not Waive the $PM_{2.5}$ Monitoring Requirements, as Mr. Simpson Alleges*

Mr. Simpson cites the *Sierra Club* decision to support his argument that the Region lacked authority to waive the monitoring requirements for $PM_{2.5}$ emissions. *See* Simpson Pet. at 2-3. This argument fails because the Region did not, in fact, waive the requirements. Instead, in keeping with the PSD regulations, Sierra Pacific submitted ambient $PM_{2.5}$ monitoring data collected in 2011 from a station at the Redding Department of Health, approximately 6.5 miles to the northeast of the proposed project site. *See* AAQIR at 28 & tbl.8.2-1; *see also* 40 C.F.R. §§ 51.166(m)(1)(i), (ii), (iv), 52.21(m)(1)(i), (ii), (iv). As the Board explained in *NMU*, "EPA has long implemented the PSD program pursuant to the understanding that representative data may be substituted [for on-site data] where circumstances warrant, * * * and the Board and its predecessors have long upheld the Agency's guidance to that effect." 14 E.A.D. at 328 (citing Agency guidance documents). The Board denies review of the petition on this issue.

[34] EPA historically has used SILs and SMCs to help determine whether facility emissions are significant enough to trigger various PSD requirements. A SIL is a numeric value, measured in micrograms per cubic meter ("$\mu g/m^3$"), that represents the level of ambient impact below which the EPA considers a source to have an insignificant effect on ambient air quality. *See* 72 Fed. Reg. 54,112, 54,138-39 (Sept. 21, 2007). An SMC is an "'air quality concentration *de minimis* level[] for each pollutant * * * for the purpose of providing a possible exemption from monitoring requirements.'" *Id*. at 54,141 (quoting 45 Fed. Reg. 52,676, 52,707 (Aug. 7, 1980)).

b. *The Region Did Not Solely Rely on the Now-Vacated SIL for $PM_{2.5}$ (Annual) Emissions as a Basis for Excusing the Cumulative Impacts Analysis for That Pollutant, as Mr. Simpson Alleges*

Mr. Simpson also cites the *Sierra Club* decision to support his argument that the Region erroneously relied on a SIL (now vacated) to avoid analyzing the cumulative impacts of Sierra Pacific's projected $PM_{2.5}$ (annual) emissions. Simpson Pet. at 1-2. This argument fails because in excusing the $PM_{2.5}$ (annual) cumulative impacts analysis, the Agency did not merely compare Sierra Pacific's projected average annual $PM_{2.5}$ emissions to the relevant SIL.[35]

Instead, in light of the *Sierra Club* decision, the Region carefully examined the ambient air concentration of $PM_{2.5}$ and concluded that both the background $PM_{2.5}$ levels and Sierra Pacific's projected $PM_{2.5}$ emissions were sufficiently low that neither the $PM_{2.5}$ (annual) NAAQS nor PSD increment was in any danger of being exceeded. *See* RTC at 4 (observing that "[t]he AAQIR and further analysis included here show that the Project does *not* present the type of situation in which existing air quality in the affected area is already close to the NAAQS or PSD increment, such that a source with an impact below the $PM_{2.5}$ SILs could nevertheless cause or contribute to a violation of the $PM_{2.5}$ NAAQS or increment") (emphasis added). Therefore, the Board denies review of the petition on this issue.

c. *Mr. Simpson Did Not Preserve for Review Issues Related to the Region's Use of AERMOD and CALPUFF Modeling Programs*

