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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	Appeal No. PSD 11-07
	)	
PETITION FOR REVIEW RE:	)	
PALMDALE HYBRID POWER PLANT	)	**INTERVENOR CITY OF PALMDALE**
PSD PERMIT	)	**RESPONSE TO PETITION FOR REVIEW**
	)	
PSD Permit No. SE 09-01	)	
_____	)	

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On behalf of the Permittee City of Palmdale ("the City"), applicant for the Palmdale Hybrid Power Plant ("Project") Prevention of Significant Deterioration ("PSD") Permit No. SE 09-01 ("PSD Permit") issued by the U.S. Environmental Protection Agency ("EPA) on October 18, 2011, we respectfully submit this response to Appeal No. PSD 11-07 ("Appeal") by Mr. Robert Simpson ("Petitioner" or "Mr. Simpson") before the Environmental Appeals Board ("Board"). Mr. Simpson and his attorney filed a mix of notes, draft materials, and what appears to be multiple versions of an intended petition on the deadline of November 17, 2011 using the Board's electronic filing system (the "Petition Materials") and an untimely amended petition on November 24, 2011 (the "Untimely Filing"). As we describe in this Response:

I. A long line of Board precedent strongly supports dismissing the Untimely Filing because no special circumstances justify a late submittal.

II. The Petition Materials do not comply with the Board's procedural requirements, either in aggregate or individually, and the Appeal should therefore be dismissed.

III. Even to the extent the Board hears the Appeal on its merits, Mr. Simpson does not demonstrate that the PSD Permit is based on a clearly erroneous finding of fact or conclusion of law, or involves an exercise of discretion or an important policy consideration that warrants review.

I. PETITIONER'S UNTIMELY FILING SHOULD BE DISMISSED

As a threshold matter, it is difficult to determine which documents represent Mr. Simpson's attempted Appeal. Mr. Simpson's attorney submitted a letter to the Board on November 24, 2011 requesting that the Untimely Filing constitute the Appeal petition. Mr. Simpson later sent an e-mail to the Board that suggested the Untimely Filing was *not* intended to be the appeal petition but was merely intended to supplement the Petition Materials. *See* the Board Index of Filing for the PSD Permit ("Filing Index"), No. 20. Regardless of the purpose, the Untimely Filing was submitted seven days past the appeal deadline and should be dismissed based on clear Board precedent.

The Board has long held petitioners to a very high standard for timeliness of appeals. "It 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, 1999 WL 345288, *4 (1999), *aff'd sub nom. Sur Contra La Contaminacion v. EPA*, 202 F. 3d 443 (1st Cir. 2000); *In Re: Envotech, L.P.* 6 E.A.D. 260, 1996 (dismissing four petitions that were filed several days after the appeals deadline).

AES Puerto illustrates how strictly this standard has been applied. There, the Board treated a petition filed *one day late* as timely only because "extraordinary circumstances created by [a] hurricane and its aftermath" delayed Federal Express' delivery of the petition. The petitioner even provided "a letter of apology from Federal Express explaining the reason for the late delivery." *In re AES Puerto Rico,* at *4. However, *in the same matter*, the Board dismissed another petition as untimely that was also delayed by the hurricane but which "was further delayed" because the petitioner accidently sent it to the wrong address. *Id*. (citing *Apex Microtechnology, Inc.*, EPCRA Appeal No. 93-2 (EAB, July 8, 1994) (appeal dismissed as untimely when petition was received late because of an accidental filing error the by petitioner)).

Further, the Board's Practice Manual, September 2010 ("Practice Manual") unequivocally establishes that late filings will not be allowed based on technical difficulties with the Board's electronic filing system:

> A party filing electronically assumes the risk at all times of filing problems caused by its own errors in using CDX. It is within the Board's discretion, on a case-by-case basis, to accept a late filing under special circumstances. A filing problem not attributable to a malfunction of CDX will not normally be considered a special circumstance justifying late filing. Thus, any party filing electronically is advised to allow sufficient time in advance of the filing deadline to correct any such error. *Id*., at 12-13.

