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

In re:	)	
	)	
Sierra Pacific Industries – Anderson	)	
	)	PSD Appeal Nos. 13-01, 13-02, 13-03, & 13-04
PSD Permit No. SAC 12-01	)	
	)	
	)	

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

The EPA Environmental Appeals Board ("Board") should deny review of the challenges brought by Petitioners Ed Coleman, Heidi Strand, Celeste Draisner, and Rob Simpson and Helping Hand Tools ("HHT")[1] to the Prevention of Significant Deterioration ("PSD") permit issued pursuant to section 165 of the Clean Air Act ("CAA") by EPA Region 9 ("Region 9") on February 19, 2013. This modification of the existing PSD permit authorizes Sierra Pacific Industries ("SPI") to construct and operate a new stoker boiler capable of generating 31 MW of gross electrical output from the combustion of clean cellulosic biomass, and the related auxiliary equipment ("Project").

Region 9's PSD permit for the Project is fully supported by the record, and Petitioners have failed to meet their heavy burden of demonstrating clear error, an abuse of discretion, or an important policy consideration warranting review of Region 9's decision. Moreover, Petitioners have failed in most instances to meet the applicable procedural requirements for Board review, and their petitions should be dismissed for that reason alone.

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[1] As explained in Region 9's March 26, 2013 Order Clarifying Docket and Denying Motions for Extension of Time, Ed Coleman, Heidi Strand, and Celeste Draisner are all members of the organization Citizens for Clean Air, but "each intended to file petitions for review as individuals and not on behalf of Citizens for Clean Air." Order at 3. Accordingly, the Board assigned PSD Appeal Number 13-01 to the Petition of Ed Coleman ("Coleman Petition); PSD Appeal Number 13-02 to the Petition of Heidi Strand ("Strand Petition"); and PDS Appeal Number 13-03 to the Petition of Celeste Draisner ("Draisner Petition"). The Board also received a fourth petition from Rob Simpson and HHT ("Simpson Petition"). On March 30, 2013, Mr. Coleman filed a "Second Amended Petition." However, as the Board stated in its April 9, 2013 "Order Concerning Board Procedures," the Petition "was not accompanied by a motion, did not identify the changes made from the previous two peitions, and did not provide any jusitification for the Board's acceptance of this amended peition after the deadline had passed." Ms. Strand also submitted a "Motion to provide supplemental documentation" that, as the Board stated, "does not seek permission from the Board to file the documents, does not explain the relevance of the documents, or justify why they are being submitted beyond the petition deadline." The Board has not yet ruled whether it will consider these improperly filed documents.

Prompt review by the Board is especially important for petitions regarding a PSD permit. As the Board has recently recognized, PSD permitting proceedings are particularly "time-sensitive." *See In re: City of Palmdale* ("*Palmdale*"), PSD Appeal No. 11-07, slip op. at 17 n.5 (EAB Sept. 17, 2012) (stating that "the Board considers PSD permitting proceedings to be time-sensitive" because, among other things "[i]n the event of an administrative appeal, a permit decision does not become effective until the appeal is resolved."). Here, SPI has already made significant investments in the Project and is ready to move forward once the permit is upheld. Moreover, Region 9 has issued a thorough and well-reasoned explanation for its permitting decision. SPI respectfully submits that the Board should uphold Region 9's permit and deny the petitions for review.

FACTUAL AND PROCEDURAL BACKGROUND

The PSD permit at issue here authorizes SPI to construct and operate a biomass cogeneration boiler capable of generating 31 MW of gross electrical output. The biomass facility will enable SPI to produce electricity for use on site and for sale to the grid using biomass fuels, which across their life-cycle constitute a low-carbon emission fuel source. The new stoker boiler will use biomass fuel which may be generated on site and at other SPI facilities to produce steam that will be used to dry lumber as well as to drive the generator.

The permit requires Best Available Control Technology ("BACT") emission limits for nitrogen oxides (NO_x), carbon monoxide (CO), total particulate matter (PM), PM under 10 micrometers in diameter (PM_{10}) and PM under 2.5 micrometers in diameter ($PM_{2.5}$). These emission limits will assure that the emissions from the Project will not

cause or contribute to violations of any National Ambient Air Quality Standards ("NAAQS") or any applicable PSD increments for the pollutants regulated under the permit.

On September 13, 2012, Region 9 issued notice of a proposed PSD permit for the Project, and opened the public comment period. The comment period closed on October 17, and on October 30, Region 9 made the public comments available on its website. After careful consideration of the public comments submitted regarding the PSD permit, including comments from the Petitioners, SPI, and other interested parties, Region 9 issued its final PSD permit on February 19, 2013, along with a 53-page Response to Comments ("RTC"),[2] which explained in detail Region 9's reasoning in responding to the comments received, including the basis for its decision and additional analyses conducted by Region 9 as part of its response.