Finally, Mr. Simpson argues that the Region erred by relying on an "antiquated" version of "AERMOD," an air quality modeling program used to assess impacts within fifty kilometers of a proposed stationary source. Simpson Pet. at 2; *see* 40 C.F.R. pt. 51, app. W, § 4.2.2.b. He argues further that the Region also erred by relying on "CALPUFF," another air quality modeling program used to assess impacts at greater distances (i.e., fifty to 300 kilometers). Simpson Pet. at 2-3; *see* 40 C.F.R. pt. 51, app. W, §§ 6.1, 6.2.3. Mr. Simpson does not cite to anything new in *Sierra Club* in so arguing because that decision does not address questions of appropriate use of these models. Instead, he references Sierra Pacific's 2010 permit application and May 2012 air quality modeling correspondence. Both of these documents were available for review during the original public comment period; thus, under the permitting regulations, arguments pertaining to them were

[35] In addition, in striking down the SILs themselves, the D.C. Circuit declined to rule on the deeper question whether EPA possesses authority to promulgate SILs in the first instance. The court explicitly stated that that legal question was "not prudentially ripe" and therefore was reserved for another day. *Sierra Club*, 705 F.3d at 464.

reasonably ascertainable at that time and should have been raised then. *See* 40 C.F.R. §§ 124.13, .19(a). Accordingly, the Board denies review of the petition on this issue. *See In re Christian Cnty. Generation, LLC*, 13 E.A.D. 449, 459 (EAB 2008) ("The regulatory requirement that a petitioner must raise issues during the public comment period 'is not an arbitrary hurdle, placed in the path of potential petitioners simply to make the process of review more difficult; rather, it serves an important function related to the efficiency and integrity of the overall administrative scheme.'" (quoting *In re BP Cherry Point*, 12 E.A.D. 209, 219 (EAB 2005))).

5. *The Region Did Not Clearly Err or Abuse Its Discretion in Determining That the Addition of a Solar Energy Component or the Alteration of the 90% Biomass-10% Natural Gas Fuel Mix Would "Redefine the Source"*

To establish appropriate air pollution emissions limits through BACT analyses, permit issuers routinely consider the capabilities of "inherently lower polluting" processes or practices and "add-on" air pollution control technologies that are available for use at the proposed facility. *See* Office of Air Quality Planning & Standards, U.S. EPA, *New Source Review Workshop Manual* B.10 (draft Oct. 1990). As a general matter, however, Agency policy provides that permit issuers need not consider technology alternatives that would require "redefining the design" of the source (or, as shorthand terminology, "redefining the source"), as proposed by the permit applicant. *See id*. at B.13; *Knauf II*, 8 E.A.D. at 136.

The Board has developed a body of case law on the concept of "redefining the source," which contains detailed explanations of the history, basis, and functioning of the policy. *See, e.g.*, *In re City of Palmdale*, 15 E.A.D. 700, 724-39 (EAB 2012), *appeal docketed sub nom. Simpson v. EPA*, No. 12-74124 (9th Cir. Dec. 18, 2012); *In re Desert Rock Energy Co.*, 14 E.A.D. 484, 524-30 (EAB 2009); *NMU*, 14 E.A.D. at 301-03; *In re Prairie State Generating Co.*, 13 E.A.D. 1, 14-34 (EAB 2006), *aff'd sub nom. Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007).

In a nutshell, these cases indicate that permit issuers should begin their analyses of potentially available control technologies by examining how the permit applicant defines the proposed facility's "purpose" or "basic design," which typically is set forth in the permit application and related documents. *See, e.g.*, *Palmdale*, 15 E.A.D. at 731-33; *Desert Rock*, 14 E.A.D. at 529-32; *Prairie State*, 13 E.A.D. at 21-23. The permit issuer then takes a "hard look" at which design elements are "inherent" to the applicant's purpose and which design elements could possibly be altered to achieve pollutant emissions reductions without disrupting the applicant's "basic business purpose" for the proposed facility. *See, e.g.*, *Desert Rock*, 14 E.A.D. at 530, 533; *NMU*, 14 E.A.D. at 301-03; *Prairie State*, 13 E.A.D.

at 27; *Knauf I*, 8 E.A.D. at 136-44. In taking this hard look, the permit issuer must ensure that the proposed facility's design has been "derived for reasons independent of air quality permitting." *Palmdale*, 15 E.A.D. at 731 (citing cases). Finally, the permit issuer has discretion under section 165(a)(2) of the CAA, 42 U.S.C. § 7475(a)(2), to consider "alternatives" to the proposed facility. *See, e.g.*, *Desert Rock*, 14 E.A.D. at 524, 532-36; *Prairie State*, 13 E.A.D. at 28-34.

