

STATE OF CALIFORNIA  
State Energy Resources  
Conservation and Development Commission

<b>DOCKET</b>	
<b>08-AFC-1</b>	
DATE	_____
RECD.	June 08 2009

In the Matter of: )  
**Avenal Energy Power Plant** )  
 )  
 )

Docket Number: 08-AFC-1

ROB SIMPSON

**PETITION FOR INTERVENTION**  
 REQUEST TO STAY PROCEEDINGS  
 PENDING COMMISSION POSTING  
 OF FINAL DETERMINATION OF  
 COMPLIANCE (FDOC)FOR  
 INFORMED PUBLIC PARTICIPATION,  
 PETITION FOR FINANCIAL HARDSHIP

**PETITION FOR INTERVENTION**

Petitioner, Rob Simpson desires to participate fully with the rights and obligations of a party.. (Cal. Code of Regs., tit. 20, § 1207)

Petitioner is a resident of California and a citizen of the United States of America and wishes to preserve his First Amendment right to ***“petition the Government for a redress of grievances.”***

Petitioner has 3 children ages 8 and 11 and 13 for whom he intends to preserve the planets ability to maintain human life. Clean energy independence is his clearest path to this future. Petitioner also has Associates and potential business in the area of the proposed plant.

Petitioner interest is relevant to this particular proceeding as he attempted to participate with the San Joaquin Valley Air pollution Control District regarding this siting and has filed a complaint with the EPA regarding the Air Districts refusal to allow public participation. (Attachment 1) Petitioner has also consulted with other groups and community members regarding this siting.

(a) The maintenance of a quality environment for the people of this state now and in the future is a matter of statewide concern.

e) Every citizen has a responsibility to contribute to the preservation and enhancement of the environment.

(f) The interrelationship of policies and practices in the management of natural resources and waste disposal requires systematic and concerted efforts by public and private interests to enhance environmental quality and to control environmental pollution.(CEQA California Public Resources Code section 21000)

Petitioner has demonstrated an interest in California Energy production and power plant licensing before the Commission. Specifically, Russell City Energy Center, Eastshore Energy Center, East Altamont Energy Center, Humboldt Bay Repower Project, Carlsbad Energy Center and now Avenal Energy Power Plant. Petitioner has prevailed in his appeal to the United States Environmental Protection Agency, Environmental Appeals Board (EAB) petition 08-01 regarding the inadequacies of the Russell City Energy Center Permit (attachment 2). Petitioner has a pending appeal, at the EAB, of the Gateway Generating Station which is presently operating inconsistent with its CEC license and without a valid Federal PSD permit. He will also likely prevail in his pending EPA Administrator appeal of the Humboldt Bay Repower Project.

Petitioner has functioned as a consultant in Power plant licensing cases for The Center on Race, Poverty and the Environment, Sierra Club, Power of Vision (attachment 3) County of Alameda, the City of Hayward, Chabot Las Positas Community College, Golden Gate University environmental Law and Justice Clinic, Audubon Society, Hayward Area Planning Association, Communities for A Better Environment, Citizens Against Pollution, California Pilots Association, Californians for Renewable Energy (CARE) as well as other community members and groups.

Petitioner believes that he brings a perspective to licensing cases that is often otherwise unavailable to persons involved in their first siting. It is his intent to provide an independent and informed citizens perspective to the licensing process and hopes that the public can participate to ensure that any plant licensed in California at minimum observes State and Federal requirements for the public protection and preservation of the environment. Future plants could more appropriately advance control technology and site specific integration.

**REQUEST TO STAY PROCEEDINGS PENDING COMMISSION POSTING OF FINAL DETERMINATION OF COMPLIANCE FOR INFORMED PUBLIC PARTICIPATION.**

**The California Energy Commission has not posted the Air District Final Determination of Compliance in the Documents and Reports record of this proceeding. Petitioner has discussed this with Joseph Douglas Project**

**Manager. This is the document that is routinely posted in other proceedings. It is the document that is the basis of the Final Staff Assessment air Quality analysis. It is integral to informed public participation. Neither the Commission nor the Air District has issued any notice that indicates any effect on air Quality. The REVISED COMMITTEE SCHEDULING ORDER indicates that the Final Staff Assessment will be issued June 1, 2009 The 692 page document is posted June 2, 2009. This provided only 3 business days before all other parties were to file testimony on June 8, 2009.**

**There appears no basis for this type of urgency. A cursory review of the FSA indicates:**

**40 CFR 52.21, Prevention of Significant Deterioration. The U.S. EPA has not yet issued a preliminary Prevention of Significant Deterioration (PSD) permit for the project. The project is not allowed to commence construction until the PSD permit is issued. The District FDOC (SJVAPCD 2008b) would likely serve as the basis for the PSD permit for this project, and to ensure that the applicant amends the Energy Commission license as necessary to incorporate changes triggered by the PSD permit, if any, Staff proposes Condition of Certification AQ-SC6**

#### **Air Quality Appendix Air-1**

“the project does not currently have a power purchase agreement”

“its potential GHG benefits are less than ideal for two reasons: 1) its proposed technology would not provide faststarting capabilities and 2) its proposed location would not be physically within a local reliability area.”

“Should California reach its goal of meeting 33 percent of its retail demand in 2020 with renewable energy, non-renewable, most likely fossil-fueled, energy needs will fall by over 36,000 GWh/year. In other words, all growth will need to come from renewable resources to achieve the 33 percent RPS. And some existing and new fossil units will generate less energy than they currently do, given the expected growth in retail sales.”

#### *The project*

“*Would not* be able to satisfy/partially satisfy local capacity area (LCA) resource requirements.”

“*Would not* provide black start capability.”

“*Would not* provide fast start-up capability (within 2 hours or less).”

“ *Would not* have low minimum load levels.”

The Interpollutant Offset Ratio Development posted June 3, 2009 by the Air District

states:

“The summary of this analysis is included as an attachment, and this summary has also been submitted with the Preliminary Determinations of Compliance for three current projects: Tracy Combined Cycle Power Plant (08-AFC-7), Lodi Energy Center (08-AFC-10) and Henrietta Combined Cycle Power Plant (Henrietta Peaker Amendment 01-AFC-18C).”

On the same day, June 3, 2009 in the above referenced Tracy proceeding.

[Comment from the U.S. Environmental Protection Agency Regarding San Joaquin Valley Air Pollution Control District Preliminary Determination of Compliance.](#)

“Based on our review, we are concerned that several issues fail to meet federal requirements, such as the proposal to re-bank NOx offsets that have been surrendered previously and the proposal to use inter-pollutant offset ratios that EPA has not yet approved. Because these proposals are inconsistent with the requirements of the Clean Air Act, we recommend that the District work with the applicant to address these deficiencies.”

The FSA should be amended to indicate the air districts compliance with public participation requirements and the EPA concerns indicated above.

The Commission has wasted considerable time and public resources licensing facilities that will never be built based upon, the realities of demand, constraints of the Clean Air Act and other applicable State and Federal laws. The commission should enjoy the opportunity to take respite and not rush to license fundamentally flawed plans, like this one, that do not employ Best Available Control Technology, did not satisfy the requirements for informed public participation and can not survive review.

## **PETITION FOR FINANCIAL HARDSHIP**

Rob Simpson Hereby petitions to be excused from

- 1) Filing 12 copies with the Commission Docket unit
- 2) Serving papers on all other parties of record

Compliance with the above requirements creates and undue financial hardship as the petitioner is represented by himself and is not funded by any organization. Petitioner is self employed and has limited income to participate in the proceeding,

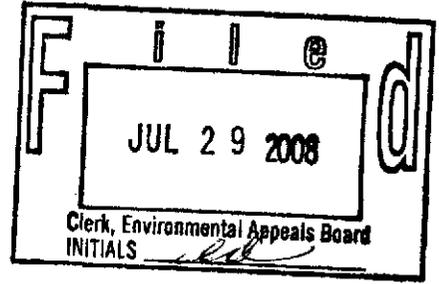
Respectfully submitted By

Rob Simpson  
Environmental Consultant  
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complaint with the EPA regarding the Air Districts refusal to allow public participation.  
(Attachment 1)

(EAB) petition 08-01 regarding the inadequacies of the Russell City Energy Center  
Permit (attachment 2).

Power of Vision (attachment 3)



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(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the Environmental Administrative Decisions (E.A.D.). Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, of any typographical or other formal errors, in order that corrections may be made before publication.

**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 No. 08-01
	)	
Permit No. 15487	)	
	)	
	)	
	)	

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[Decided July 29, 2008]

**REMAND ORDER**

*Before Environmental Appeals Judges Edward E. Reich,  
Charles J. Sheehan, and Anna L. Wolgast.*

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## IN RE RUSSELL CITY ENERGY CENTER

PSD Appeal No. 08-01

### ***REMAND ORDER***

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Decided July 29, 2008

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#### Syllabus

Petitioner Rob Simpson (“Mr. Simpson”) petitioned the Environmental Appeals Board (“Board”) to review a federal Prevention of Significant Deterioration (“PSD”) permit (“Permit”) issued by the Bay Area Air Quality Management District (“the District”) to Russell City Energy Center (“RCEC”), on November 1, 2007, for operation of a 600-megawatt natural gas-fired facility. The District processes PSD permit applications under the Clean Air Act (“CAA”) and issues permits under the federal PSD program, pursuant to a delegation agreement with the U.S. Environmental Protection Agency.

The PSD proceedings that are the subject of this case are embedded in a larger California “certification” or licensing process for power plants conducted by the California Energy Commission (“CEC”), which is responsible for the siting of most power plants in the state. Pursuant to procedures for coordination of District and CEC proceedings, the District delegated to CEC the bulk of its 40 C.F.R. part 124 notice and outreach responsibilities with respect to the draft PSD permit for RCEC.

