

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

In re:)	
Russell City Energy Center)	PSD Appeal No. 10-01 (California Pilots Association, Petitioner)
)	
PSD Permit No. 15487)	[Related to PSD Appeals No. 10-02, 10-03, 10-04, 10-05, 10-06, & 10-07.]
)	

**RESPONSE TO PETITION FOR REVIEW
REQUESTING SUMMARY DISMISSAL**

Pursuant to the March 25, 2010, letter from the Clerk of the Board, Respondent the Bay Area Air Quality Management District (“District”) hereby submits this Response Requesting Summary Dismissal of the Petition for Review filed by Petitioner California Pilots Association (“Calpilots”) in PSD Appeal No. 10-01. As explained herein, the Petition should be summarily dismissed for two reasons. First, the Petition should be dismissed because it fails to satisfy the threshold procedural requirement of identifying with specificity the issues on which review is sought. Second, the Petition should be dismissed because the concerns that Petitioner raises regarding aviation safety and airport operations are not related to any requirements of the federal PSD permitting program, and they are therefore not within the Environmental Appeals Board’s jurisdiction under 40 C.F.R. Section 124.19.

BACKGROUND

This Petition for Review seeks to appeal a Prevention of Significant Deterioration (“PSD”) Permit issued by the District for the Russell City Energy Center. This PSD Permit was issued in response to a Remand Order issued by the Environmental Appeals Board in PSD Appeal No. 08-01, which remanded an earlier version of the permit to the District to provide additional public notice and comment opportunities. (*See* Remand Order, *In re Russell City*

Energy Center, 14 E.A.D. ___, PSD Appeal No. 08-01 (EAB July 29, 2008) (hereinafter, “Remand Order”).)

In response to the Remand Order, the District re-issued a draft PSD permit and conducted a great deal of public outreach notifying the public of the draft PSD permit and inviting public comment. The District initially published its draft PSD permit, along with a Statement of Basis explaining the District’s basis for the draft permit, on December 8, 2008. The District provided a comment period of well over the minimum 30 days required under 40 C.F.R. Part 124, accepting written comments until February 6, 2009. The District also held a public hearing during this time period to receive verbal comment, on January 21, 2009. The District then reviewed and considered the public comments it received, and based on the public comments (and other new information) it revised and re-issued the draft permit for a further round of public review and comment. The District issued the revised draft, along with an Additional Statement of Basis, on August 3, 2009, and again provided a comment period of well over the minimum 30 days required, accepting written comments until September 16, 2009. The District also held a second public hearing, on September 2, 2009. (*See generally* Responses to Public Comments, Exh. 3 to Declaration of Alexander G. Crockett In Support of Responses Requesting Summary Dismissal (hereinafter, “Crockett Decl.”), at p. 1 (summarizing the notice and public participation opportunities provided).)

The District then issued the Final PSD Permit that is the subject of this Petition for Review on February 3, 2010 (*see* Final PSD Permit, Crockett Decl. Exh. 1, at p. 2.), along with comprehensive responses to all public comments it received (*see* Responses to Public Comments, Crockett Decl. Exh. 3). At the time of issuance, the District established an effective date of the permit of March 22, 2010, pursuant to 40 C.F.R. Section 124.15(b)(1). (*See* Final PSD Permit, Crockett Decl. Exh. 1, at p. 2.) This effective date gave interested members of the public until March 22, 2010 – again, more than the minimum 30 days required under 40 C.F.R. Part 124 – to file any appeals of the permit under 40 C.F.R. Section 124.19.

