

**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 Ass'n, Petitioner)
)	
PSD Permit No. 15487)	[Related to PSD Appeals No. 10-02, 10-03, 10-04, 10-05, 10-06, 10-07, 10-08, 10-09, & 10-10.]
)	

RESPONSE TO PETITION FOR REVIEW 10-01

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TABLE OF CONTENTS

INTRODUCTION AND SUMMARY OF ARGUMENT 3

FACTUAL AND PROCEDURAL BACKGROUND 3

STANDARD OF REVIEW 5

ARGUMENT..... 7

 I. The Board Should Dismiss The Petition For Lack of Jurisdiction Under 40 C.F.R. Section 124, As Set Forth In The District’s Response Requesting Summary Dismissal..... 7

 II. The Board Should Dismiss The Petition’s Claims Regarding Power Plant Plumes Because They Do Not Establish That The District Erred In Its PSD Permitting Analysis..... 8

 A. The District Conducted A Health Risk Analysis To Examine The Potential Health Risks From The Facility On Aircraft Pilots, Passengers And Aircrews, And Found The Potential Risks To Be Less Than Significant. 8

 B. The District Considered The Potential For Facility Emissions To Interfere With Safe Aircraft Operation, And Found The Potential Risks To Be Less Than Significant..... 9

 III. The Board Should Dismiss The Petition’s Claims Regarding Accidental Hazardous Materials Releases Because They Do Not Establish That the District Erred In Its PSD Permitting Analysis 10

 IV. The Board Should Dismiss The Petition’s Claims Regarding Air Traffic Congestion And Airport Economic Impacts Because They Do Not Establish That The District Erred In Its PSD Permitting Analysis..... 11

CONCLUSION 12

INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to the April 14 and 20, 2010, Orders of the Environmental Appeals Board, Respondent the Bay Area Air Quality Management District (“District”) submits this Response to the Petition for Review filed by Petitioner California Pilots Association (“CalPilots”) in PSD Appeal No. 10-01.

This Petition should be dismissed in its entirety because the claims it asserts concern aircraft safety and airport operations, which are not issues related to PSD permitting that are within the Board’s jurisdiction to review in permit appeal under 40 C.F.R. Section 124.19, as the District noted in its April 8, 2010, Response Requesting Summary Dismissal. But the Petition should also be dismissed on the merits as well. The District fully considered and responded to each of the arguments that the Petition now raises, but the Petition simply repeats Petitioner’s earlier objections without explaining how the District’s response could be insufficient or its analysis incorrect. The Petition therefore fails to provide any grounds on which the Board could grant review, and should be dismissed in its entirety.

FACTUAL AND PROCEDURAL 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 accepted

written comments until February 6, 2009, and it also held a public hearing 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. The District accepted written comments until September 16, 2009, and 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 To Petitions For Review 10-02, 10-03, and 10-04, April 23, 2010 (hereinafter, “Crockett 4/23/10 Declaration”), 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 4/23/10 Declaration Exh. 1, at p. 2, along with comprehensive responses to all public comments it received, *see* Crockett 4/23/10 Declaration Exh. 3.

During this process, the District addressed the aircraft safety and airport operation issues that the Petition now raises, both in the Additional Statement of Basis and in the Responses to Public Comments. The District conducted a special Health Risk Assessment to evaluate the potential for health risks to aircraft pilots, passengers and crews from “plumes” emanating from the facility’s exhaust stacks, and found them to be less than significant. *See* Additional Statement of Basis at 94-95; Responses to Public Comments at 188-89. The District also considered the potential for plumes to interfere with safe aircraft operation, and found that any such risks would be extremely remote and within acceptable ranges. *See* Responses to Public Comments at 226-27. The District also considered the potential for accidental releases of hazardous materials to impact aircraft in the vicinity of the facility, and found that with appropriate safeguards in place to prevent or mitigate such releases the level of risk would not be significant. *See id.* at 57. And finally, the District also considered comments concerning potential impacts related to air traffic congestion and the potential for associated adverse economic impacts to area airports, but noted that these concerns are completely unrelated to any

air-quality issues that could possible fall within the purview of the PSD requirements in 40 C.F.R. Section 52.21.

