

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

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In re: )  
          ) )  
Russell City Energy Center ) PSD Appeal Nos. 10-08, 10-09 & 10-10  
          ) )  
PSD Permit No. 15487 )  
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**RUSSELL CITY ENERGY COMPANY, LLC'S  
RESPONSE SEEKING SUMMARY DISPOSITION  
OF PETITIONS FOR REVIEW FILED BY  
HAYWARD AREA RECREATION AND PARK DISTRICT,  
MINANE JAMESON AND IDOJINE J. MILLER**

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## I. INTRODUCTION

Permittee Russell City Energy Company, LLC (“RCEC”) hereby submits its Response Seeking Summary Disposition of Petitions for Review Numbered PSD Appeal 10-08, 10-09, and 10-10.<sup>1</sup> These petitions for review, filed by the Hayward Area Recreation and Park District (“HARD”) (PSD Appeal No. 10-08), Minane Jameson (PSD Appeal No. 10-09), and Idojine J. Miller (PSD Appeal No. 10-10), challenge the decision by the Bay Area Air Quality Management District (the “Air District”) to issue a Prevention of Significant Deterioration (“PSD”) permit to RCEC to construct a new natural gas-fired combined-cycle power plant in Hayward, California.

RCEC respectfully requests that the Environmental Appeals Board (the “Board”) deny these three petitions in their entirety. Because they were filed after the March 22, 2010 deadline set by the Air District, all three petitions for review were untimely and should be denied for this reason alone. In addition, all of the petitions lack specificity, fail to demonstrate why the Air District’s response to comments on the issues raised was clearly erroneous or otherwise warrants review, and raise issues outside the Board’s jurisdiction. Should the Board not deny one or more of these petitions in its entirety, RCEC will promptly respond to the contentions made by such petition(s) in accordance with any schedule set forth by the Board.

## II. BACKGROUND

The Russell City Energy Center will be a 600-MW natural gas-fired, combined-cycle power plant in Hayward, California (the “Project”). The Project cannot commence construction without obtaining a federal PSD permit from the Air District, which issues PSD permits in its jurisdiction pursuant to a delegation agreement with the U.S. Environmental Protection Agency

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<sup>1</sup> On April 12, 2010, the Board granted RCEC’s Motion for Leave to Respond to the Petitions. Order Granting Motion for Leave To Respond to Petitions, PSD Appeal Nos. 10-01, 10-02, 10-03, 10-04, 10-05, 10-06, 10-07, 10-08, 10-09 & 10-10 (Apr. 12, 2010). The Board provided that RCEC may file a response to these petitions for review, “on or before April 23, 2010, if RCEC seeks summary disposition of the petitions, or otherwise by May 10, 2010.” *Id.* at 1.

(“EPA”), Region 9. *See* U.S. EPA - Bay Area Air Quality Management District Agreement for Delegation of Authority to Issue and Modify Prevention of Significant Deterioration Permits Subject to 40 CFR 52.21 (Feb. 4, 2008). The factual and procedural history of the Project up through mid-2008 is well-known to the Board because the PSD proceedings were subject to two prior petitions for review (PSD Appeal Nos. 08-01 and 08-07). *See In re Russell City Energy Center*, PSD Appeal No. 08-01 (EAB, July 29, 2008); *In re Russell City Energy Center*, PSD Appeal No. 08-07 (EAB, Nov. 25, 2008) (Order Denying Review).

In the approximately 18 months since the Board remanded the Project’s PSD permit to the Air District, the Air District completed PSD permit proceedings pursuant to 40 C.F.R. part 124 and the Board’s July 29, 2008 Order. On December 8, 2008, the Air District issued a Draft PSD Permit for the Project. Exhibit 1, Statement of Basis for Draft Amended Federal “Prevention of Significant Deterioration” Permit (Dec. 8, 2008) (“Statement of Basis”). The Air District solicited public comments on the Draft PSD Permit and accompanying Statement of Basis and accepted written comments for nine weeks, until February 6, 2009. Exhibit 2, Letter from Brian Bateman, Director of Engineering, Bay Area Air Quality Management District, to Rick Thomas, Vice President of Development (Feb. 4, 2010) at 1 (“February 4, 2010 Letter”). The Air District also held a public hearing at the Hayward City Hall on January 21, 2009. *Id.* Based on the comments received during this first comment period and the Air District’s additional review and analysis, the Air District issued a revised Draft PSD Permit and Additional Statement of Basis on August 3, 2009. Exhibit 3, Additional Statement of Basis, Draft Federal “Prevention of Significant Deterioration” Permit (Aug. 3, 2009) (“Additional Statement of Basis”). The Air District solicited public comments on the revised Draft PSD Permit and accompanying Additional Statement of Basis and accepted written comments for more than six weeks, until September 16, 2009. Exhibit 2, February 4, 2010 Letter, at 2. The Air District held a second public hearing at the Hayward City Hall on September 2, 2009. *Id.* Altogether, since the Board remanded the permit to the Air District, the Air District accepted additional public comments on the Draft PSD Permit for more than 15 weeks during two public comment periods,

each with a public hearing conducted pursuant to EPA requirements.