Here, there are no "special circumstances" to justify acceptance of the Untimely Filing. Petitioner's only explanation is that the late submittal is a "clerical" revision because of unspecified difficulties with the e-filing system. This argument does not pass even a cursory review. First, the Petition Materials were filed on time, demonstrating that the e-filing system worked satisfactorily. Second, the Untimely Filing includes multiple substantive changes, including adding exhibits for the first time, providing tables of content and authority, reorganizing portions of the arguments, and potentially other unknown revisions that the Board should not be obligated to ascertain. *See In re Environmental Disposal Systems, Inc*., 12 E.A.D. 254, 2005 WL 2206804, at *28, n. 27 (EAB 2005) ("[I]t is neither [the Board's] responsibility nor [the Board's] practice to 'scour the record' for information that would support a petitioner's arguments"). However, even if the Untimely Filing merely involved "clerical" revisions, the desire of a petitioner to edit a filing clearly does not constitute "extraordinary circumstances." Mr. Simpson's clerical errors are analogous to the petitioner in *AES Puerto* that accidently mailed the petition to the wrong address, which resulted in a dismissal. *See In re AES Puerto Rico*, at *4. Moreover, the Practice Manual expressly advises parties "to allow sufficient time in advance of the filing deadline to correct any such error." Practice Manual at 13. Allowing a late filing for clerical revisions would eviscerate any deadline requirement because parties could repeatedly file new petitions for "clerical" reasons, forcing the Board to frequently determine what changes are clerical and what are substantive, which would run directly counter to the Board's policy of "facilitate[ing] expeditious resolution of NSR appeals." Order Governing Petitions For Review of Clean Air Act New Source Review Permits, Before the Environmental Appeals Board, dated April 19, 2011, at 2 ("NSR Order").

Board precedent and the Practice Manual demonstrate that the Untimely Filing should be dismissed. As a result, the Appeal should rest solely on the Petition Materials. As we describe next, the Petition Materials fall short of the Board's procedural requirements and should also be dismissed.

II. PETITION MATERIALS DO NOT MEET THE BOARD'S PROCEDURAL REQUIREMENTS AND SHOULD BE DISMISSED

As discussed above, on November 17, 2011, Mr. Simpson and his attorney used the Board's electronic filing system to file the Petition Materials in an effort to appeal the PSD Permit. The five Petition Materials are a mix of notes, draft materials, and what appear to be multiple versions of an intended petition, summarized by the following table:

Name of Board Index Filing	Pages (Limit: 30)[1]	Approx. Words (Limit: 14,000)[1]	Person Filing[2]	Address?[2]	Telephone Number?[2]	Email?[2]	Case and Docket Number?[2]	Signature?[2]
#1 Rob Simpson (DRAFT) Petition for Review (11/17/2011)	15	6000	April Rose Sommer	P. O. Box 6937 Moraga, CA 94570	(510) 423-0676	None listed	Case name, no docket number	Yes (but incorrect date)
#2 Rob Simpson (DRAFT) Petition for Review (11/17/2011)	14	6000	Robert Simpson	27126 Grandview Avenue Hayward, CA 94542	None listed	None listed	Case name, no docket number	No
#3 Rob Simpson (DRAFT) Petition for Review &11/17/2011)	4	1500	Not listed	Not listed	None listed	None listed	None listed	No
#4 Attachment to Petition for Review (11/17/2011)	2	500	Not listed	Not listed	None listed	None listed	None listed	Yes (but not by Petitioner)
#5 Rob Simpson Petition for Review (11/17/2011)	32	8500	April Rose Sommer	P. O. Box 6937 Moraga, CA 94570	(510) 423-0676	None listed	Case name, no docket number	Yes
Total:	**67 pages**	**22,500 words**						
Exceeds Limit By:	**37 pages**	**8500 words**						

1 The Board has set limits for petitions at 14,000 words or, alternatively, 30-pages. (NSR Order, at 2.)

2 The Board requires that each filing "shall contain the name, address, telephone number, and email address (if available) of the person filing the pleading." Practice Manual, at 16. Moreover, "in a permit proceeding governed by 40 C.F.R. § 124.19, the name of the case and the docket number should also appear on the document." *Id*.