Petitioner Calpilots filed its Petition for Review, PSD Appeal No. 10-01, on March 22, 2010. (Petition 10-01, Docket Entry No. 1.) The Petition for Review alleges that construction and operation of the Russell City Energy Center may negatively impact aircraft and airport operations in the vicinity of the facility, including at or near the Hayward Executive Airport, among others. Specifically, the Petition for Review alleges that the facility’s exhaust “plume” may contain hazardous substances that could present health hazards to aircraft pilots and passengers in the area of the facility and could adversely affect the performance of aircraft airframes and engines. (*Id.* at 5-7.) The Petition also alleges that the oxygen content of the plume could affect aircraft engine performance. (*Id.* at 6.) The Petition also alleges that the plume could have an effect on aircraft aerodynamic performance, and could become opaque and impede visibility. (*Id.* at 7.) The Petition requests that Permit “be remanded back to the BAAQMD for further comment by the FAA and others” on these issues (*id.* at 2), and also requests that the FAA evaluate the potential economic impact of the Russell City Energy Center on the Hayward Executive Airport, including potential related impacts to Oakland International Airport and San Francisco International Airport which also utilize airspace in the vicinity of the project, as well as potential financial and economic impacts to the City of Hayward related to operations of Hayward Executive Airport (*id.* at 8).

Notably, the Petition does not provide any discussion to connect these concerns to any federal PSD requirements or to any of the District’s permitting analyses set forth in the Statement of Basis, Additional Statement of Basis, or Responses to Public Comments. The Petition does not mention any PSD permitting requirements, with a single exception. On page 8, just above the signature block, the Petition recites verbatim the definition of “Best Available Control Technology” from 40 C.F.R. Section 52.21(b)(12). (Petition 10-01 at 8.) But the Petition does not offer any argument or explanation as to how any of the concerns it raises could implicate this regulatory provision, and makes no other attempt to link anything in the Petition to anything in the federal PSD program or in the PSD permit conditions in the Permit the District issued.

STANDARD OF REVIEW

The Environmental Appeals Board may review a permit decision under 40 C.F.R. Section 124.19(a) if it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. (*See* 40 C.F.R. § 124.19(a).)

Before considering the merits of a permit appeal, however, the Board must first ensure that the petitioner has satisfied the important jurisdictional prerequisites to EAB review, including timeliness, standing, preservation of issues for review, and articulation of the challenged permit conditions with sufficient specificity.¹ The burden rests with the petitioner to show that these procedural requirements have been satisfied sufficient to warrant review² by “includ[ing] specific information supporting their allegations.”³ The Board has made clear that it “strictly construes” these threshold procedural requirements.⁴ In doing so, it has always been mindful of the direction in the Preamble to 40 C.F.R. Section 124.19, the regulation governing PSD permit appeals, which states that the Board’s power of review “should be only sparingly exercised.” (45 Fed. Reg. 33,412 (May 19, 1980).) Thus, where a petition has not satisfied the minimum prerequisites for a permit appeal, the Board must decline review.

Furthermore, in addition to these important threshold procedural requirements, the Board must also examine at the outset whether the issues raised in the Petition “fall within the purview of the PSD program and are thus subject to the Board’s jurisdiction.”⁵ This important

¹ *See In re Beeland Group, LLC*, UIC Appeal No. 08-02, 14 E.A.D. ___, Slip. Op. at 9 (EAB Oct. 3, 2008).

² *See, e.g., In re Avon Custom Mixing Services, Inc.*, 10 E.A.D. 700, 706 and n.12 (EAB 2002); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 249 (EAB 1999); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 119-20 (EAB 1997).

³ *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999).

⁴ *In re Gateway Generating Station*, PSD Appeal No. 09-02, slip op. at 10 (EAB September 15, 2009); *In re Town of Marshfield, Mass.*, NPDES Appeal No. 07-03, slip op. at 8 (EAB, March 27, 2007) (collecting cases).

⁵ *See Sutter Power Plant*, 8 E.A.D. at 685.

inquiry stems from the fact that “the Board’s jurisdiction, and thus review power, is limited, extending only to those issues which are directly related to permit conditions that implement the federal PSD program or that are otherwise linked to the PSD program in the context of a particular case.”⁶ Thus a petition for review that raises concerns about a project that are unrelated to the federal PSD permitting requirements as set forth in 40 C.F.R. Section 52.21 must also be dismissed for lack of subject-matter jurisdiction under Section 124.19.