In his Petition, Mr. Simpson challenges issuance of the Permit as clearly erroneous on both procedural and substantive grounds. Among the procedural grounds for challenging the permit, Mr. Simpson contends that the District, in issuing the draft permit and Permit, failed to carry out certain forms of public notice, and to notify specific entities entitled to notice as required by 40 C.F.R. § 124.10. On substantive grounds, Mr. Simpson challenges the Permit as not complying with Best Available Control Technology (“BACT”) as well as numerous other federal and state law requirements.

In response, the District seeks summary dismissal of the Petition on the basis that Mr. Simpson failed to meet jurisdictional thresholds for Board review, including standing, preservation of issues for review, and timeliness. The District argues further that any alleged failure to comply strictly with the regulatory requirements was harmless since Mr. Simpson would not have participated in the PSD proceedings in any event.

Mr. Simpson counters that the District’s failure to comply with part 124 notice requirements thwarted his ability to participate in these proceedings and thus satisfy jurisdictional thresholds.

**RUSSELL CITY ENERGY CENTER**

Held: The Board remands the Permit so that the District can renounce the draft permit in accordance with the notice provisions of 40 C.F.R. § 124.10.

- (1) Mr. Simpson may raise his notice claims for Board consideration despite Mr. Simpson's "failure" to meet the ordinary threshold for standing under 40 C.F.R. § 124.19(a), which limits standing to those who participate in a permit proceeding by filing comments on the draft permit or participating in a public hearing on a draft permit. Denying Board consideration of fundamental notice claims would deny parties the opportunity to vindicate before the Board potentially meritorious claims of notice violations and preclude the Board from remedying the harm to participation rights resulting from lack of notice. Such denial would be contrary to the CAA statutory directive emphasizing the importance of public participation in PSD permitting and section 124.10's expansive provision of notice and participation rights to the public.
- (2) Mr. Simpson has not demonstrated that his affiliation with the Hayward Area Planning Association ("HAPA") entitled him to particularized notice of the draft permit because HAPA, as a private organization, does not qualify as a "comprehensive regional land use planning agency" entitled to such notice during PSD permitting pursuant to section 124.10(c)(1)(vii) and, even if it were, that does not mean Mr. Simpson was entitled to such notice.
- (3) While the Board generally will not consider notice allegations in a petition where the sole deficiency alleged is failure to give notice to a particular person other than the petitioner, it nevertheless regards it as appropriate to consider claims of failure of notice to other persons within the scope of allegations of fundamental defects in the integrity of the notice process as a whole that may be prejudicial to the notice rights of the petitioner and others.
- (4) While a delegated state agency may redelegate notice and comment functions to another state agency to the extent the federal delegation so permits, in all cases it is incumbent upon the delegated state agency to ensure strict compliance with federal PSD requirements.
- (5) Mr. Simpson has demonstrated that the District, in re delegating outreach to CEC, failed to ensure compliance with the notice and outreach obligations of the PSD regulations, thereby narrowing the scope of public notice to which Mr. Simpson and other members of the public were entitled. In particular, the District failed to ensure compliance with the specific obligation at section 124.10(c)(1)(ix) to inform the public of the opportunity to be placed on a "mailing

list” for notification of permitting actions through “periodic publication in the public press and in such publications as Regional and State funded newsletters, environmental bulletins, or State Law Journals.”

- (6) The District’s almost complete reliance upon CEC’s certification-related outreach procedures to satisfy the District’s notice obligations regarding the draft permit resulted in a fundamentally flawed notice process. By “piggybacking” upon the CEC’s outreach, the District failed to exercise sufficient supervision over the CEC to ensure that the latter adapted its outreach activities to meet specific section 124.10 mandates. The inadequacy of the notice lists used by the CEC, the handling of public comments by the CEC, and the conduct of a public workshop by CEC with likely District participation during the PSD comment period at which air quality issues were discussed but no record of public comments made all demonstrate that the CEC merely folded the PSD notice proceeding into its ongoing process without attempting to ensure that the part 124 requirements for public participation were met.
- (7) Contrary to the District’s statements, the District’s notice omissions do not constitute “harmless error.” Such omissions affected more persons than Mr. Simpson, and even as to Mr. Simpson, the District’s assumption that, even with the proper notice, he would not have participated, is purely speculative.
- (8) The District’s notice deficiencies require remand of the Permit to the District to ensure that the District fully complies with the public notice and comment provisions at section 124.10. Because the District’s renoticing of the draft permit will allow Mr. Simpson and other members of the public the opportunity to submit comments on PSD-related issues during the comment period, the Board refrains at this time from opining on such issues raised by Mr. Simpson in his appeal.
- (9) Several of the issues raised in Mr. Simpson’s Petition concern matters of California or federal law that are not governed by PSD regulations and, as such, are beyond the Board’s jurisdiction during the PSD review process. The Board will not consider these issues if raised following remand.

***Before Environmental Appeals Judges Edward E. Reich,  
Charles J. Sheehan, and Anna L. Wolgast.***

***Opinion of the Board by Judge Reich:***

I. INTRODUCTION

On January 3, 2008, Mr. Rob Simpson filed a petition for review (“Petition or Pet.”) challenging a federal Prevention of Significant Deterioration (“PSD”) permit issued by the Bay Area Air Quality Management District (“the District”)<sup>1</sup> to Russell City Energy Center (“RCEC”) on November 1, 2007, for operation of a 600-megawatt (MW) natural gas-fired facility. Mr. Simpson, who resides in the City of Hayward, located in Alameda County (within the District’s boundaries), opposes issuance of the permit on several grounds, including the alleged failure by the District to provide adequate public notice of the permit as well as the District’s allegedly inadequate Best Available Control Technology determination, and several California state issues.

Upon review of the parties’ briefs and the information obtained by the Board during a teleconference hearing held on April 3, 2008, we remand the Final Permit Decision (“Permit”) to the District because we find that the District, in issuing its decision, did not comply with the public notice provisions in the 40 C.F.R. part 124 rules that govern this proceeding. In particular, the District redelegated a substantial portion of its public notice obligations to another state agency, the California

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<sup>1</sup> The District is one of thirty-five California air districts charged with regulating stationary sources of air pollution in the state. See Cal. Health & Safety Code §§ 40000, 40200; <http://www.arb.ca.gov/drdb/dismap.htm>. The U.S. EPA delegated authority to the District to administer the federal PSD program in 2006. See U.S. EPA-[District], Agreement for Limited Delegation of Authority to Issue and Modify Prevention of Significant Deterioration Permits Subject to 40 C.F.R. [§] 52.21, Jan. 24, 2006. The permits that the District issues pursuant to that delegation are considered federal permits subject to federal permitting procedures, including the potential for review by the Environmental Appeals Board under 40 C.F.R. § 124.19. See *In re Christian County Generation, LLC*, PSD Appeal No. 07-01, slip op. at 2-3 n.1 (EAB Jan. 28, 2008), 13 E.A.D. \_\_\_; *In re RockGen Energy Ctr.*, 8 E.A.D. 536, 537 n.1 (EAB 1999); *In re SEI Birchwood, Inc.*, 5 E.A.D. 25, 26 (EAB 1994). Among the various issues raised in his Petition, Mr. Simpson contends that the Permit is not within the scope of the U.S. EPA’s delegation to the District. See *infra* Part III.

Energy Commission, but failed to ensure that the latter adhered to the mandatory requirements of 40 C.F.R. part 124.

## II. BACKGROUND

### A. Legal and Regulatory Background

#### 1. Delegated Federal PSD Proceedings and the Relationship to California Energy Commission Proceedings

Congress enacted the PSD provisions of the Clean Air Act (“CAA”) in 1977 for the purpose of, among other things, “insu[ring] that economic growth will occur in a manner consistent with the preservation of existing clean air resources.” CAA § 160(3), 42 U.S.C. § 7470(3). The statute requires preconstruction approval in the form of a PSD permit before anyone may build a new major stationary source or make a major modification to an existing source<sup>2</sup> if the source is located in either an “attainment” or “unclassifiable” area with respect to federal air quality standards called “national ambient air quality standards” (“NAAQS”).<sup>3</sup> See CAA §§ 107, 161, 165, 42 U.S.C. §§ 7407, 7471,

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<sup>2</sup> The PSD provisions that are the subject of the instant appeal are part of the CAA’s New Source Review (“NSR”) program, which requires that persons planning a new major emitting facility or a new major modification to a major emitting facility obtain an air pollution permit before commencing construction. In addition to the PSD provisions, explained *infra*, the NSR program includes separate “nonattainment” provisions for facilities located in areas that are classified as being in nonattainment with the EPA’s national Ambient Air Quality Standards. See *infra*; CAA §§ 171-193, 42 U.S.C. §§ 7501-7515. These nonattainment provisions are not relevant to the instant case.

<sup>3</sup> See CAA §§ 107, 160-169B, 42 U.S.C. §§ 7407, 7470-7492. NAAQS are “maximum concentration ceilings” for pollutants, “measured in terms of the total concentration of a pollutant in the atmosphere.” See U.S. EPA Office of Air Quality Standards, *New Source Review Workshop Manual* at C.3 (Draft Oct. 1990). The EPA has established NAAQS on a pollutant-by-pollutant basis at levels the EPA has determined are requisite to protect public health and welfare. See CAA § 109, 42 U.S.C. § 7409. NAAQS are in effect for the following six air contaminants (known as “criteria (continued...)