On February 3, 2010, the Air District issued the Final PSD Permit for the Project. Exhibit 4, Prevention of Significant Deterioration Permit Issued Pursuant to the Requirements of 40 CFR § 52.21 (“Final PSD Permit”). It also issued a 235-page Responses to Public Comments that responds to comments received during both public comment periods. Exhibit 5, Responses to Public Comments, Federal “Prevention of Significant Deterioration” Permit (Feb. 2010) (“Responses to Public Comments”). The Air District served notice of the Final PSD Permit by electronic mail (“email”) and regular mail on February 4, 2010. Exhibit 6, Email from Barry Young, Subject: Russell City Energy Center – Notice of Issuance of Final PSD Permit (Feb. 4, 2010) (“Email Notice”); Exhibit 7, Email from Alexander Crockett to Kevin Poloncarz (Apr. 6, 2010), attaching Notice of Issuance of Final Prevention of Significant Deterioration (PSD) Permit for the Russell City Energy Center (“Mail Notice”).

The Final PSD Permit specifies that “Petitions for Review must be received by the EAB no later than March 22, 2010.” Exhibit 4, Final PSD Permit at 2. Similarly, the Responses to Public Comments provides that “[p]ermit appeals must be actually received and filed with the Environmental Appeals Board no later than March 22, 2010, to be considered timely.” Exhibit 5, Responses to Public Comments at i. Both the Email Notice and Mail Notice provide that “[a]ny such members of the public must file any appeal no later than March 22, 2010. Appeals must be received by the EAB by this date to be timely.” Exhibit 6, Email Notice at 1; Exhibit 7, Mail Notice at 1.

Petitions for review of the Final PSD Permit were filed by the following 10 parties: (1) California Pilots Association (PSD Appeal No. 10-01); (2) Chabot-Las Positas Community College District (PSD Appeal No. 10-02); (3) Citizens Against Pollution (PSD Appeal No. 10-03); (4) Robert Sarvey (PSD Appeal No. 10-04); (5) CALifornians for Renewable Energy, Inc., Bob Sarvey, and Rob Simpson (PSD Appeal No. 10-05); (6) Juanita Gutierrez (PSD Appeal No. 10-06); (7) Karen D. Kramer (PSD Appeal No. 10-07); (8) HARD (PSD Appeal No. 10-08); (9) Minane Jameson (PSD Appeal No. 10-09); and (10) Idojine J. Miller (PSD Appeal No. 10-

10).

For the reasons discussed below, the petitions for review filed by HARD, Ms. Jameson, and Ms. Miller should be denied in their entirety at this time.

### III. DISCUSSION

#### A. Standard of Review

The Board will grant review of a PSD permitting decision only if it involves a “finding of fact or conclusion of law which is clearly erroneous,” or “[a]n exercise of discretion or an important policy consideration which the [Board] should, in its discretion, review.” 40 C.F.R. § 124.19(a)(1)-(2). The Board has noted repeatedly that its “power of review should be only sparingly exercised” and that “most permit conditions should be finally determined at the [permitting authority] level.” *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 6-7 (EAB 2000) (“*Knauf II*”) (quoting 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)).

In determining whether to grant review of a petition, the Board “first looks to whether the petition meets the threshold procedural requirements of the permit appeal regulations.” *Id.* at 5 (citing 40 C.F.R. § 124.19; *In re Sutter Power Plant*, 8 E.A.D. 680, 685 (EAB 1999)). The threshold procedural requirements include timeliness, standing, and preservation of an issue for review. *Id.* The Board “strictly construes threshold procedural requirements, like the filing of a thorough, adequate, and timely petition.” *In re Town of Marshfield, Massachusetts*, NPDES Appeal No. 07-03, slip op. at 4 (EAB, Mar. 27, 2007) (Order Denying Review). For every issue raised, the petitioner bears the burden of demonstrating that review is warranted. *In re Steel Dynamics, Inc.*, 9 E.A.D. 740, 744 (EAB 2001). Petitions for review “must meet a minimum standard of specificity.” U.S. Environmental Protection Agency, *The Environmental Appeals Board Practice Manual* at 33 (June 2004) (“EAB Practice Manual”). Petitioners “must not only state their objections to a permit but must also explain why the permitting authority’s response to those objections (for example in a response to comments document) is clearly erroneous or otherwise warrants review.” *In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04, slip op. at 87-88 (EAB, Sept. 27, 2006). To do so, “the petitioner must address the permit issuer’s responses to