STANDING AND STANDARD OF REVIEW

When considering a petition for review of a PSD permit, the Board "first considers whether the petitioner has met key threshold pleading requirements such as timeliness, standing, and issue preservation. . . . [I]n order to demonstrate that an issue has been preserved for appeal, a petitioner must show that any issues being appealed were raised with reasonable specificity during the public comment period." *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006) (internal citations and footnotes omitted). The burden of establishing that issues have been preserved for review rests squarely with the petitioner. *In re Encogen Cogeneration Facility* ("*Encogen*"), 8 E.A.D. 244, 250

[2] The RTC, and all other permit documents and administrative record materials cited herein, are available at Region 9's online docket for the PSD permit. *See* http://www.regulations.gov/#!docketDetail;D=EPA-R09-OAR-2012-0634.

(EAB 1999). A petitioner must not only specify objections to the permit but also must explain why the permit issuer's previous response to those objections is clearly erroneous or otherwise warrants review. *Palmdale*, slip op. at 10 (EAB Sept. 17, 2012); s*ee also* Order Governing Petitions for Review of Clean Air Act New Source Review Permits (April 19, 2011) ("NSR Order") at 4 ("[T]he petitioner must also demonstrate with specificity, by citing to the applicable documents and page numbers, where in the response to comments the permit issuer responded to the comments and must explain why the permit issuer's response to comments is inadequate.").[3] Alternatively, a petitioner may demonstrate that an issue or argument was not reasonably ascertainable during the public comment period. 40 C.F.R. § 124.13; *see Encogen*, 8 E.A.D. at 250 n.8.

Where threshold pleading requirements are met, the Board will not grant review of a PSD permit unless it is based on a clearly erroneous finding of fact or conclusion of law or raises an important policy matter requiring review. 40 C.F.R. § 124.19(a); *In re Zion Energy, LLC*, 9 E.A.D. 701, 705 (EAB 2001). The petitioner has the burden of demonstrating that review is warranted. 40 C.F.R. §124.19(a); *In re EcoEléctrica L.P.*, 7 E.A.D. 56, 61 (EAB 1997). In assessing a petition for review, this Board generally defers to the permitting agency's technical expertise and experience so long as it is supported by the record and not clearly erroneous. *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 510 (EAB 2006). Overall, "the Board's power of review 'should be sparingly exercised' and . . . 'most permit conditions should be finally determined at the [permit issuer's] level.'" *Palmdale*, Slip Op. at 9 (EAB Sept. 17, 2012)

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[3] *Available at* http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/187fae71622d082185257af000499628/$FILE/NSR%20Revised%20Standing%20Order%202013.pdf

(quoting 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)) (quoting preamble to 40 C.F.R. § 124.19) (alteration in original).

ARGUMENT

I. PETITIONERS FAIL TO DEMONSTRATE THAT REGION 9'S DECISION NOT TO HOLD A PUBLIC HEARING CONSTITUTED CLEAR ERROR, AN ABUSE OF DISCRETION, OR RAISED AN IMPORTANT POLICY CONSIDERATION THAT THE BOARD SHOULD REVIEW

The Coleman Petition, Strand Petition, Draisner Petition, and Simpson Petition all assert that Region 9 improperly failed to hold a public hearing in regard to the PSD permit, and that therefore the Board should remand the permit so that a public hearing can be held. They assert that Region 9's decision not to hold a public hearing was arbitrary and capricious and that a public hearing was necessary because Shasta County is an Environmental Justice Community. These arguments are without merit. In each case, Petitioners fail to comply with pleading requirements because they fail to explain why Region 9's response to their previous comments on these matters was inadequate, and review should be denied on that basis. *See* NSR Order at 4-5. Even if review were granted, these claims are baseless because the record shows that Region 9 reasonably determined within its discretion that there was not significant public interest in a hearing.

A. Region 9 Reasonably Determined There Was Not Significant Public Interest in a Hearing

Petitioners assert that Region 9 erred in determining that there was not "significant public interest" in a hearing and that Region 9 acted arbitrarily and capriciously by "establishing a threshold for public involvement and refusing to disclose that threshold to the public." (Coleman Petition at 4). Petitioners' assertion fails to respond to Region 9's explanation in the RTC and misstates the law.