7475. EPA designates an area as “attainment” with respect to a given NAAQS if the concentration of the relevant pollutant in the ambient air within the area meets the limits prescribed in the applicable NAAQS. CAA § 107(d)(1)(A), 42 U.S.C. § 7407(d)(1)(A). A “nonattainment” area is one with ambient concentrations of a criteria pollutant that do not meet the requirements of the applicable NAAQS. *Id.* Areas “that cannot be classified on the basis of available information as meeting or not meeting the [NAAQS]” are designated as “unclassifiable” areas. *Id.*

The PSD Regulations provide, among other things, that the proposed facility be required to meet a “best available control technology” (“BACT”)<sup>4</sup> emissions limit for each pollutant subject to regulation under the Clean Air Act that the source would have the potential to emit in significant amounts. CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4); *see also* 40 C.F.R. § 52.21(b)(5).

As previously noted, the District processes PSD permit applications and issues permits under the federal PSD program, pursuant to a delegation agreement with the U.S. EPA. The District’s regulations,

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<sup>3</sup>(...continued)

pollutants”): sulfur oxides (measured as sulfur dioxide (“SO<sub>2</sub>”)), particulate matter (“PM”), carbon monoxide (“CO”), ozone (measured as volatile organic compounds (“VOCs”)), nitrogen dioxide (“NO<sub>2</sub>”) (measured as NO<sub>x</sub>), and lead. 40 C.F.R. § 50.4-.12.

<sup>4</sup> BACT is defined by the CAA, in relevant part, as follows:

The term “best available control technology” means an emissions limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of such pollutant.

CAA § 169(3), 42 U.S.C. § 7479(3); *see also* 40 C.F.R. § 52.21(b)(12).

among other things, prescribe the federal and State of California standards that new and modified sources of air pollution in the District must meet in order to obtain an “authority to construct” from the District. *See* Bay Area Air Quality Management District Regulation (“DR”) New Source Review Regulation 2 Rule 2, 2-2-100 to 2-2-608 (Amended June 15, 2005), *available at* <http://www.baaqmd.gov/dst/regulations/rg0202.pdf>.

In addition to the substantive provisions for EPA-issued PSD permits, found primarily at 40 C.F.R. § 52.21, PSD permits are subject to the procedural requirements of Part 124 of Title 40 of the Code of Federal Regulations (Procedures for Decisionmaking), which apply to most EPA-issued permits. *See* 40 C.F.R. pt. 124.<sup>5</sup> These requirements also apply to permits issued by state or local governments pursuant to a delegation of federal authority, as is the case here.

Among other things, Part 124 prescribes procedures for permit applications, preparing draft permits, and issuing final permits, as well as filing petitions for review of final permit decisions. *Id.* Also, of particular relevance to this proceeding, part 124 contains provisions for public notice of and public participation in EPA permitting actions. *See* 40 C.F.R. § 124.10 (Public notice of permit actions and public comment period); *id.* § 124.11 (Public comments and requests for public hearings); *id.* § 124.12 (Public hearings).<sup>6</sup>

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<sup>5</sup> Part 124 sets forth procedures that affect permit decisions issued under the PSD program, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k; the National Pollution Discharge Elimination System (“NPDES”) program under the Clean Water Act, 33 U.S.C. § 1342; and the Underground Injection Control program under the Safe Drinking Water Act, 42 U.S.C. § 300h to 300h-7. 40 C.F.R. § 124.1(a).

<sup>6</sup> The requirement for EPA to provide a public comment period when issuing a draft permit is the primary vehicle for public participation under Part 124. Section 124.10 states that “[p]ublic notice of the preparation of a draft permit \* \* \* shall allow at least 30 days for public comment.” 40 C.F.R. § 124.10(b). Part 124 further provides that “any interested person may submit written comments on the draft permit \* \* \* and may request a public hearing, if no public hearing has already been scheduled.” *Id.* § 124.11.

(continued...)

As explained by the parties in their briefs and amplified upon in the April 3, 2008 teleconference hearing held by the Board,<sup>7</sup> the PSD proceedings that are the subject of the instant case are embedded in a larger California certification process for power plants prescribed by California law. Pursuant to California's Warren-Alquist State Energy Resources Conservation and Development Act ("Warren-Alquist Act"), *see* Cal. Pub. Res. Code §§ 25000 *et seq.*, the California Energy Commission ("CEC") has exclusive jurisdiction to "certify" or license the siting of all thermal power plants of 50 MW or greater (such as the proposed RCEC), *see id.* §§ 25119, 25120, 25502. In certifying thermal energy projects, the CEC has a broad mandate, which is to "ensure that any sites and related facilities certified provide a reliable supply of electrical energy at a level consistent with the need for such energy, and in a manner consistent with public health and safety, promotion of the general welfare, and protection of environmental quality." Cal. Code Regs. tit. 20, § 1741.

The Warren-Alquist Act and its implementing regulations prescribe the CEC certification procedures, including the required content of the applications for certification submitted for proposed energy projects, the issuance of proposed and final certification decisions, preparation by CEC staff of reports assessing the environmental impact of the proposed power plants, as well as provisions

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<sup>6</sup>(...continued)

In addition, EPA is required to hold a public hearing "whenever [it] \* \* \* finds, on the basis of requests, a significant degree of public interest in a draft permit(s)." *Id.* § 124.12(a)(1). EPA also has the discretion to hold a hearing whenever "a hearing might clarify one or more issues involved in the permit decision." *Id.* § 124.12(a)(2).

<sup>7</sup> On April 3, 2008, the Board convened a teleconference hearing attended by representatives of the District, the California Energy Commission, petitioner Rob Simpson, and permittee RCEC to discuss factual matters in this case. The primary objective of the teleconference hearing was to clarify the interplay between the delegated federal PSD proceedings and the California Energy Commission proceedings.

for public notice and participation during the certification process.<sup>8</sup> *See* Cal. Pub. Res. Code §§ 25500-25543; *see also* Cal. Code Regs. tit. 20, §§ 1703-1709.8, 1741-1770, 2027.

Pursuant to its broad mandate, the CEC must make a specific finding that a proposed facility conforms with relevant federal and local law. *See* Cal. Pub. Res. Code § 25523(d)(1). As the Warren-Alquist Act states, “the [CEC] may not certify a facility \* \* \* when it finds \* \* \* that the facility does not conform with any applicable federal, local, or regional standards, ordinances, or laws” and “[CEC] may not make a finding in conflict with applicable federal law or regulation.” *Id.* § 25525. As such, the certification process serves as a procedural umbrella under which the CEC coordinates and consults with multiple agencies in charge of enforcing relevant laws and standards to ensure that a facility, as proposed, will satisfy such mandates. *See* Cal. Code Regs. tit. 20, § 1744.

With respect to CEC’s conformity finding, the Warren-Alquist Act imposes, as a condition for certification, that the local air pollution control officer of the relevant air quality district (in this case, the District) makes a specific determination that the proposed power facility complies with state and federal air quality requirements, including NSR.

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<sup>8</sup> The CEC certification process provides the following forms of public participation and notice: holding of hearings on the application for CEC certification (Cal. Code Regs. tit. 20 §§ 1748, 1754); convening workshops to discuss an application for certification (Cal. Code Regs. tit. 20, § 1709.5); holding “informational presentations and site visits” on an application for CEC certification with notice of such mailed to “adjacent landowners” (*id.* § 1709.7); mailing notice of an initial public hearing fourteen (14) days prior to the first such hearing to the “applicant, intervenors, and to all persons who have requested notice in writing,” (*id.* § 1710); the right to intervene as a party in the certification proceedings; (*id.* § 1712); mailing a “summary of notice or application” for certification to public libraries in communities near the proposed sites and to “any persons who requests such mailing or delivery, and to all parties to the proceeding” and publishing the summary “in a newspaper of general circulation in each county in which a site and related facility \* \* \* are proposed to be located” (*id.* § 1713); and providing notice of an application for certification to relevant local, regional, state, federal, and Tribal agencies (*id.* § 1714).

*See id.* tit. 20, § 1744.5. In particular, the Warren-Alquist Act's implementing regulations provide that "[t]he local air pollution control officer shall conduct, for the [CEC's] certification process, a determination of compliance review of the application [for certification] in order to determine whether the proposed facility meets the requirements of the applicable [NSR] rule and all other applicable district regulations. If the proposed facility complies, the determination shall specify the conditions, including BACT and other mitigation measures, that are necessary for compliance." *Id.*

The District process for permitting power plants is integrated with the CEC's certification process to support the latter's conformity findings, as reflected in the District's regulations specific to power plant permitting. *See* DR, Power Plants Regulation 2 Rule 3 §§ 2-3-100 to 2-3-405, available at <http://www.baaqmd.gov/dst/regulations/rg0202.pdf>. These regulations state that "[w]ithin 180 days of [the District's] accepting an [application for certification] as complete [for purposes of compliance review], the [District Air Pollution Control Officer] shall conduct a \* \* \* review [of the application] and make a "preliminary decision" as to "whether the proposed power plant meets the requirements of District regulations." *Id.* § 2-3-403. If the preliminary decision is affirmative, the District's regulations provide that the District issue a preliminary determination of compliance ("PDOC") with District regulations, including "specific BACT requirements and a description of mitigation measures to be required." *Id.* The District's regulations further require that "[w]ithin 240 days of the [District's] acceptance of an [application for certification] as complete," the District must issue a final Determination of Compliance ("FDOC") or otherwise inform the CEC that the FDOC cannot be issued. *Id.* § 2-3-405.<sup>9</sup>

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<sup>9</sup> CEC's statements during the teleconference hearing make clear that CEC's role in determining legal conformity with respect to federal PSD issues is a ministerial one. In response to the question of whether the CEC has authority to "change what was in the FDOC as it would impact PSD requirements," Mr. Ratliff, CEC's representative, responded that the CEC "would have to yield to the District" on PSD conditions because the "District stands in the role of EPA." Transcript of April 3, 2008 Teleconference (continued...)