Whether viewed in aggregate or individually, the Petition Materials fail to meet the strict procedural requirements established by the Board to facilitate the efficient review of PSD permitting decisions. *See* NSR Order, at 4 ("The Board will make use of summary disposition to resolve cases that do not meet these and other threshold requirements for filings before the Board.")

A. Petition Materials Do Not Meet Filing Requirements

The combined Petition Materials cannot be found to meet the Board's procedural requirements. The Board has set firm word and page limits to petitions and response briefs "to facilitate expeditious resolution of NSR appeals." NSR Order, at 2. Petitions cannot exceed 14,000 words or, alternatively, 30-pages, unless a "party can demonstrate a compelling and documented need to exceed such limitation," and in those instances only, the party must "seek advance leave of the Board to file a longer petition. . .Such requests are discouraged and will be granted only in unusual circumstances." *Id*. at 2-3.

In contrast, the Petition Materials contain approximately 22,000 words at 67 pages. Of these materials, only Filing Index No. 4 (two pages and approximately 500 words) is arguably an exhibit and should be excluded from the word or page count. *See id*. at 2, n. 5. The Petition Materials more than double the page limit and exceed the word limit by approximately 63%. Mr. Simpson did not seek advance leave to exceed the strict limits and no such approval was granted. Moreover, in an email to the Board on February 1, 2012 (Filing Index No. 20), Mr. Simpson confirms that all the documents filed on November 17, 2011 "remain a part of my appeal" and the Untimely Filing was only intended to amend "clerical issues in the documents that it replaces identified as entry 1 and 5."

Given the foregoing, the combined Petition Materials should rightfully be viewed as Mr. Simpson's attempt to appeal the PSD Permit. It would run counter to the NSR Order to attempt to cure the procedural deficiencies of the Petition Materials. "[I]t is neither [the Board's] responsibility nor [the Board's] practice to 'scour the record' for information that would support a petitioner's arguments." *In re Environmental Disposal Systems, Inc*., 12 E.A.D. 2542005 WL 2206804, at *28, n. 27 (EAB 2005). Although the Board attempts to construe *pro se* petitions

"as generously as possible," no such deference is needed here because Mr. Simpson is represented by counsel and Mr. Simpson has been actively involved with previous appeals before the Board. *See id*., at *22; *see also, e.g., In Re Russell City*, PSD Appeal No. 08-01, July 29, 2008 (Mr. Simpson actively participated in petition to the Board).

The Appeal should be dismissed by the Board because the Petition Materials significantly exceed the limitations established by the NSR Order and other filing requirements. NSR Order, at 4 ("The Board will make use of summary disposition to resolve cases that do not meet these and other threshold requirements for filings before the Board.") Mr. Simpson has not met the burden needed to review the PSD Permit. *See In Re Westborough And Westborough Treatment Plant Board*, 10 E.A.D. 297, 2002 WL 202356, at *5 (2008) ("The petitioner bears the burden of establishing grounds for review") (citing 40 C.F.R. § 124.19(a)(1) & (2)). The Appeal must conform to the Board's filing requirements to warrant consideration. *See* Practice Manual, at 11, NSR Order 2. Indeed, allowing procedurally defective appeals to proceed would run directly counter to the NSR Order requiring swift and efficient review of PSD permit appeals. NSR Order, at 1 ("NSR Permits are time sensitive.") (citing 72 U.S.C. § 7475(a)).

B. Individual Components Of Petition Materials Also Fall Short of Filing Requirements

The Petition Materials cannot be cured by selecting certain individual filings that may conceivably meet the filing requirements because Mr. Simpson has not requested that the Board attempt to dissect his various submittals. Even if the Board attempted to do so, all the individual filings are defective. Specifically: Index Filing No. 1 does not include an email, the docket number or correct signature (the date is from 2010); Index Filing No. 2 does not include a telephone number, email, docket number, signature or a word count; Index Filing No. 3 does not include the person filing, a telephone number, address, email, docket number, signature or a