Petitioner CalPilots then filed its Petition for Review, PSD Appeal No. 10-01, on March 22, 2010, raising the instant concerns regarding aircraft safety and airport operations. 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 even 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). *See* 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. Furthermore, the Petition does not address anywhere the analysis and responses that the District provided on the issues that Petitioner now raises. The fact that the District endeavored to look into the concerns that Petitioner had raised, and to provide detailed responses to its comments, is simply ignored.

STANDARD OF REVIEW

Petitions for Review of PSD permits are adjudicated under 40 C.F.R. Section 124.19(a). Pursuant to Section 124.19(a), the Board may grant review only if the permitting authority's decision to issue the permit was based on a clearly erroneous finding of fact or conclusion of law, or if it involves an important matter of policy or exercise of discretion that warrants review. *See In re Zion Energy, LLC*, 9 E.A.D. 701, 705 (EAB 2001); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126-27 (EAB 1999) ("*Knauf I*"). The Board's power of review should be only sparingly exercised, and most permit conditions should be finally determined at the permit issuer's level, absent exceptional circumstances. *See In re Kawaihae Cogeneration Project*, 7

E.A.D. 107, 114 (EAB 1997). The burden of demonstrating that review is warranted rests with the petitioner challenging the permit decision. *Kawaihae Cogeneration*, 7 E.A.D. at 114; *In re EcoElectrica L.P.*, 7 E.A.D. 56, 61 (EAB 1997). If the Petition fails to establish that the District has clearly erred or abused its discretion in some way in issuing the PSD permit, it should be dismissed. Petitioners must also do more than simply repeat objections made during the comment period; they must explain how the agency's response was inadequate or incorrect in some way. *See In re Prairie State Generating Co.*, 13 E.A.D. ___, PSD Appeal No. 05-05 (EAB Aug. 24, 2006), *aff'd sub nom.*, *Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007), slip. op. at 145 (collecting cases). A petition that fails to do so should be dismissed.

Furthermore, in order to establish a basis for review, a petition must present issues within the scope of the PSD permitting program. As the Board has stated, “[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. The Board will deny review of issues that are not governed by the PSD regulations because it lacks jurisdiction over them.” *In re Sutter Power Plant*, 8 E.A.D. 680, 688 (EAB 1999) (internal quotation marks and citations omitted); *see also 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); *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). Where a petition raises issues that are not part of the PSD review process, the petition should be dismissed.

ARGUMENT

As explained in detail below, this Petition for Review should be dismissed in its entirety because it does not establish that the District clearly erred or abused its discretion in any way in issuing this PSD permit..

I. The Board Should Dismiss The Petition For Lack of Jurisdiction Under 40 C.F.R. Section 124, As Set Forth In The District's Response Requesting Summary Dismissal

The District filed a Response Requesting Summary Dismissal on April 8, 2010, requesting that the Board summarily dismiss this Petition because the aircraft-related issues that it raises are outside of the PSD program and therefore outside of the Board's jurisdiction to review in a PSD permit appeal under 40 C.F.R. Section 124.19; and similarly because the Petition has not pointed to any PSD permit condition or area of the PSD permitting analysis where it contends the District erred. The Board acknowledged that there may be merits to these arguments, but declined to dismiss the Petition on these grounds pending further briefing on the merits. *See Order Denying Request For Summary Dismissal Of CalPilots Petition And Requesting Response On The Merits, April 14, 2010, at 2.*

The District continues to assert that the airport and aircraft safety and operations issues raised here are beyond the Board's jurisdiction to consider in an appeal of a PSD permit, and respectfully submits that the Board should dismiss the Petition in its entirety for this reason after a review of the responses on the merits. *See South Shore Power, supra*, slip. op. at 10 (“[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). Aircraft and airport safety and operations issues are not part of the federal PSD permitting analysis required under 40 C.F.R. Section 52.21, and the Petitioner’s contentions do not point to any PSD permit condition or element of the PSD permit process on which the District could have committed clear error or abused its discretion.

II. The Board Should Dismiss The Petitioner’s Claims Regarding Power Plant Plumes Because They Do Not Establish That The District Erred In Its PSD Permitting Analysis.