In the present case, Mr. Simpson argues that the Region provided an inadequate response, unsupported by the administrative record, to his comment suggesting that a solar energy component be considered in the BACT analyses for the proposed facility. Simpson Pet. at 5-7. Mr. Simpson had commented that "[a] solar component would reduce all emissions by preheating the system or augmenting the electrical output. Solar energy is an inherently lower emitting, add-on control technology." Simpson Comments at 2. Mr. Simpson also argues on appeal that the Region erred by failing to include in the BACT analyses different variations of the permitted fuel mix (10% natural gas, 90% biomass). Simpson Pet. at 7-10. He states in his comments that increased gas use would raise the total combustion temperature, produce more complete combustion, and reduce emissions, resulting in a cleaner facility. Simpson Comments at 1.

In declining to consider solar energy in its BACT analysis, the Region responded as follows:

> A solar component for this Project presents a significant departure from the existing facility's operations and the Project's purpose. In this instance, the existing lumber facility will add equipment within its existing physical footprint and utilize the excess biomass at this and other Sierra Pacific sawmill or lumber operations.

RTC at 13. The Region similarly declined to augment the BACT analyses by investigating different fuel mix proportions, claiming that it was "unclear what mix the commenter is ultimately recommending and where this should be incorporated into the analysis." *Id*. The Region further explained that "[a]ccording to Sierra Pacific's 2010 Application, Sierra Pacific intends to use biomass from existing Sierra Pacific facilities, as well as in-forest materials and various sources of agricultural and urban wood waste. Therefore, an *inherent* aspect of the project is that its fuel use be primarily biomass." *Id*. (emphasis added).

The Board finds no basis for a remand on these issues. The Board's review of the record as a whole makes clear that Sierra Pacific's "purpose" in proposing this project is to put to use the hundreds of thousands of bone-dry tons of wood waste the lumber company has in the Shasta County region, for the production of

lumber and electricity. *See, e.g.*, ENVIRON Int'l Corp., *Biomass-Fired Cogeneration Project Authority to Construct and [PSD] Permit Application for Sierra Pacific Industries-Anderson Facility* 3-4 (Mar. 2010) (AR I.01) ("Permit Appl."); AAQIR at 3-4. These productive uses of waste biomass are the core of the proposed project; thus, the "inherent aspect" identified by the Region in the response to comments as the burning of biomass is reasonable and supported by the record. Indeed, the record establishes that Sierra Pacific has more surplus biomass at its various facilities than its proposed Anderson boiler can consume on an annual basis. Specifically, the Region's AAQIR states:

> Currently, the Anderson lumber operation produces approximately 160,000 BDT of wood waste per year. Approximately 60,000 BDT are consumed by the existing cogeneration unit, 20,000 BDT are trucked to other biomass power plants, and the roughly 80,000 BDT balance is trucked to other markets (e.g. wood chips to pulp mills). The new proposed boiler will have the capacity to consume *a maximum of 219,000 BDT per year.* Roughly 80,000 BDT will be generated by the facility's existing lumber operations at its current output, [and] additional wood fuel will be transported by truck to the facility *from [Sierra Pacific's] other lumber operations in California.*

AAQIR at 4 (emphasis added); *see* Permit Appl. at 3-4 ("the available supply from [Sierra Pacific]-owned or [-]controlled facilities and timberlands totals 400,000 [BDT] per year"). Given these facts, requiring Sierra Pacific to burn fewer tons of wood waste so that it could generate solar power or burn more natural gas instead would plainly disrupt the project's "basic business purpose" of using as much surplus biomass as possible to generate steam to be "used to dry lumber in existing kilns for the lumber operation, as well as feed a turbine that will drive a generator to produce electricity for use on site or for sale to the electrical grid."[36] AAQIR at 4.