The District's issuance of an authority to construct ("ATC") for a power plant is predicated upon the District issuing a FDOC and ensuring that the CEC's certification incorporates the conditions contained in the FDOC. *See id.* 2-3-301. As explained by the District's counsel, the District's ordinary practice is to issue a PSD permit together with an ATC after CEC certification. District Response to Petition for Review at 4.

*2. Notice and Comment Provisions in 40 C.F.R. part 124.10*

The parties devote considerable attention in their briefs to the provisions in 40 C.F.R. § 124.10, which instruct EPA (and its delegates) how to provide notice of permitting actions such as draft permits (including public comment periods and any public hearings), and final permits. *See* 40 C.F.R. § 124.10(a). Section 124.10 provides instruction on both the method and content of notice.

With regard to the method of notice, the section 124.10 regulations require that EPA notify by mail designated governmental agencies and officials. *See* § 124.10(c). More particularly, notice is required to be given to the following governmental agencies and officials:

[A]ffected State and local air pollution control agencies, the chief executives of the city and county where the major stationary source or major modification would be located, any comprehensive regional land use planning agency and any State, Federal Land Manager, or Indian Governing Body whose lands may be affected by emissions from the regulated activity[.]

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<sup>9</sup>(...continued)

Hearing at 14. Accordingly, Mr. Ratliff further explained that the CEC "could not overwrite or change the nature" of a District-issued permit regarding PSD issues because these are "determined by the [District] acting for \* \* \* EPA." *Id.* at 17.

40 C.F.R. § 124.10(c)(1)(vii).

As to general outreach efforts, 40 C.F.R. § 124.10 directs the EPA to proactively assemble a “mailing list” of persons to whom PSD notices should be sent. *See* 40 C.F.R. § 124.10(c)(1)(ix). The mailing list must be developed by:

(A) Including those who request in writing to be on the list;

(B) Soliciting persons for “area lists” from participants in past permit proceedings in that area; and

(C) Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as Regional and State funded newsletters, environmental bulletins, or State law journals.

40 C.F.R. § 124.10(c)(1)(ix).<sup>10</sup>

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<sup>10</sup> The part 124 rules, moreover, prescribe the particular content of public notice of permitting actions. For example, the rules require a “brief description of the comment procedures required by [sections] 124.11 and 124.12 and the time and place of any hearing that will be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled) and other procedures by which the public may participate in the final permit decision.” 40 C.F.R. § 124.10(d)(1)(v). Part 124 further requires that the EPA or its delegate provide the “[n]ame, address and telephone number of a person from whom interested persons may obtain further information, including copies of the draft permit or draft general permit, as the case may be, statement of basis or fact sheet, and the application[.]” *See* 40 C.F.R. § 124.10(d)(1)(iv). As discussed below, *see infra* Part III, Mr. Simpson challenges the adequacy of the content of the notice in addition to arguing that notice was not provided to everyone entitled to notice.

*B. Factual and Procedural Background*

The PSD permitting procedures at the heart of this dispute were triggered by RCEC's application to the CEC, on November 17, 2006, to amend the CEC's original 2002 certification<sup>11</sup> of RCEC's proposal to build a 600-MW natural gas-fired, combined cycle power plant in Hayward, California. *See* Declaration of J. Mike Monasmith ("Monasmith Decl.") ¶ 2, Att. A. According to the District Air Quality Engineer who oversaw the RCEC's PSD permitting, the District, after conducting an air quality analysis, issued its PDOC/draft PSD permit, notice of which it published in the Oakland Tribune on April 12, 2007. Declaration of Wyman Lee, P.E. ("Lee Decl.") ¶ 2. In the notice, the District established a thirty-day public comment period ending on May 12, 2007. Lee Decl. ¶ 3.

According to the District, the District mailed out copies of the notice of the PDOC/draft PSD permit issuance, along with the draft permit itself, to the CEC, EPA Region 9, project applicant RCEC, the Point Reyes National Seashore, and four local air quality regulatory agencies bordering the District's jurisdiction. *Id.* ¶ 2.<sup>12</sup> Otherwise, the District essentially delegated the bulk of its outreach efforts to CEC, as

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<sup>11</sup> RCEC originally filed for certification by the CEC in early or mid-2001, and was initially certified by the CEC on Sept. 11, 2002, pursuant to the Warren-Alquist Act, *see supra*. During the initial CEC certification process, which also incorporated the District permitting, the District issued a PDOC/Draft PSD Permit to RCEC in November 2001. However, the District did not proceed to issue a final PSD permit because RCEC withdrew plans to construct the project in the spring of 2003. *See* Letter from Gerardo C. Rios, Chief, Permits Office, U.S. EPA Region 9, to Ryan Olah, Chief Endangered Species Division, U.S. Fish and Wildlife Service (Jun. 11, 2007). The amended CEC certification and PSD permitting were required because RCEC afterwards proposed relocating the project 1,500 feet to the north of its original location. *See* Final PSD Permit, Application No. 15487 ("Final Permit") at 3.

<sup>12</sup> The District's Air Quality Engineer identified the following four neighboring air quality regulatory agencies as having received notice of the draft PSD Permit/PDOC: Sacramento Metropolitan, San Joaquin Valley, Yolo-Solano, and Monterey Bay. Lee Decl. ¶ 2.

recounted by District and CEC officials. These officials assert that the District's mailing of the PDOC/draft PSD permit and accompanying notice caused copies of these materials to be sent "to all persons included on [CEC's] service list for the proceedings" based on the officials' understanding that CEC's "practice" was to mail copies of all material filed in its docket to those on CEC's "service list." Lee Decl. ¶ 2; Monasmith Decl. ¶¶ 3,4. Apparently, no documentation of this mailing exists, *see* Transcript of April 3, 2008 Teleconference Hearing ("Teleconf. Hr'g") at 25, though the District cites the Declaration of J. Mike Monasmith, a CEC siting officer in the present matter, to the effect that he was "informed and believed" that such notice was given "per the normal procedures" of CEC staff. Monasmith Decl. ¶ 4.

In a declaration filed in this proceeding and during the teleconference hearing, Mr. Richard Ratliff of the CEC described CEC's outreach activities in the parallel CEC certification proceedings. In particular, Mr. Ratliff stated that CEC had compiled three lists of agencies and persons for purposes of outreach. These lists consisted of an "interested agency" list of "30 regional, state, and federal agencies"; a "Property Owner" list of "130 individuals and business[es] that own property adjacent to or near the site of proposed [RCEC]"; and a "General List" of "140 other people, businesses, and other entities to whom the Energy Commission sent information." *See* Declaration of Richard C. Ratliff ("Ratliff Decl.") ¶ 2. Mr. Ratliff described the third "general list" as "comprised of those agencies and persons who had participated in the earlier proceeding and had not requested to have their names removed \* \* \* and comprised of other people who had expressed interest or had attended any event or commented in writing on the project." *See* Teleconf. Hr'g at 27.

The District received only one comment during the public comment period on the draft PSD permit (from the applicant RCEC) and one letter from CEC after the PSD comment period closed. Lee Decl. ¶¶

4, 5. The District did not hold a public hearing for the RCEC PSD facility.<sup>13</sup>

With regard to the parallel CEC certification process, the CEC did not receive written comments regarding air quality issues or hold hearings during the time frame of the PDOC/draft PSD comment period. *See* Monasmith Decl. ¶ 7. A CEC official noted, however, that the CEC docket received public comments on air quality issues outside the time frame of the PSD comment period. *See id.*; Monasmith Decl. (Ex. A). The record does not indicate whether any of these comments related to PSD issues. During the teleconference hearing, Mr. Ratliff indicated that the CEC staff “don’t really attempt to determine whether these are PSD comments or not.” Teleconf. Hr’g at 14.

Also, on April 25, 2007, during the PSD comment period which ran from April 12 to May 12, the CEC held a public workshop, during which various issues related to the RCEC project, including air quality, were discussed. *See* Teleconf. Hr’g at 20-22. It appears likely that the District was represented during this workshop. *Id.* at 19-20.

On June 19, 2007, the District issued an Amended FDOC for RCEC. Lee Decl. ¶ 6. The CEC certified RCEC on September 26, 2007. Monasmith Decl. at 2. On Nov. 1, 2007, the District issued its Permit/ATC to RCEC.<sup>14</sup> On the same date, the District mailed notice of the Permit, along with the Permit itself, to the CEC, Region 9, RCEC, the

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<sup>13</sup> 40 C.F.R. part 124 directs a permit issuer to hold a hearing only when it “finds, on the basis of requests, a significant degree of public interest in a draft permit(s).” 40 C.F.R. § 124.12(a). There is no record of the District having made such a finding in this case, and Mr. Simpson has not alleged that the District should have held a hearing based on the degree of public interest in this proceeding. *See In re Sunoco Partners Mktg. & Terminals, L.P.*, UIC Appeal No. 05-01, at 12 (EAB June 1, 2006) (Order Denying Review in Part and Remanding in Part) (holding that the EPA’s decision to conduct a public hearing is “largely discretionary”); *accord In re Avery Lake Property Owners Assoc.*, 4 E.A.D. 251, 252 (EAB 1992).

<sup>14</sup> As explained by the District’s Air Quality Engineer, the Permit also serves as the ATC under California Law. *See* Lee Decl.

Point Reyes National Seashore, and the four neighboring air quality management districts noted above. Lee Decl. ¶ 7. On December 7, 2007, the District published notice of the issuance of the Permit in the Oakland Tribune. Id. ¶ 9.

On January 3, 2008, Mr. Simpson filed a petition for review challenging the issuance of the Permit for RCEC. In his Petition, Mr. Simpson challenges issuance of the draft permit and Permit on the basis that the District failed to provide adequate notice of the issuance of the draft permit and Permit in accordance with 40 C.F.R. part 124 and failed to satisfy BACT and other federal and state requirements. *See* Pet. at 1-5. At the Board's request, the District, on January 18, 2008, filed a response to the Petition. The District sought summary dismissal of the Petition on the grounds that Mr. Simpson failed to meet jurisdictional thresholds for Board review, including standing, preservation of issues for review, and timeliness. *See* Response to Petition for Review Requesting Summary Dismissal ("District's Response").