relevant comments made during the process of permit development; the petitioner may not simply reiterate comments made during the public comment period, but must substantively confront the permit issuer's subsequent explanations." *Id.* at 88. Failure by a petitioner to do so will result in a denial of review. *In re Zion Energy, L.L.C.*, 9 E.A.D. 701, 705 (EAB 2001). Although the Board "tries to construe petitions filed by persons unrepresented by legal counsel broadly," such petitions must still "provide sufficient specificity such that the Board can ascertain what issue is being raised" and "articulate some supportable reason as to why the permitting authority erred or why review is otherwise warranted." *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 127 (EAB 1999) ("*Knauf I*").

The Board will also assess whether the issues raised in petitions for review are subject to the Board's jurisdiction. *Zion Energy*, 9 E.A.D. at 706; *Sutter*, 8 E.A.D. at 688. The Board's jurisdiction to review PSD permits extends only to those issues relating to permit conditions that implement the federal PSD program. *In re Hawaii Elec. Light Co.*, 10 E.A.D. 219, 238 (EAB 2001) ("*HELCO*"). As the Board has explained, "[t]he 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." *Knauf I*, 8 E.A.D. at 127. If an issue is not governed by the PSD regulations, the Board lacks jurisdiction over them and will deny review. *Id.*

#### **B. The Petitions for Review Were Untimely**

HARD and Ms. Jameson filed their petitions for review on April 1, 2010, and Ms. Miller filed her petition for review on April 6, 2010.<sup>2</sup> To be considered timely, petitions for review needed to be actually received and filed with the Board no later than March 22, 2010. Thus,

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<sup>2</sup> HARD's letter is dated March 26, 2010, but it was not filed with the Board until April 1, 2010. *See* Docket No. 21. Ms. Jameson's letter is dated March 17, 2010, but it was not filed with the Board until April 1, 2010. *See* Docket No. 22. Ms. Miller's letter is dated March 29, 2010, but it was not filed with the Board until April 6, 2010. *See* Docket No. 23.

HARD and Ms. Jameson filed 10 days late, and Ms. Miller filed 15 days late. As discussed below, the petitions for review should be denied by the Board for this reason alone.

As the Board recently explained, petitions for review must be received by the Board by the date specified by the permitting agency:

With respect to timeliness, the Agency's permit regulations generally require petitions for review to be filed "[w]ithin 30 days after" a final permit decision has been issued. The regulations alternatively allow a permit issuer to specify a later deadline for the filing of a petition for review. As the Board has consistently held, petitions are considered "filed" when they are *received* by the Board, not when they are mailed. Failure to submit a petition within the time provided will ordinarily result in the dismissal of the petition.

Order To Show Cause Why Petition Should Not Be Dismissed, PSD Appeal No. 10-06 (Apr. 14, 2010), at 2 (citations omitted) ("April 14, 2010 Order"); Order To Show Cause Why Petition Should Not Be Dismissed, PSD Appeal No. 10-07 (Apr. 14, 2010) (same).

As the Board has emphasized, "[i]t is a petitioner's responsibility to ensure that filing deadlines are met, and the Board will generally dismiss petitions for review that are received after a filing deadline." *In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 329 (EAB 1999), *aff'd*, *Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000); *see also In re Puna Geothermal Venture*, 9 E.A.D. 243, 273 (EAB 2000) ("failure to ensure that a petition for review is received by the filing deadline will generally lead to dismissal of the petition on timeliness grounds."). The Board "strictly construes threshold procedural requirements, like the filing of a thorough, adequate, and timely petition." *Town of Marshfield*, slip op. at 4.

In this case, the Air District served notice of the Final PSD Permit by email and by regular mail on February 4, 2010.<sup>3</sup> Exhibit 6, Email Notice; Exhibit 7, Mail Notice. The Final

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<sup>3</sup> As the Board recently explained, "[t]he permitting regulations provide that, when the time frame for filing a petition for review begins 'after the service of notice \* \* \* [of the final decision] by mail,' three additional days shall be added onto the prescribed time (i.e., three days would be added to the thirty days). However, where the deadline for filing the petition is based on an alternate date specified in the permit issuer's notice, as is the case here, the three additional days are not added to the deadline." April 14, 2010 Order at 3 n.3 (citations omitted). In any case, three additional days would not matter, as the petitions for review were all filed more than three days late.