[36] The Board notes that in its responses to comments, the Region gave somewhat different responses as to the basic "purpose" of the facility. *Compare, e.g.*, RTC at 13 (stating that a solar component "presents a significant departure" from the project's "purpose," and noting that "an inherent aspect of the project is that its fuel use be primarily biomass") *with id*. at 24 (explaining that Sierra Pacific's "business purpose in constructing the new boiler is two-fold: to [provide] process steam for its mill operations and to provide a renewable energy source of grid power"). The Region should take care in the future to ensure that its statements regarding a project's "purpose" or "basic design" are clear and precise, so as to avoid misunderstandings of the kind presented by members of the public in this case.

Solar power in particular would displace the applicant's proposal with an alternative energy source that, even though renewable like biomass, would play absolutely no role in putting to beneficial use Sierra Pacific's millions of tons of wood waste. Given these facts, requiring Sierra Pacific to set aside some of its surplus biomass so that a solar component could be constructed and operated instead would impermissibly redefine the source. *See, e.g.*, *Prairie State*, 13 E.A.D. at 14-34 (rejecting arguments that a proposed "mine-mouth" coal facility be compelled to burn low-sulfur fuel or install alternative power sources (such as wind or solar) because such changes would "redefine the source"). Accordingly, the Region did not err by refusing to consider this option further.

The question of fuel mix is a closer one, in light of the fact that the Agency's Greenhouse Gas Permitting Guidance acknowledges that "when a permit applicant has incorporated a particular fuel into one aspect of the project design (such as startup or auxiliary applications), this suggests that a fuel is 'available' to a permit applicant." Office of Air Quality Planning & Standards, U.S. EPA, Doc. No. EPA-457/B-11-001, *PSD and Title V Permitting Guidance for Greenhouse Gases* 28 (Mar. 2011). "In such circumstances," the guidance continues, "greater utilization of a fuel that the applicant is already proposing to use in some aspect of the project design should be listed as an option in Step 1 [of the BACT analysis,] unless it can be demonstrated that such an option would disrupt the applicant's basic business purpose for the proposed facility." *Id.*

This guidance gives a straightforward answer to the Region's purported questions about where in the BACT analysis consideration of differing fuel mixes should be incorporated. *See* RTC at 13. However, though the Region readily could have evaluated higher percentages of natural gas than the 10% proposed by Sierra Pacific, to do so again would have undermined the company's plan to use as much of its waste biomass fuel as possible, particularly at the 49% gas level Mr. Simpson suggests. Simpson Pet. at 9. It also would have triggered the imposition of New Source Performance Standards ("NSPS") emissions limits for NO_x that apply on an on-going basis to wood- and natural gas-fired boilers of the type proposed by Sierra Pacific. *See* 40 C.F.R. § 60.44b(d). The Agency's CAA regulations provide that if such a boiler has an "annual capacity factor" for natural gas that is less than or equal to 10% of the total fuel input per year, and if the owner/operator of such a boiler agrees to accept a federally enforceable permit condition that restricts the natural gas fuel capacity factor to 10% or less annually, then the owner/operator is allowed to combust natural gas without complying with the NO_x NSPS. *Id.*

Sierra Pacific opted to accept such a permit condition, *see* Final Permit at 10 (cond. X.G.2), which is perfectly acceptable and lawful. *See, e.g.*, 40 C.F.R.