As Region 9 explained in the RTC, under 40 CFR § 124.12, "[t]he Director 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)." (RTC at 10.) In this case, Region 9 broadly notified the public regarding the proposed permit. According to the RTC, Region 9 mailed "roughly 800 public notices in the area" and in California, e-mailed "roughly 650 recipients," and published a notification in the local newspaper the *Record Searchlight*. (*Id.*) After distributing public notice so broadly, "EPA received comments from 15 members of the public, including [Ms. Strand], and three requests for a public hearing." (*Id.*) Based on this lack of response and the requests, Region 9 determined that "[n]one of the requests for a public hearing demonstrated that there was significant public interest in the Project." (*Id.*)

First, none of the Petitioners address or explain "why the permit issuer's response to comments is inadequate" and thus they fail to meet the requirements of 40 CFR § 124.19(a). *See* NSR at 4-5. Petitioner Simpson asserts without support that "Commenter's [sic] clearly met the threshold for a public hearing" but does not explain why Region 9's determination that there was not "a significant degree of public interest" was inadequate, particularly after receiving only fifteen responses to a broad public notice reaching at least 800 people. (Simpson Petition at 9). Neither the Coleman Petition nor the Strand Petition provides any explanation for why Region 9's determination was inadequate. Accordingly, these claims should be dismissed by the Board because they fail to meet the pleading requirements under 40 CFR § 124.19(a).

Second, it is a misrepresentation of Region 9's decision and a misstatement of the law to claim that Region 9 "establish[ed] a threshold for public involvement and

refus[ed] to disclose that threshold to the public." (Coleman Petition at 4). Under 40 CFR § 124.12(a), the Director has discretion to determine whether a public hearing is warranted, and nothing in the regulations establishes a threshold for granting or denying a request for a public hearing. Here, Region 9 did not set a secret "threshold" for holding a public hearing, but rather determined based on the contents of the requests, and the general lack of response, that a public hearing was not warranted. (RTC at 10.) Petitioners do not explain why this determination was "clear error," and thus their claims fail.

Finally, Region 9's determination that there was not significant public interest in a hearing was well justified. As noted above, Region 9 received minimal response to its broad notice. (*Id.*) Moreover, the administrative record shows that there was little public interest in the Project throughout the permitting process, including during CEQA review. In a June 15, 2012 e-mail, Dave Brown of SPI explained that the vote regarding the EIR and Special Use Permit for the Project was sparsely attended, that only two members of the public spoke against the Project at the hearing, and that only two opposition letters were received before the vote. (Admin. Rec. at I.32).[4] Given the lack of public interest in the Project and PSD permit, Region 9's determination that a hearing was not required was reasonable.

B. Region 9's Decision Regarding the Necessity of a Public Hearing Was Not in Violation of Environmental Justice Guidelines

The Coleman Petition and the Strand Petition raise the fact that Shasta County is an Environmental Justice Community, and make vague allegations that Region 9's

[4] *Available at* http://www.regulations.gov/#!documentDetail;D=EPA-R09-OAR-2012-0634-0004. None of the Petitioners spoke at the hearing or were involved in the CEQA process.

decision not to hold a public hearing is in violation of Executive Orders 12898 and 13563. However, Petitioners again fail to meet pleading requirements by failing to explain why Region 9's response to Petitioners' comments regarding the same issue was inadequate. In addition, they fail to identify any specific provision of either Executive Order that has been violated by Region 9's decision.

In its RTC, Region 9 explained that pursuant to Executive Order 12898, Region 9 had analyzed whether the Project would have a "disproportionately high and adverse human health or environmental effect[]" on "minority populations or low-income populations" and had concluded that "the proposed modification will not cause or contribute to air quality levels in excess of health standards" either to populations residing near the Project or to the community as a whole. (RTC at 9-10.) Neither of the Petitions responded to Region 9's explanation or explained why it was inadequate.

Nor do either of the Executive Orders cited by Petitioners require public hearings. Both Orders broadly endorse public input in the regulatory process to further Environmental Justice concerns, but neither requires public hearings for that purpose. Executive Order 13563, for example, does not mention public hearings, but states that "consistent with Executive Order 12866" agencies "shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation." Petitioners, who all submitted comments through the Internet, cannot argue that these guidelines have not been met.

II. REGION 9 DID NOT ERR BY DETERMINING THAT THE PROJECT WAS A "MAJOR MODIFICATION" AS DEFINED BY 40 CFR § 52.21

Both the Coleman Petition and the Strand Petition allege that it was unclear whether Region 9 intended to issue a new PSD permit for a new facility, a modification

of the existing PSD, or a blanket PSD permit for both facilities. The Coleman Petition argues that it was unreasonable for Region 9 to provide a PSD permit under the "major modification" regulations for an expansion of the facility that is larger than the existing facility. (Coleman Petition at 7-8.) However, the Coleman petition fails to explain why Region 9's explanation in its RTC was inadequate, or to cite any law indicating that Region 9's determination was erroneous.