word count; Index Filing No. 4 does not include any information but arguably was an exhibit; and Index Filing No. 5 does not include an email or docket number. As stated above, we request that the Appeal be dismissed because the Petition Materials are defective, and request that the Board not stretch to allow a component of the Petition Materials to constitute the Appeal petition, particularly because Mr. Simpson is represented by counsel and has significant experience with the Board's proceedings. *See In re Environmental Disposal Systems, Inc*., 12 E.A.D. 2542005 WL 2206804, at *22, 28, n. 27 (EAB 2005) ("[I]t is neither [the Board's] responsibility nor [the Board's] practice to 'scour the record' for information that would support a petitioner's arguments."); *See In Re Russell City*, PSD Appeal No. 08-01, July 29, 2008 (Mr. Simpson actively participated in petition to the Board).

C. Lack of Specificity of Arguments Supports Dismissal

In addition, individual arguments within the Petition Materials do not meet the standards required by the Board. The NSR Order at 4 clearly requires:

> For each issue appealed, to satisfy the requirements of 40 C.F.R. § 124.19(a), the petitioner must demonstrate, by citing with specificity to the record, including to the applicable documents and page numbers, that any issues being raised were either raised during the public comment period or were not reasonably ascertainable, as provided in 40 C.F.R. § 124.13. Where a comment was previously raised, the 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. (Emphasis added.)

Mr. Simpson's Appeal raises three broad claims: (1) the public participation and comment period for the PSD Permit was not adequate; (2) the best available control technology ("BACT") analysis did not satisfy necessary requirements; and (3) the EPA failed to consider the need for the Project. *See* Index Filing No. 5 at 4-14, 14-28, and 28-31, respectively.

These *same issues* were raised by Mr. Simpson in his comments to the PSD Permit and were thoroughly addressed by the EPA's Response to Public Comments on the Proposed Prevention of Significant Deterioration Permit for the Palmdale Hybrid Power Plant Project, October 2011, at pp. 27-48 ("Response to Comments"). By Response to Comments No. 25 through 32, the EPA addressed Mr. Simpson's comments about public participation. By Response to Comments No. 37 through 41 and 54 through 58, the EPA addressed Mr. Simpson's comments about public participation. By Response to Comments No. 35, the EPA addressed Mr. Simpson's comments about the need for the Project.

On Appeal, Mr. Simpson does not explain how the EPA's responses were inadequate but merely recirculates his prior comments without providing new information. Mr. Simpson does not comply with the NSR Order by demonstrating with specificity—by citing to documents and pages within the record—why the EPA's responses were not sufficient. *In Re Westborough And Westborough Treatment Plant Board*, 10 E.A.D. 297, 2002 WL 202356, at *13-14 (2008) (dismissing claim because petitioner failed to explain how responses were lacking). Moreover, Mr. Simpson does not bring new evidence that casts doubt on the EPA's conclusions. *See In re Environmental Disposal Systems, Inc*., 12 E.A.D. 254, 2005 WL 2206804, at *22 (dismissing appeal that "fails to present any sufficiently specific or compelling evidence or argument that would cast doubt on the thoroughness or rationality of the Region's technical evaluations and conclusions.").

Mr. Simpson cannot cure this defect by alleging the final PSD Permit included changes from the draft permit. *See* Index Filing No. 5, at 3 (alleging that changes to the BACT analysis and failing to reopen the public comment period amount to issues that "were not reasonably ascertainable at the time of comment"). Mr. Simpson already extensively commented on the

same issues and the mere fact that the final PSD Permit varied from the draft permit does not give Mr. Simpson another pass to repeat prior comments on Appeal. To require otherwise would force the EPA to freeze the permit in draft form or have to address the same comment on appeal. *See South Terminal Corp. v. EPA*, 504 F. 2d 646, 659 (1st Cir. 1974) ("Parties have no right to insist that a rule remain frozen in its vestigial form").