PSD Permit specifies that “Petitions for Review must be received by the EAB no later than March 22, 2010.” Exhibit 4, Final PSD Permit at 2. Similarly, the Responses to Public Comments provides that “[p]ermit appeals must be actually received and filed with the Environmental Appeals Board no later than March 22, 2010, to be considered timely.” Exhibit 5, Responses to Public Comments at i. In addition, both the Email Notice and Mail Notice provide that “[a]ny such members of the public must file any appeal no later than March 22, 2010. Appeals must be received by the EAB by this date to be timely.” Exhibit 6, Email Notice at 1; Exhibit 7, Mail Notice at 1. Thus, consistent with the governing regulations at 40 C.F.R. part 124, the Air District specified a “later date” by extending the PSD Permit’s effective date and, as a consequence, the deadline for filing a petition for review by more than two weeks beyond the required 30-day period. According to the Air District’s notices, “[t]his date provides 45 days from permit issuance to file appeals, which is greater than the minimum 30 days required . . . .” Exhibit 6, Email Notice, at 1; Exhibit 7, Mail Notice, at 1. Petitioners, however, submitted their petitions for review on April 1, 2010 (HARD and Ms. Jameson) and April 6, 2010 (Ms. Miller).

As RCEC discussed in its previous Response Seeking Summary Disposition, the Board will consider untimely petitions in only rare cases with special circumstances. *See* Russell City Energy Company, LLC’s Response Seeking Summary Disposition, PSD Appeal Nos. 10-01, 10-05, 10-06 & 10-07 (Apr. 8, 2010) at 13 (citing *AES Puerto Rico*, 8 E.A.D. at 328-29; *In re Avon Custom Mixing Services., Inc.*, 10 E.A.D. 700, 703 n.6 (EAB 2002); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 123-24 (EAB 1997); *In re Hillman Power Co., L.L.C.*, 10 E.A.D. 673, 680 n.4 (EAB 2002)). None of the petitioners here alleges any special circumstances. The Air District provided clear instructions on the specified filing deadline, making it clear that petitions had to be actually filed with and received by the Board by March 22, 2010 in order to be considered timely filed. Indeed, the clarity of the Air District’s instructions is evidenced by the fact that CalPilots (as but one example) did timely file its petition on March 22, 2010 and did so successfully by use of the Central Data Exchange

(“CDX”) portal – notwithstanding that the CalPilots Petition was filed without the assistance of legal counsel. The Air District also provided more than two weeks beyond the minimum amount of time required by law.

Thus, because they were filed after the March 22, 2010 deadline set by the Air District, all three petitions for review were untimely and should be denied by the Board for this reason alone.

**C. The Petitions for Review Fail To Meet Other Threshold Requirements**

**1. The HARD Petition (PSD Appeal No. 10-08) Should Be Denied in its Entirety**

On April 1, 2010, HARD filed a one-page letter to “share [HARD’s] concern with the possible future impact that the Russell City Energy Center could have to the Hayward Shoreline and Interpretative Center programs.” *See* Letter from Minane Jameson, Vice-President to Clerk of the Board (Mar. 26, 2010). In particular, HARD stated that its “concern is that the construction and placement of a large Energy Center within distance of the Shoreline and the Interpretative Center, and the potential impact it would have on [HARD’s] programs, including a loss of program support and revenue to [HARD].” *Id.* HARD requested that the Board “carefully consider and further study the impact of the decision to construct the Russell City Energy Center in its presently proposed location within close proximity to the Bay Trail, sensitive environment, endangered species and the Hayward Shoreline Interpretative Center.” *Id.*

Even if HARD’s letter had been timely, its request for review should be denied because it fails to articulate any specific objections to any conditions of the Final PSD Permit related to any of the issues it raises. Indeed, HARD’s letter does not provide a single citation to a permit term or condition. *Cf. In re Beeland Group, LLC*, UIC Appeal Nos. 08-01 & 08-03, slip op. at 4 (EAB, May 23, 2008) (“Although the Board will construe a *pro se* petition broadly, it nonetheless must clearly identify the permit conditions at issue and state why those provisions warrant review.”).