Turning to the merits of Petitioner’s claims, the first claim contends that the District did not properly consider the impacts to aircraft and to pilots, passengers and crew from “plumes” that may be emitted from the facility’s exhaust stack. *See* Petition 10-01 at 2, 5-7. But a review of the record shows these claims to be incorrect. The District did in fact analyze the very concerns the Petitioner now asserts – even though they are not required by the Federal PSD requirements in 40 C.F.R. Section 52.21 – and found that they would not have any significant impacts.

A. The District Conducted A Health Risk Analysis To Examine The Potential Health Risks From The Facility On Aircraft Pilots, Passengers And Aircrews, And Found The Potential Risks To Be Less Than Significant.

First, the Petition claims that the District failed to evaluate the impacts to “mobile sensitive receptors” in aircraft flying through exhaust plumes. *See* Petition 10-01 at 2, 5. But this claim is wrong, because the District did conduct such a health risk analysis in response to comments on this issue. *See* Responses to Public Comments, Exh. 3 to Declaration of Alexander G. Crockett, Esq., submitted with the District’s Responses to Petitions 10-02, 10-03, and 10-04 on April 23, 2010 (hereinafter, “Crockett 4/23/10 Declaration”), at pp. 188. As the District explained there, it conducted a health risk analysis for sensitive receptors in aircraft above the exhaust stacks, and conservatively assumed that such sensitive receptors would be exposed to the plume in this way continually for an hour. This analysis found that such exposure would not lead to an acute hazard index above 1.0, and therefore was below the level at which any adverse

impacts could potentially start to occur. *Id.* at 188-89; *see also* Additional Statement of Basis, Exh. 4 to Crockett 4/23/10 Declaration, at pp. 94-95. (Note also that the District explicitly addressed ammonia emissions, which the Petition claims deserves “[s]pecial attention” (Petition 10-01 at 6), on page 59 of the Responses to Public Comments, in which it referenced its Health Risk Analysis as the basis for concluding that ammonia slip from the facility would not present any significant health risks to aircraft pilots, passengers or crew.)

The Petition now asserts that there may be health risks to mobile sensitive receptors flying through the plume, but it does not even acknowledge that the District evaluated this issue and found otherwise, let alone try to provide any reason how the District’s assessment could be incorrect. The Petition should therefore be dismissed with respect to this claim under *Prairie State, supra*, slip. op. at 145, and the cases cited therein. The Petition does provide some points about how Petitioner believes that a health risk assessment of plume impacts should be conducted. But it does not acknowledge or try to challenge the District’s discussion of its Health Risk Assessment methodology that the District provided in response to comments on this issue. *See* Responses to Public Comments at 84-85; *see also* Additional Statement of Basis at 93. These points therefore do not constitute a challenge to the District’s methodology, because they do not state how the District could have erred in its response to comments about what Health Risk Assessment methodology the District used and whether it was adequate.

B. The District Considered The Potential For Facility Emissions To Interfere With Safe Aircraft Operation, And Found The Potential Risks To Be Less Than Significant

The Petition also claims that the District failed to evaluate the potential for plumes from the facility to interfere with safe aircraft operation, for example if oxygen content in the plume was at levels that could cause aircraft engine malfunction; if the plume contained chemicals that could adversely affect other physical elements of the aircraft such as skin, frame, or flight controls; if a rising buoyant thermal plume caused flight turbulence or other interference with safe aircraft operation; or if a plume impedes clear visibility. *See* Petition 10-01 at 6-7. But

again, this assertion is wrong because District did evaluate the potential for disruption of safe aircraft operation. *See* Responses to Public Comments at 226-27. The District based its evaluation on a study of this issue by the California Energy Commission. The Commission's evaluation concluded that the risks from aircraft over-flight of industrial exhaust plumes is extremely remote and within acceptable ranges. *Id.* at 227. The study also noted that any risks can be mitigated using practices recommended by the Federal Aviation Administration ("FAA"). *Id.* The District concluded that, based on the Energy Commission's assessment of this issue, it was safe to conclude that there would be no significant adverse impacts to safe aircraft operation.

The Petition now asserts that there may in fact be aviation safety risks that have not been evaluated, but again it does not even acknowledge the District's evaluation of this issue nor provide any reason how the District's assessment could be incorrect. The Petition should therefore be dismissed with respect to this claim as well under *Prairie State, supra*, slip. op. at 145, and the cases cited therein.