Under 40 CFR 52.21(b)(2)(i), a "major modification" requiring a new PSD permit is defined as "any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase . . . of a regulated NSR pollutant . . .and a significant net emissions increase of that pollutant from the major stationary source." As Region 9 explained in its RTC, "SPI-Anderson is undergoing a physical change and or change in the method of operation that results in a significant emissions increase of several regulated NSR pollutants at the existing major stationary source" and therefore 40 CFR 52.21(b)(2)(i) applies. (RTC at 9.) Moreover, as Region 9 explained, classification as a "major modification" requires a new PSD permit subject to the same requirements as a new stationary source. (*Id.*) Therefore, "it is unclear why the commenter believes that [Region 9] is circumventing the PSD permitting process." (*Id.*)

Neither of the Petitioners explains why this explanation is inadequate, or why the distinction is relevant. Petitioner Coleman cites to *Environmental Defense v. Duke Energy Corp.*, 549 U.S 561 (2007) for the point that "EPA was authorized to clarify the definition of 'modification' for the PSD program so long as the clarifications were 'reasonable.'" (Coleman Petition at 8.) However, the Coleman Petition presents no explanation for why the definition of a "major modification" is not "reasonably"

applicable to the Project—which, as Region 9 explains, fully satisfies the plain language of the regulatory conditions—or why it would be unreasonable as a matter of law or policy to treat an expansion of a facility that would be larger than the original facility as a "major modification." Therefore the Board should decline to consider the Coleman Petition or Strand Petition on this point.

III. REGION 9 FULLY ADDRESSED BOTH MS. STRAND'S AND MS. DRAISNER'S COMMENTS, AS WELL AS THE COMMENTS RAISED BY CENTER FOR BIOLOGICAL DIVERSITY

Both the Strand Petition and the Draisner Petition argue that Region 9 failed to enter the comments of Ms. Strand or Ms. Draisner into the record or to respond to them.[5] These allegations are belied by the administrative record, and the Board should decline to consider them. Further, the Simpson Petition incorporates by reference a number of arguments raised by the Center for Biological Diversity ("CBD") in its comments, but fails to properly plead those arguments.

A. Region 9 Entered the Comments of Ms. Strand and Ms. Draisner in the Administrative Record

In her petition, Ms. Strand claims that Region 9 "did not enter my public comment into the public record." (Strand Petition at 2.) This is false. Region 9 both entered Ms. Strand's comments in the record (*see* Docket No. EPA-R09OAR-2012-0634-0007, Attachment IV.10, "Strand Public Comments") and responded to them in the record. (*See* RTC at 9-10.) Moreover, the Strand Petition errs when it challenges Region 9 for "paraphrasing" Ms. Strand's comments. The regulations require EPA to "[b]riefly

[5] The Strand Petition also claims that the Petitioner has not received a response to a FOIA request seeking "the complete comments submitted on the project" and that Region 9 has not yet responded to the request, thus "impact[ing] [Petitioner's] ability to make [her] case." (Strand Petition at 2.) All comments submitted on the Project are posted on the EPA's docket website and are available in their entirety. Petitioner should not be able to delay the PSD appeal process by submitting baseless FOIA requests for public information.

describe and respond to all significant comments on the draft permit . . . raised during the public comment period." 40 CFR § 124.17(a) (emphasis added). On their face, the regulations allow the agency to paraphrase or "describe" comments rather than restate them verbatim.

The Strand Petition and Draisner Petition also err when they state that the agency chose not to enter the comments of Ms. Draisner in the administrative record. As the March 6, 2013, Response to Comments Submitted by Celeste Draisner explains, Ms. Draisner incorrectly submitted her comments to the personal e-mail address of Omer Shalev rather than to the Region 9 e-mail address specified in the Notice. (*See* Post Final Decision Material Not Included in Administrative Record, No. EPA-R09-OAR-2012-0634-0014 ("Post Final Decision Material") at 1.) As the Draisner Petition notes, Ms. Strand also incorrectly sent her comments to Mr. Shalev's personal address, and they were accepted. (Draisner Petition at 2.) Ms. Draisner argues that "[t]here is no reasonable explanation why [Ms. Strand's] email was accepted and Celeste Draisner's was denied." (*Id.*) But just because Mr. Shalev happened to catch Ms. Strand's e-mail when it was improperly submitted does not impose a duty to catch all such improperly submitted e-mails. Both Ms. Strand and Ms. Draisner failed to follow the procedures clearly specified in the Notice to submit comments for the administrative record, and thus could have no reasonable expectation that their comments would be included in that record.

Regardless, when Ms. Draisner raised the issue with Region 9, the Region reviewed individual e-mail accounts and located the comments in Mr. Shalev's account. (Post Final Decision Material at 1.) Because Ms. Draisner's comments were not properly

submitted, they were not included in the record, and Region 9 would have been at liberty to disregard them. Instead, Region 9 responded to them fully and included them in the online docket so that they would be available to the public and the Board. (*Id.*) The Strand Petition's claims that Ms. Draisner was "disenfranchised" are baseless.