**THE BOARD SHOULD DISMISS THE PETITION BECAUSE
IT DOES NOT ALLEGE ANY SPECIFIC GROUNDS FOR REVIEW
RELATED TO FEDERAL PSD PERMIT REQUIREMENTS**

The Board should summarily dismiss Calpilots’ Petition for Review in this case for two reasons. First, the Petition fails on its face to satisfy the important threshold procedural requirement that it must articulate with specificity the issues on which review is sought. The Petition merely alludes to Petitioner’s general concerns about safe airport and aircraft operations, without explaining with any specificity whatsoever how these concerns could suggest that the District’s PSD permitting analysis was clearly erroneous or otherwise warrants review. Second, the Petition’s aviation-related concerns are not related to any PSD requirements, and so they do not fall within the Board’s PSD review jurisdiction under 40 C.F.R. Section 124.19(a) in any event. For both these reasons, the Petition should be summarily dismissed.

I. Petitioner Has Failed To Allege Any Defects In The PSD Permit With Any Specificity Whatsoever.

Calpilots’ Petition fails to satisfy the threshold procedural requirement of setting forth with specificity grounds for EAB review. As the Board has made clear, in order to meet the standard of specificity, the Petition must at a minimum contain “two essential components: (1) clear identification of the conditions of the permit that [are at] issue, and (2) argument that the

⁶ *In re South Shore Power, L.L.C.*, PSD Appeal No. 03-02, Slip. Op. at 10 (EAB June 4, 2003) (citing *In re Knauf Fiber Glass, GmbH* (“*Knauf I*”), 8 E.A.D. 121, 127, 161 (EAB 1999)).

conditions warrant review.”⁷ Calpilots’ generalized allegations regarding potential aircraft and aviation safety issues fail both of these tests.

First, the Petition fails to identify any conditions in the Permit that it claims is defective because of any of the issues discussed in the Petition. To the contrary, the Petition simply discusses generalized concerns that “plumes” from the Russell City Energy Center could cause potential aviation and aircraft safety concerns, without discussing how the permit analysis is allegedly inadequate. In particular, the Petition does not mention even a single permit condition, let alone discuss how the District could have committed clear error with respect to any such condition in connection with the aviation safety concerns that Petitioner raises. The Board has recognized that petitions for review such as this, which do not discuss how permit terms could be inadequate as a result of the issues raised in the petition, “fall far short” of satisfying the specificity requirement.⁸ As the Board has explained, “generalized concerns that are not tied to particular permit terms are not suitable for Board review.”⁹

Second, the Petition fails to provide any specific argument as to why the Permit warrants review. The Board’s requirement is clear that “[i]n order to establish that review of a permit is warranted, a petitioner must, pursuant to section 124.19(a), both state the objections to the permit that are being raised for review *and explain why the permit decision maker’s . . . basis for the decision . . . is clearly erroneous or otherwise warrants review.*”¹⁰ Here, Petitioner simply

⁷ *Beeland*, UIC Appeal No. 08-02, 14 E.A.D. ___, Slip. Op. at 9 (quoting *In re Puna Geothermal Venture*, 9 E.A.D. 243, 274 (EAB 2000)).

⁸ *In re Knauf Fiber Glass GmbH (“Knauf II”)*, 9 E.A.D. 1, 6 (EAB 2000) (Petitions failing to identify any permit conditions being challenged failed to satisfy the specificity requirement, and others that alluded to relevant issues were inadequate where they did specifically discuss why the permitting agency’s responses on these issues were incorrect or inadequate, because the Board “must insist that minimum specificity standards are adhered to.”)