III. The Board Should Dismiss The Petition's Claims Regarding Accidental Hazardous Materials Releases Because They Do Not Establish That the District Erred In Its PSD Permitting Analysis

The Petition also claims that the District failed to assess the potential for accidental releases of hazardous materials to affect mobile sensitive receptors such as aircraft pilots, passengers and crew. *See* Petition 10-01 at 7. But this assertion is wrong too, as the District considered this potential impact as well in responding to comments that raised this concern. *See* Responses to Public Comments at 55-57. The District evaluated the risks to pilots, passengers and crew from accidental releases of ammonia – the hazardous material that will be stored at this facility in the greatest quantities, and the material that was cited in the comments on this subject – and found them to be less than significant. *See id.* at 57. The District explained that with the safeguards that will be in place to prevent and/or mitigate accidental releases, including Clean Air Act Section 112(r) risk management plans and similar measures, the risk of such a release

will not be significant, and thus the risk of a release having the potential to harm airborne sensitive receptors will not be significant. *See id.*

Once again, the Petition fails even to acknowledge the District's response on this issue, and provides no reason whatsoever how the response could be clearly erroneous. As with the earlier claims, Petitioner's arguments with respect to the risks from hazardous materials releases must be rejected under *Prairie State, supra*, slip. op. at 145, and the cases cited therein.

IV. The Board Should Dismiss The Petition's Claims Regarding Air Traffic Congestion And Airport Economic Impacts Because They Do Not Establish That The District Erred In Its PSD Permitting Analysis.

The Petition's final claim is unrelated to the health and safety of aircraft pilots, passengers, and crew, and instead concerns airport operations. The Petition claims that the existence of the facility may increase air traffic congestion in the area. *See* Petition 10-01 at 5. The Petition also contends that congestion-related impacts that the facility could cause on air space and flight procedures could have adverse economic impacts on Hayward Executive Airport, as well as Oakland International Airport, San Francisco International Airport, and the City of Hayward itself. *See id.* at 8. The Petition claims that the permit should be remanded for the FAA to evaluate these concerns. *See id.*

As with the rest of Petitioner's claims, the District evaluated these claims in the Responses to Public Comments, and the Petition fails to acknowledge the District's response or explain how it could be incorrect. The District considered these issues on pages 227-28 of the Responses to Public Comments, and it explained there that some of the comments had expressed concerns about whether the facility would be incompatible with operations at area airports. *See* Responses to Public Comments at 227. It also explained that some comments had raised concerns about economic impacts and had requested that the FAA consider such impacts. *See id.* The District then responded that the PSD program addresses air quality issues, and does not address concerns such as this about airport operations or economic impacts. *See id.* at 228. The District explained that issues such as these are not related to any PSD requirements and are not

something that the District can or should consider in a PSD permit review. *See id.* The District also pointed out in this section of the Responses to Public Comments that the District had received comments from some other commenters who claimed that there would be no adverse impacts to aircraft or airport operations. *See id.* at 227.

Once again, the Petition must be dismissed with respect to these issues because it does not explain how the District's response to the comments was incorrect or flawed in any way. *See Prairie State, supra*, slip. op. at 145, and cases cited therein. The Petition provides no reason to conclude that any of these concerns are related to anything in 40 C.F.R. Section 52.21. It should therefore be dismissed for failing to raise any issues on which the District could have erred in conducting its PSD permitting review under that regulation.

CONCLUSION

For the foregoing reasons, the District respectfully submits that Petition for Review No. 10-01 should be DISMISSED in its entirety. The claims it raises are not related to the PSD permit requirements and thus not within this Board's jurisdiction to review under 40 C.F.R. Section 124.19. And in any event, the District did consider each of the claims Petitioner raises here and addressed them in its responses to comments, and the Petition has not provided any reason on which to conclude that the District could have erred.

Dated: April 29, 2010

Respectfully Submitted

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BAY AREA AIR QUALITY
MANAGEMENT DISTRICT

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

I, Vanessa Hodgson, 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 10-01”**, by placing copies of it in sealed envelopes, with First Class postage thereon fully paid, and depositing said envelopes in the United States Mail at San Francisco, California, addressed to the persons set forth below:

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