B. Ms. Draisner's Comments Regarding BACT Raised by the Strand Petition are Not Properly Before the Board

The Strand Petition also alleges that "Petitioner Celeste Draisner raised legitimate, well researched BACT questions on this project" that were not addressed by Region 9. (Strand Petition at 2.) These allegations fail to meet the pleading standards because they do not establish with specificity which "BACT questions" the Petitioner believes are at issue or why Region 9's response to the questions is "inadequate." The vague allegations regarding BACT in the Strand Petition are invalid, and the Board should decline to review them.

C. CBD's Comments are Not Properly Before the Board, and Were Fully Addressed in the RTC

Like the Strand Petition, the Simpson Petition improperly attempts to incorporate arguments made by other commenters. The Simpson Petition states that commenter CBD "raised issues of law that the Region has not resolved in the RTC" and then proceeds to list issues raised by CBD, each of which is followed by the conclusory statement that "the Region clearly erred" in regard to the issue. (Simpson Petition at 10-11.)

These issues are not properly before the Board. While Mr. Simpson may incorporate CBD's comments in his petition, in order to satisfy pleading requirements he must "demonstrate with specificity, by citing to the applicable documents and page numbers, where in the response to comments the permit issuer responded to the comments and must explain why the permit issuer's response to comments is

inadequate." NSR Order at 4. The Simpson Petition's statement that Region 9 "clearly erred" in regard to each of the issues raised by CBD fails on its face to meet the pleading requirements because the Petition neither cites to the "applicable documents and page numbers, where in the response to comments the permit issuer responded to the comments" nor "explains why the permit issuer's response to comments is inadequate."

Region 9 provided detailed responses to every issue raised by CBD, including the issues incorporated by reference in the Simpson Petition, in pages 22 to 35 of the RTC. CBD has declined to challenge those responses on this appeal, and the Simpson Petition fails to plead those issues properly. They are not properly before the Board, and the Board should decline to review them.

IV. PETITIONER'S ARGUMENT THAT REGION 9 FAILED "TO ADDRESS BACT SERIOUSLY" IS NOT PROPERLY BEFORE THE BOARD

The Draisner Petition alleges, without legal or textual support, that Region 9 "fail[ed] to address BACT seriously." (Draisner Petition at 2.) The Petition quotes a number of Region 9's responses to comments verbatim, and states that these responses "as well as other examples, clearly demonstrate the Region's failure to address BACT seriously." (*Id.*) The Draisner Petition fails to meet the Board's pleading standards because it does not explain why the response provided by Region 9 was inadequate. These points are not properly before the Board, and it should disregard them. However, Region 9's detailed responses to Ms. Draisner's comments regarding BACT indicate that the Region properly undertook the BACT analysis. (*See generally* Post Final Decision Material.)

V. THE DRAISNER PETITION'S ARGUMENT REGARDING "INDEPENDENT ENVIRONMENTAL REVIEW" IS NOT PROPERLY BEFORE THE BOARD

The Draisner Peition alleges that "[a] proper environmental review was never conducted by the Region, in the Region's capacity as lead agency." (Draisner Petition at 3.) It is unclear to what "independent environmental review" the Petitioner refers. The Petitioner cites to a letter sent to Petitioner Heidi Strand from Ross Bell, the Air Quality District Manager for the Shasta County Air Pollution Control Board.[6] Responding to Ms. Strand's statement that SPI is "currently in 'serious violation' of compliance with their air pollution permit (PSD)," Mr. Bell responded that "[t]he District does not have PSD permit authority. PSD permits are currently managed by EPA Region IX. Recent conversations with EPA Region IX staff do not indicate that SPI Anderson is in "serious violation" with its PSD Permit." (Motion to Provide Supplemental Documentation by Petitioner Heidi Strand at 3.) The Draisner Petition appears to contend that Region 9 has failed to review SPI's compliance with its existing PSD permit.

This issue is not properly before the Board. First, neither Ms. Draisner nor Ms. Strand raised this issue during the comment period and the issue is therefore waived. In order to satisfy EAB pleading requirements, a petitioner must demonstrate "that any issues being raised were either raised during the public comment period or were not reasonably ascertainable." NSR Order at 4. Second, the issue before the Board is Region 9's decision to issue a modification of the PSD permit, not SPI's compliance with the

[6] This letter was included in Ms. Strand's April 3, 2013 "Motion to Provide Supplemental Documentation." As the Board noted in its Order Concerning Board Procedures, the motion was not properly submitted because the motion "does not seek permission from the Board to file the documents, does not explain the relevance of the documents, or justify why they are being submitted beyond the petition deadline." Because the Board has not yet ruled whether it will accept Ms. Strand's improperly filed material, the Applicant will address it here.

permit. Third, the Draisner Petition cites no authority, statutory or otherwise, for the necessity of an "environmental analysis" and it is unclear what sort of analysis the Petitioner believes was required. Finally, and most importantly, neither Ms. Draisner nor Ms. Strand cites to any evidence that SPI is in "serious violation" of its PSD permit, and the letter from Ross Bell itself explains that Region 9 staff "[did] not indicate that SPI Anderson is in 'serious violation' with its PSD permit.'" To be clear: SPI is *not* in "serious violation" of its PSD permit. The Draisner Petition's improperly raised and unfounded allegations are not properly before the Board and should be disregarded.