III. TO THE EXTENT THE BOARD CONSIDERS THE MERITS OF THE PETITION (WHICH WE DO NOT BELIEVE IS WARRANTED), THE PETITION DOES NOT DEMONSTRATE EPA ERROR

Even if the Board considers some or all of the Appeal on the merits, Mr. Simpson fails to show that the EPA's approval was based on clearly erroneous factual evidence or conclusions of law, or that the EAB should exercise its discretion to review an important policy matter. *See* 40 C.F.R. § 124.19(a); *see In re Phelps Dodge Corp*., 10 E.A.D. 460, 471 (EAB 2002); *In re Gov't of D.C. Mun. Separate Storm Sewer Sys*., 10 E.A.D. 323, 332-33 (EAB 2002). Indeed, Mr. Simpson's arguments are no more than "mere allegations of error" that the Board has repeatedly held are not enough to warrant review. *See In re City of Moscow,* 10 E.A.D. 135, 172 (EAB 2001)*; In re Hadson Power 14 Buena Vista,* 4 E.A.D. 258, 294 n.54 (EAB 1992). A petitioner must support its allegations with solid evidence that demonstrates how the permit issuer clearly erred in its decision making, and Mr. Simpson's appeal does not include the required evidence. *See In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001); *In re NE Hub Partners*, L.P., 7 E.A.D. 561, 567-68 (EAB 1998).

A. Background: Four-Year Permitting Effort Included A Multitude Of Opportunities For Public Participation

The PSD Permit was not obtained in a vacuum. Mr. Simpson, like the public at large, had numerous opportunities to learn about all aspects of the Project, to comment on the Project design and conditions, and to participate in relevant proceedings. Because Mr. Simpson

repeatedly asserts he lacked time to properly assess and raise issues, we provide a snapshot here of the extensive public outreach and participation associated with the Project.

The City submitted its Application for Certification to the California Energy Commission ("CEC") on August 4, 2008. The CEC certification process spanned three years, with the CEC ultimately approving the Project on August 10, 2011, determining that the Project would not result in any unmitigated significant environmental impacts. The CEC has an open process that allows any interested person to become a formal party (or "intervenor") in the CEC's proceedings, which grants the intervenor with significant rights to request data, submit testimony, and cross-examine witnesses, among other things. Mr. Simpson did not intervene even though Mr. Simpson is familiar with the process and has intervened on other projects. (*See, for example,* Carlsbad Energy Center, 07-AFC-06, Proof of Service List, available at: http://www.energy.ca.gov/sitingcases/carlsbad/index.html.) In addition, the CEC provided numerous opportunities to participate, including multiple public comment periods, various workshops, and several public hearings. Mr. Simpson did not submit any comments or participate at a single workshop or hearing for the CEC certification.

The Antelope Valley Air Quality Management District ("AVAQMD") took a lead role evaluating the Project's potential air quality impacts. The AVAQMD issued a Preliminary Determination of Compliance ("PDOC") on February 12, 2009 and a revised PDOC on June 22, 2009, both of which included a public comment period. The AVAQMD issued the Final Determination of Compliance ("FDOC") on May 13, 2010, determining the Project complies with all applicable AVAQMD Rules and Regulations. Again, Mr. Simpson did not participate in the AVAQMD proceedings.

The City filed its PSD application on April 1, 2009. The CEC's Preliminary and Final "Staff Assessments" and the AVAQMD's PDOC and FDOC addressed air quality impacts and project BACT requirements, although approval of the PSD Permit rested with the EPA. The Project's need for the EPA's approval of the PSD application was repeatedly raised and discussed during the CEC and AVAQMD proceedings, giving Project participants and the public further opportunity to consider the issues covered by the PSD Permit. The EPA issued the draft PSD Permit in August 2011 and held a public hearing (and informational session) on September 14, 2011. The EPA completed an exhaustive effort to notify the public about the PSD Permit and the public hearing on September 14, 2011, which exceeded the requirements of 40 C.F.R. Part 124. Details of the EPA's notification and outreach efforts are provided in the Response to Comments. This public outreach was in addition to the very detailed and thorough outreach completed by the CEC and AVAQMD. Although a number of EPA staff members attended the informational session and hearing, and Spanish translation services were provided, no members of the public raised any verbal questions or comments about the Project. Mr. Simpson did not participate at the informational session or hearing.