⁹ *Beeland*, UIC Appeal No. 08-02, 14 E.A.D. ___, Slip. Op. at 24 (quoting *In re American Soda*, 9 E.A.D. 280, 295 n. 17 (EAB 2000)).

¹⁰ *Encogen Cogeneration Facility*, 8 E.A.D. at 251-52 (emphasis added) (citing *Kawaihae Cogeneration Project*, 7 E.A.D. at 114, *In re Puerto Rico Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995), & *In re Genesee Power Station, L.P.*, 4 E.A.D. 832, 866 (EAB 1993)); *see also Sutter Power Plant*, 8 E.A.D. at 687.

presents its concerns about power plant plume impacts on aircraft and airport operations, without providing any discussion at all as to how the District's PSD permitting analysis could be flawed because of them. They do not provide any discussion as to how their plume concerns could alter the District's analysis of the PSD Best Available Control Technology ("BACT") requirements pursuant to 40 C.F.R. Section 52.21(j), or how any of the District's BACT determinations or BACT limits imposed in the permit could possibly have been impacted by these concerns. Nor do they provide any discussion as to how their plume concerns could alter the District's assessment that the facility will not cause or contribute to a violation of any applicable PSD National Ambient Air Quality Standard or PSD increment pursuant to 40 C.F.R. Section 52.21(k). Indeed, nowhere throughout the Petition does Petitioner provide any discussion about impacts on aircraft and airport operations in relation to anything in the District's basis for its permitting decision, which is the detailed analyses set forth in the Statement of Basis, Additional Statement of Basis, and Responses to Comments.¹¹

Instead, all that the Petition provides is generalized concerns about potential aviation safety and airport operation issues that are within the purview of other regulatory bodies, such as the FAA. (*See, e.g.*, Petition 10-01 at 2 ("Calpilots hereby requests that based on the above, the P_S_D [sic] Permit be remanded back to the BAAQMD for further comment *by the FAA and others.*") (emphasis added).) Regardless of the validity of these concerns, Petitioner has not attempted to tie them to any of the PSD requirements on which the District based its decision under the Federal PSD requirements in 40 C.F.R. Section 52.21. As the Board has made clear, general statements of concern about a project, "rather than specific arguments as to why the

¹¹ The PSD requirements in 40 C.F.R. Section 52.21 are referenced exactly once, on the very last page of the Petition above the signature block. The reference consists simply of a recitation of the definition of "Best Available Control Technology" in 40 C.F.R. Section 52.21(b)(12), with no discussion, explanation, or analysis of how any of the points raised in the Petition could be related to this regulatory provision, let alone how they could be related to the District's detailed analyses applying the BACT requirement to this particular facility. Simply providing a regulatory citation such as this, without more, falls far short of constituting an explanation of how the "permit decision maker's . . . basis for its decision was clearly erroneous or otherwise warrants review."

[permitting agency's] responses are erroneous or an abuse of discretion," are not enough to satisfy the jurisdictional prerequisites for Board review.¹²

The District is mindful that the Board broadly construes petitions filed by *pro se* petitioners, as Calpilots appears to be here. But the Board has made clear that, even with *pro se* petitioners, it “nonetheless does expect such petitions to provide sufficient specificity to apprise the Board of the issues being raised,” and it “expects the petitions to articulate some supportable reason or reasons as to why the permitting authority erred or why review is otherwise warranted.”¹³ Here, even the broadest reading of the Petition fails to meet these minimum standards. The Petition simply alleges generalized concerns about aviation safety and airport operations, and requests that the Permit be remanded so that further study can be undertaken by the FAA on these issues (as well as on potential economic impacts on Hayward Executive Airport). (See Petition 10-01 at 2, 8.) It provides no basis whatsoever for concluding that the District could have erred in its application of any element of the PSD requirements in 40 C.F.R. Section 52.21, and as a result it must be dismissed for lack of specificity.¹⁴

¹² See *Beeland*, UIC Appeal No. 08-02, 14 E.A.D. ___, Slip. Op. at 15 (citing 40 C.F.R. § 124.19; *In re Puna Geothermal Venture*, 9 E.A.D. 243, 274 (EAB 2000)); see also *Sutter Power Plant*, 8 E.A.D. at 691-92 (denying review where the petition contained only “very general, unsupported statements that do not allege particular error or errors on [the permitting agency's] part”).