VI. REGION 9 PROPERLY DECLINED TO EXTEND THE PUBLIC COMMENT PERIOD

The Simpson Petition challenges Region 9's decision not to extend the public comment at Mr. Simpson's request. On September 26, Mr. Simpson requested an extension of the public comment period because, as Mr. Simpson stated, "This is the first such facility that I will comment on and it appears that there is more information on the docket than I could possibly review and comment about in the time allotted." (Simpson Petition at 3.) Region 9 responded that Mr. Simpson had not "adequately justif[ied] why additional time is required in order to comment on the proposed action" because "the number of documents for this project is no different than any other project, and you have not demonstrated why there would be a significantly greater burden to review the documents for this project." (*See* RTC at 11.)[7]

[7] Notably, Mr. Simpson's reasons for seeking an extension here were virtually identical to his reasons for seeking an extension in the *Palmdale* case. In that case, Mr. Simpson sought an extension "due to the massive amount of information to review." *Palmdale*, Slip Op. at 18 (EAB Sept. 17, 2012). The Board upheld Region 9's determination that it "found no particular issue associated with the Project that warranted public review time beyond that established in the public notice." *Id.*

Region 9's response was not clearly erroneous. EPA rules provide that "[a] comment period longer than 30 days may be necessary to give commenters a reasonable opportunity to comply with the requirements of [section 124.13]" and that "[a]dditional time shall be granted . . . to the extent that a commenter who requests additional time demonstrates the need for such time." 40 CFR § 124.13. This provision balances the need for adequate public input with the obligation to process PSD permits in a timely manner. The regulation presumes that in most instances a 30 day period *will* give commenters a reasonable opportunity to submit informed comments. Mr. Simpson's comment did not indicate that the documents were unusually burdensome or that he suffered from a particular hardship that called for extending the comment period. *Palmdale*, Slip Op. at 19 (EAB Sept. 17, 2012) ("Mr. Simpson continues to focus generically on the volume of the record and fails to identify, let alone demonstrate, any issue he needed more time to consider or explain why the comment period was insufficient for that task.") Mr. Simpson was not the only commenter who had never commented on a biomass cogeneration facility, but he was the only commenter who requested more time. *Id.* ("Ultimately, in this case, the Region received and responded to numerous comments from Mr. Simpson as well as others. . . . The volume of comments received and the substantive issues raised by commenters on this permit support the Region's determination [that no extension was necessary].")

If the standard for an extension was so low that simply saying, "I cannot read all these documents in the allotted 30-day period" would suffice, opponents of a project would be able to delay determination of the PSD permit in every case. Region 9's

decision that Mr. Simpson's conclusory declaration was an insufficient demonstration of need was not clearly erroneous or an abuse of discretion.

VII. REGION 9'S DETERMINATION THAT SOLAR POWER WOULD BE A SIGNIFICANT DEPARTURE FROM THE EXISTING FACILITY'S OPERATIONS AND THE PROJECT'S PURPOSE WAS NOT CLEARLY ERRONEOUS

The Simpson Petition also claims that Region 9 clearly erred by not including a solar component in the BACT analysis. (Simpson Petition at 5-6.) The Petition claims that Region 9 erroneously determined that adding a solar power component would be a significant departure from the existing facility's operations and the Project's purpose.

Region 9's determination was not clearly erroneous or an abuse of discretion. As Region 9 explained in its RTC, the purpose of the Project was to add a biomass-fired boiler, steam turbine, and generator to the existing lumber facility within its existing physical footprint in order to utilize excess biomass at this and other SPI sawmill or lumber operations. Petitioner's comment, which was that SPI should supplant a portion of the biomass energy it intends to utilize with solar energy runs contrary to the fact that "an inherent aspect of the project is that its fuel use be primarily biomass." RTC 13. Region 9 did not clearly err by determining that adding solar energy technology to obviate the use of available biomass fuel would not further the intended purpose of utilizing excess biomass as the primary fuel source. That the Petitioner would prefer a different project than the one proposed does not constitute a valid basis for challenging Region 9's determination.