With the Board's leave, Mr. Simpson, on February 11, 2008, filed a brief opposing the District's request for summary dismissal of the Petition, in which he further developed his arguments. *See* Opposition to Request for Summary Disposal ("Pet'r Opposition"). As requested by the Board, the District, on March 7, 2008, filed a response to Mr. Simpson's opposition brief. *See* Response to [Pet'r Opposition]. ("District's Response to Opposition").

On April 3, 2008, the Board held the above-mentioned teleconference hearing at which Mr. Simpson and counsel for the District, CEC, and RCEC participated.<sup>15</sup> At the teleconference hearing, the Board granted leave to Mr. Simpson to submit the brief that Mr. Simpson had filed with the Board on March 31, 2008, as well as to

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<sup>15</sup> At the teleconference hearing, the Board obtained information from the participants on CEC's and the District's public notice and outreach activities in this proceeding pursuant to 40 C.F.R. §124.10 as well as Mr. Simpson's participation in these activities.

the District to file a responsive brief submitted by the District on April 3, 2008. *See* Teleconf. Hr’g at 7-8; Opening Statement of Rob Simpson; [District’s] Response to Petitioner’s “Opening Statement.”<sup>16</sup>

III. *SUMMARY OF MR. SIMPSON’S APPEAL AND THE DISTRICT’S RESPONSE*

As noted previously, in his Petition and subsequent briefs, Mr. Simpson challenges the Permit on the basis of improper notice under 40 C.F.R. part 124, BACT issues, and other issues of federal and state law. Following is a summary of Mr. Simpson’s objections to the Permit, divided into notice and non-notice issues:

**Notice Issues (40 C.F.R. § 124.10 and California state law):**

- (1) The District failed to provide adequate notice of the issuance of the draft PSD permit and public comment period by not carrying out certain forms of notice and contacting specific entities entitled to notice;
- (2) The content of the notice of the draft permit was deficient in that the notice did not disclose the identity of the applicant, facility location, procedures for requesting a hearing, the phone number of the contact person, and the amount of PSD increment consumed; and
- (3) The District’s publication of notice of the issuance of the Permit in the *Oakland Tribune* was inadequate

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<sup>16</sup> Although Mr. Simpson had not sought the Board’s permission to file his “Opening Statement,” the Board nevertheless admitted Mr. Simpson’s “Opening Statement” and the District’s response brief because the two briefs touched upon matters for which the Board sought clarification during the teleconference hearing. Teleconf. Hr’g at 7-8.

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because the *Oakland Tribune* is not a newspaper of general circulation “within the District” as required by Cal. Code Regs. tit. 20 § 1713(c).

**Non-notice Issues:**

(1) The District’s BACT analysis is erroneous because the District failed to adopt a demonstrated technology, “OpFlex,” that was recommended by CEC staff;

(2) The Emission Reduction Credits (“ERCs”) in the Permit are not sufficient to offset the RCEC’s emissions of NO<sub>x</sub> and Precursor Organic Compounds;

(3) The Permit incorporated major changes in the use of ERCs from an already approved project, the East Altamont Energy Center, without appropriate opportunity for public comment;

(4) The District failed to consider important environmental justice issues in issuing the Permit;

(5) EPA failed to consider “impacts of air, noise, light and water pollution” when seeking an informal opinion from the FWS;

(6) The District failed to consider RCEC’s generation of greenhouse gases;

(7) The District failed to discuss cumulative impacts, including a nearby highway, and the nearby Eastshore Energy Center Proposal;

(8) The District failed to include “acrolein” in its “Toxic Air Contaminant (TAC) Health Risk Screening”; and

(9) The District lacked authority to issue the Permit because the Permit issuance is outside the scope of its delegation agreement with the EPA.

*See* Pet. at 2-6; Pet'r Opposition at 1-21.<sup>17</sup>

In response, the District avers that Simpson failed to demonstrate that he satisfied the threshold requirements for standing and other jurisdictional thresholds prerequisite to granting review of his petition. *See* District's Response at 10-20. The District states further, that, "[t]o the extent that the Environmental Appeals Board does not dismiss the Petition summarily because of the threshold defects outlines above, it should at least strike portions of the Petition raising non-PSD issues outside of the Board's jurisdiction." *Id.* at 19.<sup>18</sup>

#### IV. DISCUSSION

##### A. *Threshold Procedural Requirements for Board Review*

The parties' arguments on appeal revolve initially around the significance of certain threshold conditions that 40 C.F.R. part 124 imposes on parties seeking Board review. One threshold requirement is contained in the following provision:

[W]ithin 30 days after a \* \* \* PSD final permit decision \* \* \* has been issued \* \* \* , *any person who filed comments on that draft permit or participated in the public hearing* may petition the Environmental Appeals Board to review any condition of the permit decision.

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<sup>17</sup> Because the Board is remanding the Permit on procedural grounds, the Board's decision will not address most of the above-listed substantive arguments raised in Mr. Simpson's Petition. *See infra* Part IV.B.3.

<sup>18</sup> Consistent with the Board's procedures, the District did not file a response addressing the nonprocedural issues raised by Mr. Simpson pending disposition of the response seeking summary disposition.

40 C.F.R. § 124.19(a) (emphasis added).

The Board has described meeting this procedural threshold for Board jurisdiction as demonstrating “standing” to petition for review. *See, e.g., In re Knauf Fiber Glass, GMBH*, 9 E.A.D. 1, 5 (EAB 2000); *In re Sutter Power Plant*, 8 E.A.D. 680, 686 (EAB 1999).<sup>19</sup> In effect, section 124.19(a) confers an automatic standing entitlement on all those who participate during the public comment period, thereby making such persons “proper” petitioners before the Board.<sup>20</sup>

Also, the regulations governing PSD permitting provide that the petition for review shall include “a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations.” 40 C.F.R. § 124.19(a). The regulations include the following requirement for raising issues during the public comment period:

All persons, including applicants, who believe any condition of a draft permit is inappropriate \* \* \* must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing) \* \* \*.

40 C.F.R. § 124.13. In applying these regulations, the Board has routinely denied review where the issue “was reasonably ascertainable but was not raised during the comment period on the draft permit.” *In*

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<sup>19</sup> As noted above, petitioners seeking Board review of a PSD permit must also meet the threshold timeliness requirement of filing petitions for review within “30 days after a \* \* \* PSD final permit decision \* \* \* has been issued.” 40 C.F.R. § 124.19(a).

<sup>20</sup> “‘Standing to sue’ means that party has sufficient stake in an otherwise justifiable controversy to obtain judicial resolution of that controversy” and “focuses on the question of whether the litigant is the proper party to fight the lawsuit, not whether the issue itself is justiciable.” Black’s Law Dictionary 1405 (6<sup>th</sup> Ed. 1990) (citations omitted).

*re Christian County Generation, LLC*, PSD Appeal No. 07-01, slip op. at 12 (EAB Jan. 28, 2008), 13 E.A.D. \_\_\_\_; *In re Shell Offshore, Inc.*, OCS Appeal Nos. 07-01 & 02, slip op. at 52-53 (EAB Sept. 14, 2007), 13 E.A.D. \_\_\_\_; *In re Kendall New Century Develop.*, 11 E.A.D. 40, 55 (EAB 2003).

With respect to these foregoing threshold procedural requirements, the District asserts, in seeking summary dismissal of Mr. Simpson's appeal, that "the Petition must be summarily dismissed because it does not satisfy the threshold requirements for [EAB] review in that (i) the Petitioner lacks standing; (ii) the issues raised in the Petition were not preserved for review; and (iii) the Petition is untimely." District's Response at 1. Mr. Simpson counters that to the extent that he failed to meet threshold requirements for Board review, it was because the District's failure to comply with notice requirements under 40 C.F.R. § 124.10 prevented Mr. Simpson from commenting on the draft PSD Permit. Pet'r Opposition at 1. As Mr. Simpson contends, "[i]t is disingenuous of the District to violate public notice requirements and then argue that my appeal is precluded as a result." *Id.* at 2.

B. *The Framework for the Board's Analysis*

1. *The Importance of the Notice Provisions of the Regulations*

Mr. Simpson's appeal raises before the Board the issue of whether a permitting authority's failure to comply with notice obligations can be so substantial that it precludes the public participation upon which procedural "standing" is based. Thus, Mr. Simpson seeks to direct the Board's attention from the question of whether he complied with the procedural threshold requirements at § 124.19 to the antecedent one of whether the District complied with its initial outreach and notice obligations at 40 C.F.R. § 124.10. Inherent in Mr. Simpson's argument is the proposition that the District's notice and outreach under § 124.10 were so defective that these defects "rippled through" the permitting process, handicapping the participation necessary for standing and, by consequence, precluding satisfaction of the other procedural thresholds

for Board review, such as preserving issues for review and the timely filing of a petition for review. *See* 40 C.F.R. § 124.19(a).

In theory, it is not difficult for the Board to accept the pivotal role of initial notice depicted by Mr. Simpson and examine this issue as the starting point for our analysis. Initial outreach and notice activities under § 124.10 are clearly intended to generate the public participation upon which standing to challenge permit decisions is predicated. *See In re MCN Oil & Gas Co.*, UIC Appeal No. 02-03, at 11 (EAB Sept. 4, 2002) (Order Denying Review) (“Standing to appeal a final permit determination is limited under [40 C.F.R. §] 124.19 to those persons who *participated* in the permit process leading up to the permit decision \* \* \*.”) (emphasis added). Obviously, a person who does not receive notice of a draft permit (and is otherwise unaware of its issuance) will not be able to participate to the extent of filing comments on the draft permit, and thereby satisfy the procedural threshold imposed by section 124.19(a), entitling that person to standing before the Board. If a person is entitled to such notice, failure to receive it is clearly prejudicial. For that reason, part 124 contains very specific requirements in section 124.10 as to whom notice must be given and as to the contents of the notice.