Mr. Simpson submitted written comments on the draft permit, which the EPA fully addressed in its Response to Public Comments on the Proposed Prevention of Significant Deterioration Permit for the Palmdale Hybrid Power Plant Project, October 2011, at pp. 27-48 ("Response to Comments").

B. Public Notice and Review Met Required Standards

As an initial argument, Mr. Simpson repeats assertions raised in his comments that the EPA should have extended the comment period for the PSD Permit. This issue was thoroughly addressed by the EPA's Response to Comments. The EPA confirmed that Mr. Simpson did not

demonstrate a need for additional time per 40 C.F.R. 124.13. *See* Response to Comment No. 26. Mr. Simpson complained that 30 days was not adequate time to review all the materials from the CEC proceedings. Mr. Simpson, however, had ample opportunity to review the CEC materials during the Project's multi-year CEC certification process. The EPA also acknowledged that its reference to the CEC proceedings in the Fact Sheet did not suggest a need to review the entire CEC record. *See* Response to Comment No. 26, n. 10. In short, Mr. Simpson fails to advance a basis or requirement to justify extending the 30-day comment period required by 40 C.F.R., Part 124.

Mr. Simpson bootstraps on this argument by claiming certain changes to the final PSD Permit should obligate the EPA to reopen the proceedings for public comment. This is not the case. The EPA's revisions did not result in changes to the air quality analysis and were the logical outgrowth of the issues considered by the draft permit. The EPA was not required to reopen the public comment period. *See South Terminal Corp. v. EPA*, 504 F. 2d 646, 659 (1st Cir. 1974) ("Parties have no right to insist that a rule remain frozen in its vestigial form"); *International Harvester Co. v. Ruckelshaus*, 478 F. 2d 615, 632 n. 51 (1973) ("a contrary rule would lead to the absurdity that in rule-making under the APA the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary").

C. BACT Analysis Was Proper

Next, Mr. Simpson asserts that the PSD Permit did not properly complete the best available control technology ("BACT") analysis. Mr. Simpson wrongly suggests that the EPA failed to consider two feasible control technologies: algae ponds and larger solar installations. Instead, the EPA expressly stated that "we do not believe algae ponds are a GHG technology at this time [and the] commenter has not provided any information indicating that the use of algae

ponds is currently available for carbon sequestration." Response to Comment No. 54. Mr. Simpson has not submitted any evidence into the record that demonstrates the potential feasibility of algae ponds other than his bald assertions. For solar installations, the EPA recognized that "the solar component is a lower-emitting GHG technology at this facility." Response to Comment No. 40. Given the hybrid gas/solar nature of the Project, "the solar component is integrated into the heat recovery portion of the project, it has the potential to reduce GHG emissions by reducing use of the duct burners during peak energy demand." *Id*. The appeal misses the point by suggesting the solar component should be dramatically expanded beyond the design of the Project, as the EPA recognized this exceeds the requirements of the BACT analysis:

> In this particular case, the solar component was a part of the applicant's Project as proposed in its PSD Permit application. Therefore, requiring the applicant to utilize, and thus construct, the solar component as a requirement of BACT did not fundamentally redefine the source. EPA has stated that an applicant need not consider control options that would fundamentally redefine the source.

Id. (emphasis added). Mr. Simpson then states that the EPA did not properly list the control technologies under "Step 3" of the "top down" methodology for determining BACT. This statement is perplexing because the EPA expressly provided this step in its GHG analysis. *See* Fact Sheet, Palmdale Hybrid Power Plant, PSD Permit Number SE 09-01, August 2011, at 30 ("Fact Sheet"); Response to Comment No. 37. Lastly, Mr. Simpson challenges the EPA's supplemental BACT analysis of carbon capture and sequestration ("CCS") as a control technology. Mr. Simpson goes so far as to say the EPA "reversed its position" on CCS in the Response to Comments, but this is not the case. Rather, the EPA recognized the appropriateness of determining that CCS was logistically and technically infeasible for the Project (Response to

Comment No. 37),[1] but decided to provide supplemental information "given that there is limited data in the EPA's record concerning potential logistical barriers relating to the building of CO_2 pipelines for the PHPP or other technical or logistical barriers to implementing CCS for the Project." *Id*. The EPA clarified that it assumed the logistical feasibility of CCS merely for purposes of the economic analysis, which it completed to demonstrate that CCS also should be "eliminated as a control option because it is economically infeasible." *See id*.