VIII. REGION 9'S DETERMINATION THAT AN INHERENT ASPECT OF THE PROJECT IS THAT FUEL BE PRIMARILY BIOMASS WAS NOT CLEARLY ERRONEOUS

The Simpson Petition further asserts that Region 9 clearly erred by not considering a fuel mixture that would incorporate more natural gas. The petition vaguely asserts that the BACT analysis "fail[ed] to consider a different fuel mix" that would include a larger, unspecified amount of natural gas. (Simpson Petition at 8.)

The Simpson Petition misses the basic point raised in the RTC that the purpose of the cogeneration unit is to make use of excess waste biomass that is produced at the site and at other SPI facilities in order to produce electricity. (RTC at 13.) Region 9 determined that the boiler may use up to 10% natural gas for combustion because "that limit is appropriate as the combustion within the boiler may need to be stabilized while burning biomass and to assist with the startup and shutdown of the boiler." (*Id.*) Thus, the natural gas is necessary for the basic functioning of the boiler, but the *purpose* of the boiler is to produce energy by using excess biomass.

The Petitioner plays word games by claiming that "[t]he project could burn up to 49% gas and still satisfy [the purpose that its fuel use be primarily biomass]." (Simpson Petition at 9.) But a shift from using 90% biomass to 51% biomass—a 43% reduction—would dramatically disrupt the purpose of the Project, and would essentially consist of a different project. Moreover, 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.

As Petitioner concedes, a permit issuer must assess "which design elements are inherent to [the applicant's] purpose . . . and which design elements may be changed to achieve pollutant emissions reductions without disrupting the applicant's basic business

purpose for the proposed facility." *In re: Prairie State Generating Co.*, 13 E.A.D. 1, 23 (EAB 2006). Here, Region 9 determined that the purpose of the facility was to generate electricity using locally available waste biomass—not natural gas—and thus an "inherent aspect of the project is that its fuel use be primarily biomass." (RTC at 13.) Modifying the project so that it used significantly more natural gas would disrupt the basic business purposes for the proposed facility, which include consumption of residual biomass, minimized fossil-fuel consumption, and maintaining RPS certification.. Region 9's determination was not clearly erroneous or an abuse of discretion.

IX. THE SIMPSON PETITION IMPROPERLY RAISES A NUMBER OF ISSUES THAT WERE REASONABLY ASCERTAINABLE DURING THE COMMENT PERIOD

In order to satisfy the Board's pleading requirements, a petitioner must demonstrate "that any issues being raised were either raised during the public comment period or were not reasonably ascertainable." NSR Order at 4. The burden of establishing that issues have been preserved for review rests squarely with the petitioner. *Encogen*, 8 E.A.D. at 250. As the Board has explained, "[t]he 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."' *In re Christian Cnty. Generation, LLC*, 13 E.A.D. 449, 459 (EAB 2008) (citation omitted). "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." *Palmdale*, Slip Op. at 31 (EAB Sept. 17, 2012)

Here, the Simpson Petition purports to raise a number of "[i]ssues not reasonably ascertainable during the comment period." (Simpson Petition at 1-3.) However, each of these issues was reasonably ascertainable during the comment period and the Simpson Petition fails to meet its burden of establishing otherwise.

A. Region 9's Use of the Annual SIL Was Reasonably Ascertainable During the Comment Period

The Simpson Petition alleges that Region 9 erred in using an annual SIL to justify its determination that a PSD permit is appropriate. However, as discussed below, even though the RTC expanded on this subject, the fact that Region 9 used an annual SIL to justify the PSD permit was reasonably ascertainable during the comment period.

In its RTC, Region 9 stated that "EPA did not receive comments regarding the sufficiency of modeling for pollutants projected to have impacts below significant impact levels (SILs) for PM2.5." (RTC at 3.) However, because of the a recent decision in the United States Court of Appeals for the District of Columbia Circuit, *Sierra Club v. EPA*, 705 F.3d 458 (D.C. Cir. 2013), Region 9 elected to supplement its analysis of the Project's impacts on the annual PM2.5 National Ambient Air Quality Standards ("NAAQS"). (*Id.*) As Region 9 explained, if a project's impacts are below the level of the SIL for the pollutant, that is usually sufficient showing to demonstrate that the source "will not cause or contribute to a violation of the NAAQs." (*Id.* at 4.) But in the *Sierra Club* case, the petitioner argued, and EPA agreed, that in certain cases "if a proposed source or modification is in an area that is close to violating the NAAQS or an increment, that source could violate the NAAQS or increment even if its emissions would have an ambient impact below the SIL." *Sierra Club*, 705 F.3d at 463. As the RTC explains, the solution to this problem is to require a cumulative impact analysis in situations where an

area is close to violating the NAAQS and any additional pollution might cross the line, even if the individual project is not near the SIL. (RTC at 4.)