Furthermore, HARD's letter fails to demonstrate why the Air District's response to comments on issues related to the Hayward Shoreline, sensitive environments, and endangered species was clearly erroneous or otherwise warrants review. The Air District conducted an extensive air quality impacts analysis that found no significant impacts from air emissions on soils or vegetation. *See* Exhibit 1, Statement of Basis at 64; Exhibit 3, Additional Statement of Basis at 89-91. The Air District's soil and vegetation analysis included an initial and revised survey of existing soils and vegetation resources; an investigation of the potential for soils and vegetation impacts in the Hayward Regional Shoreline, among other areas; and an analysis of potential nitrogen deposition impacts on soil and vegetation resources that included the Hayward Regional Shoreline. Exhibit 3, Additional Statement of Basis at 89-91. The Air District provided extensive responses to comments on all of these soil and vegetation issues. *See* Exhibit 5, Responses to Public Comments at 169-80. The Air District also responded directly to public comments on potential impacts to wildlife and endangered species:

Although potential impacts to wildlife are very important resource considerations, they are addressed primarily through other regulatory mechanisms such as the Endangered Species Act and [the California Environmental Quality Act], not through Federal PSD regulations. Looking specifically at the requirements of the Federal PSD regulations, they address only impacts to soils and vegetation. The Air District has evaluated the potential for such impacts as explained in its soils and vegetation analysis and has found that there will not be any significant soils and vegetation impacts as a result of air emissions from the facility. Soils and vegetation issues can often be related to wildlife issues because soils and vegetation provide habitat and food for wildlife, and so to the extent that there is such a connection here, *the Air District's findings of no significant impact on soils and vegetation would support a finding of no significant impacts on wildlife, either. Moreover, EPA Region 9 and the US Fish and Wildlife Service have evaluated the potential for wildlife impacts in more detail and have concluded that the facility is not likely to adversely affect any endangered species, which further supports the Air District's conclusion on this point.*

*Id.* at 174-75 (emphasis added). HARD's letter fails to demonstrate why the Air District's analyses and extensive responses to comments on these issues were clearly erroneous or otherwise warrant review. HARD does not even mention the Air District's Responses to Public Comments. *Cf. Zion Energy*, 9 E.A.D. at 707 (denying petition that "merely reiterates comments previously submitted to [the permitting agency] during the comment period without indicating

why [the permitting agency's] responses to these comments were erroneous" and that "does not even mention [the permitting agency's] Responsiveness Summary.").

To the extent that HARD's letter addresses shoreline and other sensitive environment concerns not related to air emissions regulated by the PSD program, they are not within the Board's jurisdiction. *See, e.g., Zion Energy*, 9 E.A.D. at 706 (emissions of hazardous air pollutants outside purview of PSD program); *Knauf I*, 8 E.A.D. at 127 ("[t]he 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."). Similarly, potential impacts that the Project would have on HARD's programs is a siting issue not related to air emissions regulated by the PSD program. As the Air District explained in response to comments opposing the project's location, power plant siting decisions are made by the California Energy Commission and not the Air District:

The Air District defers to the Energy Commission regarding what types of electrical generating capacity should be provided at what locations to best serve California's electrical grid. *The Air District therefore refers commenters who are generally unsatisfied with the decision to site a power plant at this location . . . to the Energy Commission.* The Air District's role in the approval process for new power plants is to review them to ensure that they will comply with all applicable air quality regulatory requirements if the Energy Commission approves them. The Air District has done so here with respect to the Federal PSD requirements and has found that this facility will satisfy all such requirements and is eligible for a Federal PSD Permit.

Exhibit 5, Responses to Public Comments at 228 (emphasis added).

Because HARD has not met the threshold procedural and jurisdictional requirements for Board review, its petition for review should be denied in its entirety.

## **2. The Jameson Petition (PSD Appeal No. 10-09) Should Be Denied in its Entirety**

On April 1, 2010, Ms. Jameson filed a one-page letter questioning "how [the Final PSD Permit] was approved when no formal study was conducted on the affects [*sic*] this plant will have on the future usage of the Hayward shoreline and the Shoreline Interpretative Center." *See* Letter from Minane Jameson, Hayward resident to Whom It May Concern (Mar. 17, 2010). Ms. Jameson requested that "the PSD permit should be remanded until adequate studies are

conducted to evaluate the impact this project will have on the future usage and revenue of the shoreline and Interpretative Center.” *Id.* Ms. Jameson notes that “[t]here is a casual survey being conducted by the Center’s staff at this very moment to find out if the power plant might affect the shoreline’s future usage . . . .” *Id.* She requests the Board to “take the time to fully evaluate the impacts RCEC will have on its surroundings, especially the shoreline and Center created with public money for public use.” *Id.*

Ms. Jameson’s request for remand should be denied for several reasons in addition to its untimeliness. First, Ms. Jameson’s letter fails to articulate any specific objections to any conditions of the Final PSD Permit. Indeed, it does not cite a single permit condition. *Cf. Beeland Group*, slip op. at 4 (“Although the Board will construe a *pro se* petition broadly, it nonetheless must clearly identify the permit conditions at issue and state why those provisions warrant review.”).