§ 52.21(b)(4) (providing, in the definition of a facility's "potential to emit," that an operational limit, such as a restriction on the amount of material combusted, "shall be treated as part of [the facility's] design" if the limit is federally enforceable); *id*. § 52.21(b)(17) (providing that PSD permit conditions are "federally enforceable"). It is not evidence of a project design "derived for reasons of air quality permitting," as Mr. Simpson alleges. *See* Simpson Pet. at 10; *see also Desert Rock*, 14 E.A.D. at 530 (noting that factors such as the "cost savings" of choosing one control technology over another, or the "avoidance of risks associated with new, innovative, or transferable technologies," would not be considered "fundamental" to a facility's "basic design"). Instead, the record establishes that Sierra Pacific will fire natural gas during boiler startup and shutdown because that fuel – rather than biomass – can best be used to increase combustion temperatures in a controlled fashion and to stabilize the boiler flame during transitional periods. Biomass then can be burned safely and efficiently during steady-state conditions. *See, e.g.*, Permit Appl. at 3, 5; AAQIR at 1, 12-13, 22, 37.

This prudent use of natural gas does not obviate Sierra Pacific's basic goal of using its excess wood waste to produce new wood products and electricity, and the company's lawful acceptance of a 10% gas cap is incidental to the project's basic design. It also does not, by itself, suggest that the project's fuel mix can be readily changed without disrupting Sierra Pacific's fundamental business purpose of using its surplus natural resources in a beneficial manner.[37] In sum, requiring Sierra Pacific to reduce its surplus biomass fuel so that it could increase its natural gas fuel would impermissibly redefine this proposed source. Accordingly, this option need not be entertained further. *See* Reg. 9 Resp. at 38 (arguing, correctly, that "[t]he use of a federally enforceable permit condition to avoid a potentially

[37] In its response to the petitions, Sierra Pacific asserts that "one of the important business purposes of the biomass boiler is to take part in California's renewable portfolio standard ('RPS'), and increasing natural gas usage beyond 10% would disqualify the plant for the RPS." Sierra Pacific Resp. at 18. Notably, this RPS purpose does not appear in Sierra Pacific's 2010 Application, nor in the public notice or AAQIR the Region issued in September 2012, nor has any information been provided to the Board by either the Region or Sierra Pacific during these proceedings regarding the RPS program to support this business objective. Indeed, the only reference to the RPS program that the Board has been able to locate is in a June 2012 report submitted to the Shasta County Planning Commission. *See* Reg. 9 Resp. attach. 1, exc. 12, at 3 (noting that "the facility would be eligible for procurement through the State of California's [RPS,] which requires electric corporations to increase procurement of electricity generated from renewable energy sources"). In the absence of more relevant and timely record references, the Board assigns little weight to this belated assertion of project purpose.

applicable requirement does not invalidate the facility design or related determinations regarding basic business purpose").

D. *The Board Declines to Reach the Carbon Dioxide Deferral Rule Issue*

Finally, Mr. Simpson incorporates by reference CBD's comments on the draft PSD permit, which challenged, among other things, the Region's decision to defer consideration of "biogenic" carbon dioxide ("CO_2") emissions[38] from Sierra Pacific's proposed large-scale burning of wood and wood waste. *See* Simpson Pet. at 10-11; CBD Comments at 10-12. According to Mr. Simpson, the Region's deferral decision is clearly erroneous because it is based on "unlawful rules" whose application in this case results in Sierra Pacific being exempted from BACT requirements for biogenic CO_2 emissions. Simpson Pet. at 10. Mr. Simpson writes, "By not relying on unlawful rules[,] the Region would have fully evaluated the project and [would] not have approved it as they did." *Id.*

In its response to CBD's comments on this issue, the Region explained that EPA had issued a final rule in July 2011 that justified the Region's deferral choice. That final rule had established a three-year deferral period for regulatory decisions about CO_2 emissions from biogenic sources (such as Sierra Pacific's proposed boiler), during which time the Agency planned to conduct further scientific review of biogenic CO_2 emissions before deciding whether and how to regulate such emissions. *See* RTC at 34-35; *see also* Deferral for CO_2 Emissions from Bioenergy and Other Biogenic Sources Under the [PSD] and Title V Programs, 76 Fed. Reg. 43,490 (July 20, 2011) ("Deferral Rule"). The Region further stated that an appeal of this rule was pending in the D.C. Circuit; however, until such time (if ever) as the rule was overturned by the federal court, the Region had discretionary authority to proceed in accordance with the rule. RTC at 34-35.