Thus, Region 9 decided to supplement its analysis to clarify that there was no need to perform a cumulative analysis for annual PM 2.5 because "Table 8.4-2 of the AAQIR shows that emissions from the Project are predicted to be below the SIL for PM2.5 (annual)" and "where the Project's modeled impact was below the SIL, the maximum background concentrations measured in the area are well below the NAAQS." (RTC at 4.) Accordingly, the problem raised in *Sierra Club* would not apply here because the background air quality was such that there was no risk that the Project would cross the threshold.

The Simpson Petition argues that the new supplement to the RTC raises issues that were not "reasonably ascertainable" during the comment period. The Petition claims that Region 9 "failed to point out that . . . the project exceeds the PM2.5, 24 hour SIL" and thus the decision not to undertake a cumulative impacts analysis was erroneous. However, Region 9 addressed this issue directly in the September 2012 AAQIR that is part of the administrative record and was available for public comment. In that document, Region 9 explicitly states that the Project would exceed the PM2.5 24-hour SIL, but that there was no reason to perform a "cumulative" analysis because the Project was *the only source in the area* consuming the PM2.5 increment. (AAQIR at 8.4.3.)

If Mr. Simpson wished to challenge either Region 9's reliance on the PM2.5 SIL or its determination that no cumulative impact analysis was required for the PM2.5 24-hour SIL, he was required to do so during the comment period. Because he did not raise the issue at that time, it is waived, and is not properly before the Board.

B. Region 9's Decisions Regarding Monitoring Data Were Reasonably Ascertainable During the Comment

The Simpson Petition further claims that "[t]he court [in *Sierra Club*] made it clear that the Region did not have authority to waive the on-site monitoring requirement, as the Region did in this action." (Simpson Petition at 2.) The point of this assertion is unclear because Region 9 did not waive the monitoring requirement that was put at issue in *Sierra Club*. In that case, the court determined that EPA could not waive the requirement in 42 U.S.C. 7475(e)(2) that the analysis of a PSD permit application should include "continuous air quality monitoring data gathered for purposes of determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this part." There is no requirement stated in the statute or in *Sierra Club* that such monitoring must be conducted "on site." Moreover, the AAQIR makes clear that Region 9 fully fulfilled the monitoring requirement using data from several air quality monitors near the site. (AAQIR at 8.2.) The monitoring requirement was not—and could not have been—waived. The Simpson Petition's argument on this point has no basis and should be disregarded.

Moreover, during the comment period Mr. Simpson *did* raise concerns about the location of the NO2 monitor used to satisfy the air quality monitoring requirement that he now claims Region 9 "waived." Mr. Simpson criticized Region 9 for using a NO2 monitor that was located 50 miles away from the Project site. (RTC at 16.) Region 9 responded to Mr. Simpson's concern regarding the use of an off-site monitoring location by explaining that the monitoring site was "not only representative of the background concentrations in the Project area, but also more conservative given its proximity to a more industrialized area and the similar number of traffic counts." (RTC at 16.) The

Simpson Petition does not cite to this response or explain why it is inadequate, and thus the Petition fails to meet the pleading requirements, and should be disregarded by the Board.

C. Region 9's Use of the Aermod and CALPUFF Models Was Reasonably Ascertainable During the Comment Period But Was Not Raised in Comments

Finally, the Simpson Petition argues that Region 9 erred by relying on an "antiquated" version of the Aermod model and the CALPUFF model. (Simpson Petition at 2-3.) These concerns are based on information that was "reasonably ascertainable" during the comment period, and so were waived.

As the RTC stated, "EPA did not receive comments regarding the sufficiency of modeling for pollutants." (RTC at 3.) Moreover, nothing in the recent *Sierra Club* decision calls into question the Aermod or CALPUFF models, or even the use of modeling in general, and the supplement to the RTC does not discuss the adequacy of either model. The criticism of these models goes directly to the AAQIR, which discusses the use of both, and was available during the comment period. (*See, e.g.*, AAQIR at 8.1.1 (discussing use of AERMOD and CALPUFF.) Indeed, to support its argument that use of these models was inappropriate, the Simpson Petition cites to documents *in the administrative record*, which indicates that they were available to Petitioner during the comment period. These arguments were waived during the comment period, and may not be raised before the Board now.

X. CONCLUSION

For all of the reasons stated above, SPI respectfully requests that the Board deny review of Region 9's Final Permit for the Project.

Dated: April 16, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of April 2013, copies of the foregoing **RESPONSE TO PETITION FOR REVIEW** in the matter of Sierra Pacific Industries, Inc. EAB Appeal Nos. PSD 13-01, PSD 13-02, PSD 13-03, and PSD 13-04 to be served upon the persons listed below by the means so indicated.

Dated: April 16, 2013

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