Second, Ms. Jameson’s letter fails to demonstrate that the Air District’s responses to comments on “the impacts RCEC will have on its surroundings” were clearly erroneous or otherwise warrant Board review. As described above, the Air District found that the Project’s air emissions would have no significant impacts on soils or vegetation. *See* Exhibit 1, Statement of Basis at 64; Exhibit 3, Additional Statement of Basis at 89-91. In addition, the Air District explained that the finding of no significant impact on soils and vegetation “would support a finding of no significant impacts on wildlife, either. Moreover, EPA Region 9 and the US Fish and Wildlife Service have evaluated the potential for wildlife impacts in more detail and have concluded that the facility is not likely to adversely affect any endangered species . . . .” *Id.* at 174-75 (emphasis added).

Third, Ms. Jameson’s request to remand RCEC’s Final PSD Permit “until adequate studies are conducted to evaluate the impact this project will have on the future usage and revenue of the shoreline and Interpretative Center” ignores the fact that the Air District accepted public comments on the Draft PSD Permit for more than 15 weeks and held two public hearings, far beyond the minimum requirements of the PSD regulations.

Fourth, as discussed above, potential impacts that the Project would have on HARD's business is a siting issue not related to air emissions regulated by the PSD program. *See* Exhibit 5, Responses to Public Comments at 228 (“[t]he Air District therefore refers commenters who are generally unsatisfied with the decision to site a power plant at this location . . . to the Energy Commission.”).

Because Ms. Jameson's letter does not meet the threshold procedural and jurisdictional requirements for Board review, her petition for review should be denied in its entirety.

**3. The Miller Petition (PSD Appeal No. 10-10) Should Be Denied in its Entirety**

On April 6, Ms. Miller filed a two-page letter expressing her opposition to the Project. *See* Letter from Idojine J. Miller to Whom It May Concern (Mar. 29, 2010) (“Miller Petition”). Ms. Miller's letter alleges generally that the Project “will not do any good for us in Alameda County.” *Id.* at 1. The second page of the letter consists of a list of eight specific issues of concern. *Id.* at 2.

Ms. Miller's petition for review should be denied for several reasons in addition to its untimeliness. First, Ms. Miller's letter fails to articulate any specific objections to any conditions of the Final PSD Permit. As with HARD's and Ms. Jameson's letters, it does not cite a single permit condition. *Cf. Beeland Group*, slip op. at 4 (“Although the Board will construe a *pro se* petition broadly, it nonetheless must clearly identify the permit conditions at issue and state why those provisions warrant review.”).

Second, with respect to the eight specific issues of concern, each issue is outside the Board's jurisdiction and/or Ms. Miller's letter fails to demonstrate that the District's response to comments on the issue was clearly erroneous or otherwise warrants Board review. Thus, the Board should deny review of all of these issues.

***Issue 1: “Health of those persons living east of and in the vicinity of the power plant.”*** Miller Petition at 2. The Air District conducted a PSD air quality impact analysis for the Project, in accordance with federal PSD regulations and corresponding District regulations, and found

that “emissions from the proposed facility would not cause or contribute to air pollution in violation of any applicable National Ambient Air Quality Standard or applicable PSD increment.” Exhibit 1, Statement of Basis at 64. To meet non-PSD requirements, the Air District conducted a health risk assessment to determine the potential impact of toxic air contaminants on public health and found that the carcinogenic risk, chronic hazard index, and acute hazard index resulting from the Project are all less than significant. *Id.* at 14-16, App. B. When the Air District issued the revised Draft PSD Permit and Additional Statement of Basis, it updated the air quality impact analysis based on comments received and additional investigation and analysis conducted by the Air District. *See* Exhibit 3, Additional Statement of Basis at 80-91. The Air District provided extensive responses to public comments received during both comment periods on these issues. *See* Exhibit 5, Responses to Public Comments at 132-169 (Air Quality Impacts Analysis), 184-191 (Health Risk Assessment).