D. Mr. Simpson's Comment About Project "Need" Lacks Merit

Mr. Simpson's final argument asserts that the EPA failed to consider the need for the Project, a recycled argument that the EPA addressed in its Response to Comments. As a threshold matter, Mr. Simpson provides no basis that the EPA's treatment of this matter was clearly in error or even required. The EPA provided a detailed discussion in Response to Comment No. 35 explaining why it would defer to the state for any such analysis, even if it were required, because "mechanisms within the State of California provide the appropriate vehicles through which to address issues regarding the need for natural gas-fired power plants." The EPA recognized that the CEC has repeatedly identified the need for new natural gas generation in California. Response to Comment No. 35.

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[1] We note that this determination is entirely consistent with the PSD and Title V Permitting Guidance For Greenhouse Gases, EPA, Office of Air Quality Planning and Standards, Nov. 2010, at 37: "While CCS is a promising technology, EPA does not believe that at this time CCS will be a technically feasible BACT option in certain cases…EPA recognizes the significant logistical hurdles that the installation and operation of a CCS system presents and that sets it apart from other add-on controls that are typically used to reduce emissions of other regulated pollutants and already have an existing reasonably accessible infrastructure in place to address waste disposal and other offsite needs. Logistical hurdles for CCS may include obtaining contracts for offsite land acquisition (including the availability of land), the need for funding (including, for example, government subsidies), timing of available transportation infrastructure, and developing a site for secure long term storage. Not every source has the resources to overcome the offsite logistical barriers necessary to apply CCS technology to its operations, and smaller sources will likely be more constrained in this regard. Based on these considerations, a permitting authority may conclude that CCS is not applicable to a particular source, and consequently not technically feasible, even if the type of equipment needed to accomplish the compression, capture, and storage of GHGs are determined to be generally available from commercial vendors."

Although the EPA's response is more than satisfactory to dismiss this thin argument, we note that Mr. Simpson's allegations here are not factually accurate. First, Mr. Simpson asserts that the CEC 2009 Integrated Energy Policy Report ("IEPR") determined that the only "need" for natural gas power plants in California in the future would be in the "Sacramento Municipal Utility District, Turlock Irrigation District, and Imperial Valley control areas." This reference is taken out of context and is far off base. The 2009 IEPR was referring to a *hypothetical* demand scenario for California *after assuming* the retirement of many coastal power plants (due to new regulatory restrictions on power plants using "once-through-cooling" or "OTC") *and* that the replacement of retired plants with new generation had already occurred. Far from standing for the sweeping proposition that Mr. Simpson asserts, the 2009 IEPR's reference to the Sacramento, Turlock and Imperial Valley areas merely recognizes the fact that these areas would not be directly impacted by OTC plant retirements. *Id.* at 191.

The 2009 IEPR recognizes that because of the anticipated retirement of many OTC plants, "[i]t is crucial that the state develop new generating capacity to replace OTC power plants," although there are widely-recognized "difficulties in providing replacement power due to limits on emission reduction credits." *See* 2009 IEPR, at 107-108. Although ignored by Mr. Simpson, the 2009 IEPR expressly identifies the need for such generation and the critical future role of natural gas:

> **Natural Gas Plants and Reliability**
>
> As the California's population continues to grow, the state will have to ensure that enough new power plants are built to meet the increase in energy demand. At the same time, state policy goals to increase the use of preferred resources, like renewables, along with policies to reduce the use of OTC and to retire aging power plants, will affect system reliability…The Energy Commission's, *Framework for Evaluating Greenhouse Gas Implications of Natural Gas-Fired Power Plants in California* found that as

> California's integrated electricity system evolves to meet GHG emissions reduction targets, the operational characteristics associated with increasing renewable generation will increase the need for flexible generation to maintain grid reliability. The report acknowledges that California will need to modernize its natural gas generating fleet to reduce environmental impacts, however.