¹³ *Sutter Power Plant*, 8 E.A.D. at 687-88 (citing *In re Puerto Rico Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995) and *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 19 (EAB 1994)); see also *Encogen Cogeneration Facility*, 8 E.A.D. at 249 (although the Board broadly construes petitions filed without the aid of legal counsel, “the burden of demonstrating that review is warranted nonetheless inevitably rests with the petitioner challenging the permit decision.”) (citing 40 C.F.R. § 124.19(a) and EAB caselaw); *In re Knauf Insulation, GmbH*, PSD Appeal No. 06-01 through 06-06, Slip Op. at 6 n. 4 (EAB Nov. 14, 2006); *In re Diamond Wanapa I., L.P.*, PSD Appeal No. 05-06 Slip Op. at 15-16 n. 13 (EAB Feb. 9, 2006).

¹⁴ Note that the Board also requires a petitioner seeking EAB review to allege that it participated in the permitting process and preserved the issues for review by raising them in comments on the draft permit. See, e.g., *Encogen Cogeneration Facility*, 8 E.A.D. at 248-49. Calpilots' Petition fails on its face to do so, as there is no mention of any comments whatsoever submitted by Calpilots (let alone how the District may have failed to respond adequately to any comments). The District therefore objects to review of the Petition for having failed to satisfy these minimum jurisdictional prerequisites of standing and issue preservation. The District does not contend that Calpilots failed to submit comments, and in fact the District provided responses to those

The Petition therefore fails both elements of the *Beeland* test for specificity and should be summarily dismissed.

II. The Issues Raised In The Petition Do Not Fall Within The Purview of the PSD Program and Are Not Within the Environmental Appeals Board’s Jurisdiction.

Although the Board did not rule on any substantive issues in its July 29, 2008, Remand Order in this case, in order to prevent unnecessary expense of legal resources in connection with the remand proceedings, the Board did explain that “non-PSD issues” are not within the Board’s jurisdiction to review and should not be raised on appeal. (*See* Remand Order, Slip. Op. at 39-40 (“[T]he Board will deny review of issues that are not governed by the PSD regulations because it lacks jurisdiction over them.”) (quoting *In re Sutter Power Plant*, 8 E.A.D. 680, 688 (EAB 1999) (additional citation omitted).¹⁵) The aviation-related issues in Calpilots’ Petition for Review present exactly such “non-PSD issues”. They may be issues within the purview of the FAA or other expert agencies with jurisdiction over aviation-related issues, but Petitioner has no

comments, even though they were beyond the scope of the PSD program. *See* Responses to Comments at 188-89 (Comment XIV.7. – Health Risk Assessment to Aircraft Pilots & Passengers) and 226-28 (Comment XIX.9. – Potential Hazards to Aviation and Comment XIX.10. – Impacts to Operations at Area Airports). But a petition must explicitly set forth on its face that the petitioner filed comments sufficient to confer standing and that it preserved the issues for review by including them in the comments. *See Encogen Cogeneration Facility*, 8 E.A.D. at 248-49 & n. 10 (“It is not incumbent upon the Board to scour the record to determine whether an issue was properly raised below: this burden rests with Petitioners.”) (citations omitted). The Petition should be dismissed because of this facial defect, as well as for the other more substantive defects addressed herein.