The Board has consistently acted to ensure that permitting authorities rigorously adhere to procedural requirements that facilitate public participation and input during EPA permitting. *See In re Weber*, #4-8, 11 E.A.D. 241, 245 (EAB 2003); *In re Rockgen Energy Center*, 8 E.A.D. 536, 557 (EAB 1999). In *Weber* and *Rockgen*, while the public had been properly notified via § 124.10, we nonetheless remanded final permits to the respective permitting agencies for an equally critical procedural reason. In those cases, the agencies failed to comply with the requirement that “[a]t the time a final permit decision is issued,” the permitting authority must issue a “response to comments” document responding to “all significant comments” received during the public comment period, *see* 40 C.F.R. § 124.17, as well as to make public comments and the EPA’s response thereto part of the administrative record upon which a final permit decision is based. *See* 40 C.F.R.

§ 124.18(a),(b)(1); *see, e.g., Weber*, # 4-8, 11 E.A.D. at 245; *Rockgen*, 8 E.A.D. at 557; *see also In re Antochem N. Am., Inc.*, 3 E.A.D. 498-99 (Adm'r 1991).<sup>21</sup> In remanding in *Weber*, we explained that the purpose of 40 C.F.R. § 124.17 requirement to issue a response to comments document at the time of permit issuance was to ensure that the permitting authority “have the benefit of the comments and the response thereto to inform his or her permit decision.” *Weber*, 11 E.A.D. at 245; *see also Rockgen*, 8 E.A.D. at 557 (explaining that adherence to 40 C.F.R. § 124.17 was necessary to give “thoughtful and full consideration to all public comments before making the final permit determination.”).

Also, in *Rockgen*, we described a remand as necessary to validate a key statutory objective of the Clean Air Act’s PSD program, namely to “assure that any decision to permit increased air pollution \* \* \* is made only after consideration of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.” *See Rockgen*, 8 E.A.D. at 557 (*quoting* CAA § 160(5), 42 U.S.C. § 7470(5)). In *Rockgen*, recognizing the CAA’s stress on the central role of public participation in PSD permitting and the need for Board intervention to safeguard that role, we observed the following:

The failure of [the permitting authority] to comply fully with the public participation requirements of the [PSD] regulations implementing this statutory requirement, combined with a reasonable perception from the record that [the permitting authority] may not in fact have given consideration to the public’s comments

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<sup>21</sup> Part 124 provides, in relevant part, that the “administrative record for any final permit shall consist of the administrative record for the draft permit and \* \* \* [a]ll comments received during the public comment period provided under [40 C.F.R.] § 124.10 [and] \* \* \*[t]he response to comments required by [40 C.F.R.] § 124.17.” 40 C.F.R. § 124.18(b)(1), (4).

beforehand, undermines the statutory objective and should be rectified.

*Rockgen*, 8 E.A.D. at 557; *see also Antochem N. Am.*, 1 E.A.D. at 498.

In remanding in *Weber*, *supra*, we rejected the Region's argument that the subject procedural errors were a merely "bureaucratic in nature." *Weber*, 11 E.A.D. at 245. Characterizing these violations of § 124.17 violations as "neither harmless, inconsequential, nor trivial," we noted that accepting Region 5's arguments to the contrary would "short circuit the permit process." *Id.* In the above procedural cases, the Board acknowledged that remanding the proceedings to correct the subject procedural violations might not result in any alteration of the final permit decisions. *See Rockgen*, 8 E.A.D. at 557; *Weber*, 11 E.A.D. at 246. Instead, we viewed the Board's remedial intervention as necessary to safeguard the integrity of EPA's procedural regime for assuring public participation in Agency permitting. *See id.*

This concern for protecting the integrity of EPA's public participation procedures, as expressed in *Weber* and *Rockgen*, forms the context for considering the District's repeated suggestions in its briefs that any supposed violation of § 124.10 by it was essentially "harmless." Clearly, any violation of § 124.10 that would deny the public its rightful opportunity to comment and therefore have its views considered by the permitting agency could cause a "harm" or "prejudice" similar to that which prompted our corrective action in *Weber* and *Rockgen*. This is clear since initial notice of permitting actions –along with soliciting public comments, incorporating comments and EPA responses thereto in the administrative record, and providing proper notice of final permitting actions – constitute a set of related procedures that together support the statutory directive to foster effective public participation in PSD permitting. *See CAA* § 160(5), 42 U.S.C. § 7470(5). The only difference between the allegations in the instant case and *Weber* and *Rockgen* is that the violations alleged in this case – initial notice of permitting actions – occurred at an earlier stage of this chain of procedures. Yet the resulting harm or "short circuiting" of the permitting

process in this case would be similar. As we noted in *Weber and Rockgen*, the essence of the alleged “harm” from the procedural violation is not simply its potential impact on the final permit decision, but rather the deprivation of the public’s opportunity to have its views considered by the permitting agency. *See* §124.17.

## 2. *Whether the Board Can Consider Mr. Simpson’s Claims*

Analyzing Mr. Simpson’s claim of defective notice and request for remand poses the initial question of whether the Board has the power to adjudicate Mr. Simpson’s claim despite his not being able to qualify for the standing entitlement set forth at § 124.19(a), *supra*. Thus, the Board must determine whether Mr. Simpson is nevertheless a “proper” litigant before the Board— i.e. whether Mr. Simpson indeed has “standing” to claim exercise of the Board’s jurisdiction, making him eligible for a ruling on the merits and access to the Board’s remedial powers. *See Weiner v. Bank of King of Prussia*, 358 F.Supp. 684, 695 (E.D. Pa.. 1973) (“Standing is a jurisdictional issue which concerns power of \* \* \* courts to hear and decide cases \* \* \* [and] does not concern the ultimate merits of substantive claims involved in the action.”).

We note initially a certain circularity in addressing Mr. Simpson’s claim of defective notice. If, despite Mr Simpson’s claims, all the procedural requirements of part 124 were complied with, then Mr. Simpson would not have standing to have his Petition considered. However, as discussed below, if the procedural requirements were not fully complied with, then it is possible that Mr. Simpson’s Petition warrants consideration even though, under normal circumstances, failure to participate in the proceedings below would lead to denial of a petition on standing grounds.

But there is no way to know if part 124 requirements were met without considering the Petition at least to that extent. Indeed, it would be incongruous for the Board to categorically deny standing, and possibility of redress, to a petitioner who presents facts purporting to

show that EPA (or one of its delegates) has violated § 124.10 and thereby prejudiced the petitioner's participation rights. Denying standing outright in such cases would deny parties the opportunity to vindicate before the Board potentially meritorious claims of notice violations under part 124 and would be at odds with the Board's obligation to "decide each matter before it in accordance with applicable statutes and regulations." *See* 40 C.F.R. § 1.25(e)(1). Furthermore, conferring standing in a restrictive manner would be at odds with clear Congressional direction for "informed public participation," *see* CAA § 160(5), 42 U.S.C. § 7470(5), and § 124.10's expansive provision of notice and participation rights to members of the public. This is illustrated by the requirement for permitting agencies to implement general outreach by compiling mailing lists of persons interested in permitting actions, *see* 40 C.F.R. § 124.10(c)(1)(ix)(A)-(C), and the statement elsewhere in part 124 that "*any* interested person may submit written comments on the draft permit." *Id.* § 124.11 (emphasis added).

For the reasons stated above, we conclude that Mr. Simpson's claim of inadequate notice warrants consideration by the Board. As such, we must determine whether the District indeed violated 40 C.F.R. § 124.10 in issuing the Permit. Accordingly, the Board must examine whether Mr. Simpson meets part 124's demanding standard for Board review of PSD final permit decisions, which here requires Mr. Simpson to demonstrate that a condition of the Permit<sup>22</sup> is based upon "a finding of fact or conclusion of law which is clearly erroneous" or "an exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review." *See* 40 C.F.R. § 124.19.

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<sup>22</sup> As applied to the notice violation, the allegation of error is considered to be the Permit in its entirety. *See In re Chem. Waste Mgmt. of Ind.*, 6 E.A.D. 66, 76 (EAB 1995) (holding that the Board, in accordance with its review powers under 40 C.F.R. § 124.19, is "authorize[d] \* \* \* to review any condition of a permit decision (or as here, the permit decision in its entirety).")

3. *The Board's Conclusion That Public Notice Was Inadequate and the Permit Must Be Remanded*

Based upon our review of the arguments and facts presented by the parties in their briefs and at the teleconference hearing, as summarized below, we determine that Mr. Simpson has demonstrated that the District clearly erred by issuing the Permit without providing adequate notice of the issuance of the draft permit and opportunity to comment as required by § 124.10. To redress this harm, the appropriate remedy is to remand the Permit so that a draft permit can be “renoticed” pursuant to § 124.10. Because issuance of the draft permit will reopen the public comment period and allow new opportunity for filing public comment, the Board, for reasons of judicial economy, refrains from opining on the substantive arguments raised in Mr. Simpson’s appeal, except to the limited extent noted below.<sup>23</sup>

C. *Summary of the Parties’ Arguments Regarding Public Notice of the Draft PSD Permit*

In his three briefs and a declaration filed with the Board, Mr. Simpson claims that the District failed to accord him and others not before the Board adequate notice of the Draft Permit in accordance with 40 C.F.R. part 124.10.