2009 IEPR, at 110. The CEC's final approval for the Project recognized the same important role for new natural gas plants in California. *See* Palmdale Hybrid Power Plant, Commission Decision, August 2011, at 6.1-12 to 6.1-15.

IV. CONCLUSION

The Project has gone through an exhaustive review before the CEC, AVAQMD, EPA and other responsible agencies, taking over three years to obtain its permits. In addition, the Project has had to comply with a myriad of new regulatory requirements that evolved during the permitting process, such as significantly more stringent nitrogen dioxide ambient air standards and modeling requirements and the obligation to comply with greenhouse gas requirements.

The Project is a cutting-edge electric generating facility that the EPA recognized in its press release upon issuance of the PSD Permit:

> "*Use of Innovative Solar Technology results in one of the Cleanest, Most Efficient Fossil Fuel Plants in the Nation.* . .Palmdale's use of solar technology is a model for new electric power plants across the nation," said Jared Blumenfeld, EPA's Regional Administrator for the Pacific Southwest Region. . .This hybrid design proves that plants can provide energy while having less impact on the environment."[2]

EPA acted properly in its evaluation of the Project and complied with all procedural and substantive requirements. Mr. Simpson's appeal of the PSD Permit lacks merit. The appeal does

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[2] U.S. EPA Issues Permit to Palmdale Power Plant, Requires Limits for Greenhouse Gas Emissions, November 16, 2011 available at: http://Yosemite.epa.gov/opa/admpress.nsf/0/CC22EB37B16F31D08525794A0068F026.

not advance any potentially meritorious procedural or substantive claims that the EPA's approval was based on clearly erroneous factual evidence or conclusions of law, or that the EAB should exercise its discretion to review an important policy matter. Indeed, Mr. Simpson's arguments are no more than "mere allegations of error" that the EAB has repeatedly held are not enough to warrant review. For all of the reasons described above, we request the Board dismiss the Appeal on procedural grounds and/or deny the particular claims for lack of merit.

DATED: February 17, 2012

Respectfully submitted,

/s/ Michael J. Carroll

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Michael J. Carroll
LATHAM & WATKINS LLP
Counsel to Applicant

STATEMENT OF COMPLIANCE WITH WORD COUNT LIMITATION

I hereby certify that this Response to Petition for Review exclusive of the Table of Contents, Table of Authorities, this Statement of Compliance, and the attached Certificate of Service, contains approximately 5,533 words, as calculated using Microsoft Word word-processing software, well below the word limit of 14,000 words. *See* NSR Order, at 2.

/s/ Michael J. Carroll

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Michael J. Carroll
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Counsel to Applicant

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

In the Matter of:	)	Appeal No. PSD 11-07
	)	
PETITION FOR REVIEW RE: PALMDALE HYBRID POWER PLANT PSD PERMIT	)	**CERTIFICATE OF SERVICE**
	)	(Revised December 2, 2011)
PSD Permit No. SE 09-01	)	

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DECLARATION OF SERVICE

I, Robert Dickson, declare that on February 17, 2012, I served and filed copies of the attached document to all parties identified on the Proof of Service List in the following manner:

RESPONSE TO PETITION

For Service to Environmental Appeals Board

☒ Electronic transmission via CDX at http://CDX.EPA.GOV

☐ Transmission by depositing a copy with FedEx overnight mail delivery service at Costa Mesa, California, with delivery fees thereon fully prepaid and addressed to the following:

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
1341 G Street, N.W., Sixth Floor
Washington, D.C. 20005

☐ I certify that the attached document is an identical copy of the document electronically filed in this case with the Environmental Appeals Board on this date.

For Service to All Other Parties

☒ Transmission via electronic mail to all email addresses on the Proof of Service list; and

☐ by depositing one paper copy with the United States Postal Service via first-class mail at Costa Mesa, California, with postage fees thereon fully prepaid and addressed as provided on the Proof of Service list.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 17, 2012, at Costa Mesa, California.

Robert Dickson