On July 12, 2013, the D.C. Circuit vacated the Deferral Rule. *Ctr. for Biological Diversity v. EPA*, Nos. 11-1101, 11-1285, 11-1328, 11-1336 (D.C. Cir. July 12, 2013). The Court's judgment will not become final and effective until such

[38] "Biogenic CO_2 emissions" are emissions of CO_2 from stationary sources that "directly result[] from the combustion or decomposition of biologically[ ]based materials other than fossil fuels and mineral sources of carbon." Deferral for CO_2 Emissions from Bioenergy and Other Biogenic Sources Under the [PSD] and Title V Programs, 76 Fed. Reg. 43,490, 43,493 (July 20, 2011). "Examples of 'biogenic CO_2 emissions' include, but are not limited to: * * * CO_2 derived from combustion of biological material, including all types of wood and wood waste, forest residue, and agricultural material." *Id.*

time as it issues a "mandate."[39] *See* Fed. R. App. P. 41; D.C. Cir. R. 41. At this writing, the Court has not yet issued such a mandate, and the Agency still has a window of time in which to evaluate the Court's decision and determine how to proceed in light of it.

Given these developments, the Board declines to reach the biogenic CO_2 issue raised by Mr. Simpson. *See In re Avenal Power Ctr., LLC*, 15 E.A.D. 384, 394 (EAB 2011) (Board has discretion to review PSD permits), *appeal docketed sub nom. Sierra Club v. EPA*, No. 11-73342 (9th Cir. Nov. 3, 2011). However, the Board expects that the Region will consider Mr. Simpson's challenge to the permit on this issue in light of the decisions the Agency makes regarding the Court's ruling on the Deferral Rule.

VIII. *CONCLUSION*

For the foregoing reasons, the permit is remanded to Region 9 to hold a public hearing in accordance with 40 C.F.R. § 124.12(a)(1). The Region is directed to reopen the permit proceedings for this purpose, and shall issue a final permit decision and a document that responds to any new comments received during the public hearing. The Board denies the pending motions to file a petition out of time and to submit additional documents. The Board also denies various procedural and substantive arguments raised by Petitioners, as discussed above. The Board declines to reach the challenge to the Region's decision to rely on the Deferral Rule to defer consideration of Sierra Pacific's biogenic CO_2 emissions and instead expects the Region to consider this challenge consistent with the Agency's decisions on how to proceed in the wake of the D.C. Circuit's recent vacatur of this rule.

Once the Region issues a final permit decision following the public hearing required by this remand, that final permit decision and the Board's decision in this case become final agency action subject to judicial review. 40 C.F.R. § 124.19(*l*). Although an appeal to the Board is a prerequisite to judicial review of an initial

[39] The Court's mandate must issue seven days after the time to file a petition for rehearing expires, or seven days after entry of an order denying a timely petition for panel rehearing, petition for rehearing *en banc*, or motion for stay of mandate, whichever is later, unless the Court shortens or extends the time. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1). Moreover, the timely filing of a petition for panel rehearing, petition for rehearing *en banc*, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the Court orders otherwise. *See* Fed. R. App. P. 41(d)(1); D.C. Cir. R. 41(a)(2).

final permit decision, *id*. at § 124.19(*l*)(1), such an appeal is not a prerequisite to judicial review of a final permit decision following a Board remand of a permit decision unless the Board "specifically provides that appeal of the remand decision will be required to exhaust administrative remedies." *Id*. at § 124.19(*l*)(2)(iii). The Board is not requiring, and will not accept, an appeal to the Board on the final permit decision following remand in this case.

So ordered.