First, Mr. Simpson states that the District did not comply with the specific methods prescribed in part 124 for public outreach and notice of PSD permitting activities. For example, Mr. Simpson alleges that in his capacity as an “appointed” representative of the “Hayward Area Planning Association” (“HAPA”), he should have received notice

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<sup>23</sup> Because we determine that the District’s initial outreach of the RCEC draft permit was defective and thus justifies a remand, we need not consider the parties’ dispute over the content of the notice of the draft permit and whether Mr. Simpson received adequate notice of issuance of the Permit. Similarly, the Board need not consider whether Mr. Simpson filed his Petition in a timely manner because failure to provide the legally required notice also prejudices the ability to file a timely petition for review.

of the RCEC permitting since HAPA is a “comprehensive regional land use agency” for the Hayward area, and as such is entitled to notice of permitting actions in accordance with part 124. *See* Pet’r Opposition at 3 (citing 40 C.F.R. § 124.10(c)(1)(vii)); Simpson Decl. at 1. Moreover, Mr. Simpson maintains that the District contravened the same provision by not providing notice to a local county government body, the Alameda County Board of Supervisors. *Id.* In support of this claim, Mr. Simpson has attached the declaration of Gail Steele, of the Alameda County Board of Supervisors, District 2, who represents that she did not receive notice of the District’s process with regard to RCEC and Eastshore Energy Center.<sup>24</sup> *See* Declaration of Gail Steele (“Steele Decl.”).

Moreover, Mr. Simpson contends that the District, contrary to the requirements in 40 C.F.R. § 124.10(c)(1)(ix), failed to “solicit persons for ‘area lists’ from participants in past permit proceedings in [the] area” as part of its outreach effort. *Id.* Mr. Simpson explains that many persons who participated in prior permitting proceedings did not receive notice of the RCEC draft permit. In particular, he identifies “Communities for a Better Environment” as an entity that participated in the “original application [for RCEC]” but did not receive notice of the draft RCEC permit at issue here. Pet’r Opposition at 3. In support of this contention, Mr. Simpson attaches a declaration by Shana Lazerow, attorney with Communities for a Better Environment (“CBE”). Declaration of Shana Lazerow (“Lazerow Decl.”). In her declaration, Ms. Lazerow relates that in 2001, at the time of the original RCEC PSD permitting procedures, *see supra* note 11, a CBE colleague sent an e-mail to the District expressing CBE’s interest in obtaining a copy of the PDOC for the RCEC proposal when issued. *See id.* Attached to the

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<sup>24</sup> The proposed Eastshore Energy Center (“Eastshore”), located in Alameda County, near RCEC, obtained a PDOC and then a FDOC from the District although it apparently did not qualify as a “major source” of pollutants subject to PSD permitting. *See* Pet’r Opposition (Ex. 3). In addition, Eastshore’s permitting appears to have overlapped, in part, with that for the proposed RCEC. *See* Teleconf. Hr’g at 33. However, in a curious contrast with RCEC, which received only one comment during its comment period, *see supra*, Eastshore generated “approximately 605 comments,” according to the District’s Air Quality Engineer. Pet’r Opposition (Ex. 3).

declaration is a copy of an e-mail dated September 14, 2001, requesting the original PDOC. *Id.*

Mr. Simpson also faults the District for limiting press notice of the draft permit to “one notice in the English newspaper,” *see* Pet. at 3, and also claims that the District violated its own regulations by failing to provide notice of the draft permit in a newspaper of “general circulation within the District.” Pet’r Opposition at 8. In particular, Mr. Simpson asserts that the *Oakland Tribune* only serves as a newspaper of general circulation “within the City of Oakland and within the County of Alameda” but does not cover the entire District, “which is comprised of seven counties and portions of two additional counties.” *Id.* Mr. Simpson further states that “notice in a newspaper of general circulation must be interpreted to mean newspapers of general circulation covering the District.” *Id.*

Mr. Simpson, in his Opening Statement filed just before the teleconference hearing, also contends that during the comment period for the RCEC draft permit, CEC and the District conducted a workshop on April 25, 2007, but that neither entity recorded the comments made by the public. Opening Statement at 2. Simpson faults the CEC for not recording the comments despite what he says was the public’s belief that “this was a hearing and [the public] made ‘comments’ believing that they would be considered.” *Id.*

Based on this catalogue of alleged violations of § 124.10, Mr. Simpson asserts that the violations resulted in his and the community’s inability to participate in the RCEC permitting process. As Mr. Simpson states, “the District is tasked with providing accurate information to the public so that it may participate in a meaningful manner.” Pet’r Opposition at 5. He contends that the District’s deficiencies in providing notice of PSD permitting actions “thwarted” the notice regulation’s purpose of abetting public participation and ensuring “meaningful” public participation and “open government.” *Id.* On this topic, the thirteen declarants’ statements (including Mr. Simpson’s) attached to Mr. Simpson’s opposition memo all

represent that, had the declarants received notice of the RCEC PSD permit proceedings, they would have participated in the public comment period. *See* Pet'r Opposition (attached declarations).

In response to Mr. Simpson's arguments, the District emphasizes the CEC outreach efforts upon which the District admittedly "piggybacked" were so thorough and extensive that the CEC's outreach was essentially equivalent to what the District would have provided on its own. *See* District's Response to Opposition at 3-4, 5 n.4, *supra* Part II.B. On this point, the District recounts CEC's compiling of three mailing lists during the RCEC certification process and notes that even after the close of the comment period, CEC "h[e]ld extensive hearings and received a number of letters from the public on air quality issues." District Response at 7; *see* District's Response to Pet'r Opposition at 3-4. When asked by the Board during the teleconference hearing whether the District generated its own lists and provided those to the CEC, the District explained that it did not develop its own lists or provide input to CEC's list but rather relied on the CEC not only for physical mailing but also for determining the scope of outreach activities. Teleconf. Hr'g at 29.

The District uses CEC's allegedly comprehensive outreach process as a way to discount any "injury or harm" Mr. Simpson may have suffered and to discount the significance of any variance from the part 124 rules. In particular, the District claims that CEC's outreach was so extensive that even if CEC's notice had failed technically to comply with 40 C.F.R. § 124.10, any difference between CEC's efforts and what was required by § 124.10 was too trivial to have resulted in prejudice to Mr. Simpson. The District explains that since Mr. Simpson only responded to CEC's extensive outreach very late in the permitting process, Mr. Simpson's lack of participation can be taken as barometer of his fundamental lack of interest in the PSD permitting process. The District suggests that even if the District had performed the outreach itself in full compliance with 40 C.F.R. § 124.10, it would have accomplished the same result as CEC. *See* District's Response to Pet'r Opposition at 5 n.4, 6-7. Such was Mr. Simpson's lack of response,

asserts the District, that Mr. Simpson would not have participated in the RCEC proceedings in a manner sufficient to give him standing “no matter what level of notice was given.” District’s Response to Pet’r Opposition at 8. The District also maintains that even if it did not achieve technical compliance “in every detail” with these notice requirements, it nevertheless “substantially complied,” and furthermore, “such minor defects cannot have prejudiced [Mr. Simpson] such as to excuse his failure to participate.” District’s Response to Pet’r Opposition at 6; Teleconf. Hr’g at 28.

The District also offers as an example of Mr. Simpson’s alleged indifference his lack of participation in an April 25, 2007 workshop (which took place during the PSD comment period) carried out by CEC. As the District states, “[Mr. Simpson’s] lack of participation \* \* \* is simply further evidence” of the fact that [Mr. Simpson’s] concerns about this project have developed only at the very end of the permitting process, and as a result [he] was not in a position to have commented on the draft PSD permit last summer even if the District had done everything as he claims it should have done.” [District’s] Response to Petitioner’s “Opening Statement” at 2-3.

In the District’s view, the examples above confirm that Mr. Simpson cannot demonstrate that he was “prejudiced” by any ostensible lack of notice by the District. District Response to Opposition at 7. Quoting the Board’s decision in *In re J&L Speciality Prods. Corp.*, 5 E.A.D. 31, 79 (EAB 1994), the District avers that “because petitioner has failed to demonstrate how the Region’s alleged technical violations of 124.10 affected these proceedings, or that it was in any way prejudiced by these alleged violations, we conclude that such violations, even if they occurred, were harmless, and do not invalidate the permit issuance.” District Response to Opposition at 8 (quoting *J&L Specialty Prods.*, 5 E.A.D. at 79).

From another perspective, the District argues that CEC’s outreach efforts were essentially identical to § 124.10 notice mandates. In other words, the District suggests that CEC’s outreach efforts so

coincided with § 124.10 that Mr. Simpson's failure to be included in the scope of CEC's outreach meant that Mr. Simpson was not qualified for notice under § 124.10 in the first place. As the District explains, since CEC compiled its lists of contacts "as part of comprehensive public outreach \* \* \* undertaken for [RCEC]," Mr. Simpson's non-appearance on the CEC's outreach lists proves that Mr. Simpson "cannot be someone who was entitled to direct mail notice under 40 C.F.R. § 124.10(c)." District Response to Pet'r Opposition at 3, 5.