By going no further than to list issues of concern, Ms. Miller’s letter fails to demonstrate why the Air District’s extensive responses to comments on human health issues were clearly erroneous or otherwise warrant review. Ms. Miller does not even mention the Air District’s Responses to Public Comments. *Cf. Zion Energy*, 9 E.A.D. at 707 (denying petition that “merely reiterates comments previously submitted to [the permitting agency] during the comment period without indicating why [the permitting agency’s] responses to these comments were erroneous” and that “does not even mention [the permitting agency’s] Responsiveness Summary.”).

To the extent that Ms. Miller’s concerns address alleged human health issues not related to air emissions regulated by the PSD program, they are outside the Board’s jurisdiction. *See, e.g., Zion Energy*, 9 E.A.D. at 706 (emissions of hazardous air pollutants outside purview of PSD program); *Knauf I*, 8 E.A.D. at 127 (“[t]he 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.”).

***Issue 2. “Concerns of the surroundings [sic] communities and businesses or [sic] additional traffic during the building period--and after it’s built. Will have 25 permanent***

*jobs.*” Miller Petition at 2. Potential traffic impacts of the Project were analyzed during the CEC’s California Environmental Quality Act (“CEQA”)-equivalent environmental review and not during PSD review. Thus, this issue is outside the Board’s jurisdiction. *Cf. Knauf I*, 8 E.A.D. at 171 (“[b]oth of these issues are related to the CEQA process rather than PSD review, and we have no authority over them. Therefore, we must deny review of them.”).

***Issue 3. “Numbers of minorities living in the immediate area.”*** Miller Petition at 2. The District concluded in its environmental justice analysis for the Project that “[t]here is no adverse impact on any community due to air emissions from the [Project] and therefore there is no disparate adverse impact on an Environmental Justice community located near the facility.” Exhibit 1, Statement of Basis at 66. *See also* Exhibit 5, Responses to Public Comments at 192-94 (responding to comments received on environmental justice issues). Ms. Miller’s letter does not mention the Air District’s extensive responses to comments on this issue. *Cf. Zion Energy*, 9 E.A.D. at 707 (dismissing petition that “does not even mention [permitting agency’s] Responsiveness Summary.”). To the extent that Ms. Miller is alleging a concern not related to air emissions regulated by the PSD program, it is outside the Board’s jurisdiction. *See, e.g., Knauf I*, 8 E.A.D. at 127 (“[t]he 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.”).

***Issue 4. “Noise levels, up to 75 decibels. 62 is the allowed sound of a vacuum cleaner.”*** Miller Petition at 2. The Air District responded to comments concerning potential noise impacts of the Project as follows:

*Noise is not one of the environmental impacts that is addressed through the Federal PSD program as it is not related to air pollution or air-pollution related concerns like soils and vegetation impacts. Noise concerns are important, but they are addressed through other mechanisms such as the Energy Commission’s CEQA-equivalent environmental review. With respect to potential noise impacts on endangered species, those concerns are also addressed under the Endangered Species Act and in the case of this facility through the Endangered Species Act consultation process between EPA and the Fish & Wildlife Service (“FWS”). Here, FWS considered information provided by the applicant concerning noise impacts from the project and, as a result of EPA’s informal consultation, the applicant has agreed to submit the Construction Noise Mitigation Plan required by the Energy Commission license to FWS. The FWS has concluded that noise levels from the project, both from construction and operations, will not adversely*

affect any sensitive species or critical habitat.

Exhibit 5, Responses to Public Comments at 226 (footnotes omitted) (emphasis added). Ms. Miller's letter fails to demonstrate why the Air District's response to comments on potential noise impacts was clearly erroneous or otherwise warrants review. Moreover, as explained by the Air District, this issue is not addressed through the federal PSD program. Thus, it is outside the Board's jurisdiction. *See, e.g., HELCO*, 10 E.A.D. at 238 (“[t]he Board's jurisdiction to review PSD permits extends to those issues relating to permit conditions that implement the federal PSD program.”).

***Issue 5. “Safety of aircraft using the Hayward Airport. Local flights are allowed up to 1500 feet. The plumes of steam may rise to 1,000 feet.”*** Miller Petition at 2. The Air District responded to comments on potential hazards to aviation posed by the Project as follows:

*The Federal PSD Program is designed to address certain air quality issues, not to address safety issues such as potential hazards to aviation and aircraft operations. Safety issues such as these are obviously a very important public concern and there are comprehensive regulatory requirements in place to address them, but the Federal PSD Permit is not the mechanism to do so. Such concerns could potentially have an impact in a Federal PSD BACT analysis if there was a choice between alternative control technologies that had greater or lesser safety impacts, but that is not the case here. None of the comments has provided any information to suggest that different control technologies should be used or that permit conditions should be changed based on the potential for aviation hazards.*