¹⁵ The Board’s observation in the Remand Order rests on many years of jurisprudence consistently denying review of issues outside of the federal PSD program. *See In re South Shore Power, L.L.C.*, PSD Appeal No. 03-02, Slip. Op. at 10 (EAB June 4, 2003) (“[I]n considering whether to grant review of a PSD permit, the Board will assess whether the issues raised are governed by the PSD program, and are therefore within the Board’s scope of review, or are instead outside the scope of the Board’s jurisdiction.”) (citations omitted); *Sutter Power Plant*, 8 E.A.D. at 688 (“The PSD review process is not an open forum for consideration of every environmental aspect of a proposed project, or even every issue that bears on air quality. In fact, certain issues are expressly excluded from the PSD permitting process. The Board will deny review of issues that are not governed by the PSD regulations because it lacks jurisdiction over them.”) (internal quotation marks and citations omitted); *Knauf I*, 8 E.A.D. at 127 (“[T]he Board will not assume jurisdiction over permit issues unrelated to the federal PSD program.”) (internal quotation marks and citations omitted).

argument that they are issues subject to the Federal PSD requirements in 40 C.F.R. Section 52.21. Indeed, the Petition impliedly recognizes this reality by requesting that the Permit be remanded not for additional PSD analysis by the District, but for additional analysis related to aircraft and airport impacts by the FAA. (*See* Petition 10-01 at 2, 8.) The Board should therefore dismiss the Petition for lack of jurisdiction, and in so doing prevent the unnecessary expense of legal resources in litigating these issues that it was concerned about in the Remand Order.

Furthermore, the Petition's one reference to the BACT definition in 40 C.F.R. Section 52.21(b)(12) does not create jurisdiction over these aviation-related issues. The Petition makes no attempt to explain how this BACT definition is relevant to any of the concerns regarding aviation safety raised in the Petition. A mere recitation of a relevant regulatory requirement, without explanation of how the issues raised in the Petition implicate this requirement, cannot be used to 'boot-strap' EAB jurisdiction where none otherwise exists.

The Petition therefore does not present any issues that can be reviewed in this appeal, because "the Board's jurisdiction, and thus review power, is limited, extending only to those issues which are directly related to permit conditions that implement the federal PSD program or that are otherwise linked to the PSD program in the context of a particular case."¹⁶ The Petition must be summarily dismissed for lack of jurisdiction under 40 C.F.R. Section 124.19.¹⁷

¹⁶ *South Shore Power*, PSD Appeal No. 03-02, Slip. Op. at 10 (citing *Knauf I*, 8 E.A.D. at 127, 161).

¹⁷ Furthermore, even if these aviation issues could somehow potentially be related to a federal PSD issue, the Petition has failed to describe with specificity how any such relationship may exist or how the District could have committed clear error or abuse of discretion with respect to such issues in its PSD permitting analysis. The District submits that there can be no jurisdictional basis whatsoever in Petitioner's aviation concerns, but even if there could potentially be some jurisdictional connection, the Petition must still be dismissed for not alleging it with specificity. *See Encogen Cogeneration Facility*, 8 E.A.D. at 259-60 ("The Petitioners, however, have not shown how these issues fall within the Board's PSD jurisdiction. Moreover, even if these matters were to fall within our PSD jurisdiction, the Petitioners' general allegations do not provide sufficient information or specificity from which the Board could conclude that [the permitting agency] clearly erred in issuing the Permit or in establishing the conditions contained in the Permit.") (citations omitted).

CONCLUSION

For the foregoing reasons, the Petition should summarily be DISMISSED.

Dated: April 8, 2010

Respectfully Submitted

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

_____/s/_____
By: Alexander G. Crockett Esq.
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PROOF OF SERVICE

I, Mildred Cabato, declare as follows:

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

On the date set forth below, I served this document, **“Response To Petition For Review Requesting Summary Dismissal”**, by placing a copy of it in a sealed envelope, with First Class postage thereon fully paid, and depositing said envelope in the United States Mail at San Francisco, California, addressed to the person set forth below:

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