*Moreover, the potential for aviation hazards was examined in detail by the Energy Commission during the licensing proceedings for the facility. The Commission reviewed a sophisticated analysis of vertical plume velocities and a 2006 FAA study entitled “Safety Risk Analysis of Aircraft Overflight of Industrial Exhaust Plumes”, and concluded that the FAA would characterize this risk as extremely remote and within acceptable ranges. The Energy Commission therefore found that the impact from potential aviation hazards would be less than significant. The Energy Commission similarly found that restrictions on airspace as a result of the facility would be less than significant. While it may be true that CEC staff recommended against the project because of aviation issues, the Commission disagreed and concluded that these were not significant concerns because they could be mitigated, as recommended by the FAA, by pilot notification, among other reasons. This considered analysis by the Energy Commission is how such issues are addressed, not through the Federal PSD program.*

Exhibit 5, Responses to Public Comments at 227 (footnotes omitted) (emphases added). Ms. Miller's letter fails to explain why the Air District's response to comments on aircraft issues was clearly erroneous or otherwise warrants review. Moreover, as explained by the Air District, this

issue is not addressed through the federal PSD program. Thus, it is outside the Board's jurisdiction. *See, e.g., HELCO*, 10 E.A.D. at 238 (“[t]he Board’s jurisdiction to review PSD permits extends to those issues relating to permit conditions that implement the federal PSD program.”).

***Issue 6. “Additional lighting of the power plant, lighting will surround the site.”*** Miller Petition at 2. Potential lighting impacts of the Project were analyzed during the CEC’s California Environmental Quality Act (“CEQA”)-equivalent environmental review and not during PSD review. Thus, this issue is outside the Board’s jurisdiction. *Cf. Knauf I*, 8 E.A.D. at 171 (“[b]oth of these issues are related to the CEQA process rather than PSD review, and we have no authority over them. Therefore, we must deny review of them.”).

***Issue 7. “The very size of the site, 18 acres.”*** Miller Petition at 2. The size of the site does not relate to any permit condition that implements the federal PSD program and, thus, it is outside the Board’s jurisdiction. *See, e.g., HELCO*, 10 E.A.D. at 238 (“[t]he Board’s jurisdiction to review PSD permits extends to those issues relating to permit conditions that implement the federal PSD program.”); *see also* Exhibit 5, Responses to Public Comments at 228 (“[t]he Air District therefore refers commenters who are generally unsatisfied with the decision to site a power plant at this location . . . to the Energy Commission.”).

***Issue 8. “Co2 equals 2,000,000 pounds of green house gases, per year for 30 years. A recent figure.”*** Miller Petition at 2. As has been widely recognized, RCEC’s Final PSD Permit is the first federal PSD permit to include enforceable Best Available Control Technology (“BACT”) limits for greenhouse gases (“GHGs”). RCEC voluntarily agreed to accept binding, enforceable GHG emissions limits. *See* Exhibit 5, Responses to Public Comments at 18. As a result, the Air District conducted a first-of-its-kind BACT analysis, following EPA’s five-step “top-down” BACT methodology. *See* Exhibit 1, Statement of Basis at 58-63. In response to public comments on the Draft PSD Permit, its own additional analysis, and RCEC submissions, the District substantially revised its BACT analysis and permit conditions in the revised Draft PSD Permit. *See* Exhibit 2, Additional Statement of Basis at 15-41, 111-112. In its Responses

to Comments, the District addressed comments received on GHG issues during both public comment periods. *See* Response to Comments at 18-51. Ms. Miller's letter fails to demonstrate why the Air District's response to comments on GHG issues was clearly erroneous or otherwise warrants review.

In sum, because Ms. Miller's letter does not meet the threshold procedural and jurisdictional requirements for Board review, her petition for review should be denied in its entirety.

#### **IV. CONCLUSION**

Because the petitions for review filed by HARD, Ms. Jameson, and Ms. Miller do not meet the Board's threshold procedural and jurisdictional requirements, the Board should deny them in their entirety. Should the Board not deny any of these petitions in its entirety for failure to meet the Board's threshold procedural and jurisdictional requirements, RCEC will promptly respond to the contentions made by any such petition in accordance with any schedule set forth by the Board.

Respectfully submitted,

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Dated: April 23, 2010

## CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of April, 2010, copies of the foregoing Russell City Energy Company, LLC's Response Seeking Summary Disposition of Petitions for Review Numbered PSD Appeal 10-08, 10-09, and 10-10 were served via first-class U.S. mail, postage prepaid, to:

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