Finally, the District disputes Mr. Simpson's contention that his affiliation with HAPA entitled him to notice of the draft permit. On this point, the District avers that the declaration of HAPA's own president, Sherman Lewis, submitted with Mr. Simpson's opposition memo, indicates that HAPA is not a government agency such as would be entitled to notice under § 124.10(c)(1)(vii), but rather a private citizens organization. See District's Response to Pet'r Opposition at 3 n.2; Pet'r Opposition (Ex. 25) (Declaration of Sherman Lewis).<sup>25</sup>

*D. The Board's Analysis of Mr. Simpson's Allegations of Inadequate Notice*

In addressing Mr. Simpson's notice-based claims under 40 C.F.R. § 124.10 below, we observe that his claims consist both of allegations that the District failed to provide him with notice to which he was specifically entitled and allegations that the District failed to give particularized notice to third persons not before the Board (*e.g.*, CBE). In previous cases involving § 124.10, the Board has held that petitioners cannot ordinarily raise for Board consideration claims of the latter type. See *J&L Specialty Prods.*, 5 E.A.D. at 79 (stating that "absent any alleged harm to [petitioner], we fail to see how [petitioner] has standing

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<sup>25</sup> The District also rejects Mr. Simpson's argument that a HAPA attorney's participation in a CEC proceeding entitled Mr. Simpson to notice in the PSD proceeding. The District maintains that HAPA's attorney never claimed to represent Mr. Simpson during the CEC proceeding. District's Response to Pet'r Opposition at 3 n.2. During the teleconference hearing, Mr. Simpson acknowledged that he had filed the Petition on his own behalf, not as a representative of HAPA. See *infra* note 26.

to complain about someone else allegedly not being mailed notice of the draft permit”); *accord MCN Oil & Gas Co.*, UIC Appeal No. 02-03, at 11 (EAB Sept. 4, 2002) (Order Denying Review). While these cases indicate that the Board generally will not consider notice allegations where the sole deficiency is failure to give notice to a particular person other than the petitioner, we nevertheless regard it as appropriate to consider claims of failure of notice to other persons within the scope of allegations of fundamental defects in the integrity of the notice process as a whole that may be prejudicial to the notice rights of the petitioner and others and thus may require Board remedy.

In the Board’s view, based upon a preponderance of evidence in the record, Mr. Simpson has demonstrated that the District clearly erred in issuing the Permit without fully complying with the initial notice provisions for draft permits in 40 C.F.R. § 124.10. In this respect, Mr. Simpson has shown that the District failed to provide adequate notice of the RCEC draft permit to which he, as a member of the general public, was entitled. Moreover, Mr. Simpson has produced additional evidence, substantiated by information adduced by the Board at the teleconference hearing, showing that the District’s system for providing public notice of the draft permit was fundamentally flawed and excluded far more members of the public than just Mr. Simpson. As we describe below, the evidence in the record demonstrates that these defects were substantial and thus warrant remand and renoticing of the Permit.

*1. Whether Mr. Simpson Has Proven that He Was Entitled to Receive, But Did Not Receive, Particularized Notice*

To evaluate allegations of lack of notice to Mr. Simpson himself, we first inquire whether Mr. Simpson was entitled to notice as being among those types of entities entitled to particularized notice under section 124.10. The Board concludes that Mr. Simpson was not entitled to notice on this basis. Mr. Simpson claims a right to receive notice as the “appointed representative” of HAPA, which he asserts is a “comprehensive regional land use planning agency” entitled to notice under 40 C.F.R. § 124.10(c)(1)(vii). We reject this assertion. First, we

agree with the District that as indicated in the declaration filed by HAPA's own president, HAPA is not an "agency" with governing authority, but rather a private citizens group and thus does not qualify as a "comprehensive regional land use agency." *See supra* Part IV.C.<sup>26</sup> Second, even if HAPA were entitled to notice, that does not mean that Mr. Simpson was personally entitled to notice.<sup>27</sup>

2. *Whether Mr. Simpson Has Proven that the District Failed to Assure Compliance With Notice Requirements of Part 124*

With regard to its general notice and outreach obligations, the District emphasizes that it satisfied such requirements by relying upon the ostensibly "comprehensive" nature of the CEC's outreach. Indeed, the Board recognizes the extensive outreach that CEC conducted as part of the certification process for the proposed RCEC and does not doubt the sincerity of the CEC's efforts. Furthermore, we note that a delegated state agency, such as the District, may redelegate PSD public notice and outreach to another state agency to the extent the federal delegation so allows.

The Board, however, concludes that the District fell conspicuously short of its general outreach obligations by failing to adhere to the provision requiring a permitting agency to compile "mailing lists" of persons potentially interested in receiving information about permitting activities. *See* 40 C.F.R. § 124.10(c)(1)(ix). In this regard, Mr. Simpson has persuaded us that the District did not comply with the obligation to "notify [] the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as Regional and State funded newsletters,

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<sup>26</sup> As the District correctly observes, the declaration of HAPA's president, submitted with Mr. Simpson's opposition memo, indicates that HAPA is a private citizens organization. *See* District's Response to Pet'r Opposition at 3 n.2; Pet'r Opposition (Exh. 25).

<sup>27</sup> We note that Mr. Simpson filed the Petition in his own name and not on behalf of HAPA. Teleconf. Hr'g at 37-38.

environmental bulletins, or State Law Journals.” Pet’r Opposition at 3 (quoting 40 C.F.R. § 124.10(c)(1)(ix)(C)). The District’s notice of the draft permit and public comment period in a single publication in the *Oakland Tribune*, undertaken to satisfy State requirements, *see* Pet. at 3; Pet’r Opposition (Exh. 1), does not, in our view, satisfy the requirement that a permitting authority solicit interest and participation in permitting activities among members of the public via *periodic* publication in *multiple* print media. *See* 40 C.F.R. § 124.10(c)(1)(ix)(C). In fact, during the teleconference hearing, the District’s representative admitted that he was not aware of “anything the District or the CEC has explicitly done in an attempt to comply” with this requirement. Teleconf. Hr’g at 31-32.<sup>28</sup> By falling short of this requirement, we find that the District narrowed the scope of public notice to which Mr. Simpson and other members of the public were entitled under part 124.

In a larger sense, statements by the District’s and CEC’s representatives illuminate the fact that complying with section 124.10’s specific notice mandates was not the object of the CEC’s outreach strategy for the RCEC draft permit. Indeed, the three CEC-generated outreach “lists” upon which the District piggybacked were not tailored in any way to criteria for proper notice of PSD permitting specified at section 124.10, but rather were designed to support the CEC’s parallel

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<sup>28</sup> Significantly, the Board notes that the three CEC lists upon which the District relied for the bulk of its outreach efforts do not reflect that the District complied with its obligation to actively solicit *new* participation in the PSD permitting process via publication in print media. *See supra* Part II.B. As described by CEC’s counsel, the three lists consisted of interested agencies, adjacent residents and businesses, and agencies and persons who had participated in *previous* proceedings and persons who had expressed interest in or commented on the RCEC project. *See supra id.* In sum, the composition of those lists does not indicate that CEC carried out on the District’s behalf the requirement to broadly inform the general public of the “opportunity” to be notified of permitting actions through “periodic” publication in multiple print media. *See* 40 C.F.R. § 124.10(c)(1)(ix)(C).

certification process. *See supra* Part II.B.<sup>29</sup> As the District’s counsel acknowledged at the teleconference hearing, these CEC outreach efforts did not provide a “perfect match” with section 124.10. Teleconf. Hr’g at 30. In fact, the District conceded that its own reliance on the CEC’s outreach was so great that the District had no role in shaping the content of the CEC’s mailing lists. *See id.* at 28. As the District’s counsel summarized, “[w]e don’t provide a list[;] we rely on the outreach the [CEC] does.” *Id.* at 29. What the District appears to have done is turn over the public notice and outreach activities to the CEC without making any effort to assure that the CEC made any necessary modifications to its procedures to reflect the requirements of part 124.

Additional evidence offered by Mr. Simpson regarding the District’s notice to third persons fortifies our view that the District’s reliance upon CEC’s certification procedures resulted in a flawed notice process. For example, it appears that CEC’s outreach efforts did not satisfy the obligation to “inform the chief executive[] of the \* \* \* county where the major stationary source is located” with respect to the RCEC project. *See supra* Part IV.C.; 40 C.F.R. § 124.10(c)(1)(vii); Pet. for Review at 2. In this regard, the District has not disputed the assertion by Gail Steele, of the Alameda County Board of Supervisors (whose jurisdiction includes Hayward), that she did not receive notice of the PSD permitting for the RCEC project. *See Steele Dec 1.*

Moreover, the District has not disputed the statement of Shana Lazerow of CBE that she did not receive notice of the draft PSD Permit for RCEC even though CBE had requested from the District material related to the original RCEC PSD permitting in 2001. *See Lazerow Decl.* This reflects that the District had created no mechanism for relaying to the CEC the names of persons in the locality who had

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<sup>29</sup> During the teleconference hearing, CEC’s representative made clear that CEC’s certification process, not section 124.10 requirements, determined the scope of public outreach for the draft permit. *See Teleconf. Hr’g* at 28. As he explained, CEC developed its outreach “lists” (on which the District relied) “for our own [certification] proceeding.” *Id.* at 28.

participated in past PSD proceedings in order to ensure compliance with the requirement that permitting authorities develop “area lists,” for notification purposes, of such persons. *See* 40 C.F.R. § 124.10(c)(1)(ix)(B). In sum, the foregoing examples confirm the District’s failure to institute a system of accountability whereby CEC, in implementing public notice of the draft permit, would have to adapt its own outreach lists to section 124.10 mandates. *See, e.g.*, Teleconf. Hr’g at 28-29.

Another issue that raises serious doubts about the adequacy of the District’s procedures for public participation in this case is the District’s role with respect to a CEC-conducted public workshop regarding the proposed RCEC. As noted previously, the workshop, in which the District apparently participated, was held on April 25, 2007, during the public comment period for the draft permit, and air quality issues appeared on the agenda. *See supra* Part II.B; Opening Statement of Rob Simpson at 2. During the teleconference hearing, CEC’s counsel stated his “belief” that the District was present at the workshop along with members of the public. *See* Teleconf. Hr’g at 21. As noted previously, Mr. Simpson represents that the “public attended this workshop believing that this was a hearing and made ‘comments’ believing that they would be considered.” Opening Statement of Rob Simpson at 2. While there is no independent verification of this representation, it is certainly plausible. In any event, the fact that the workshop occurred during the time frame of the draft permit comment period with likely District participation and that no recording was made of any public comments (including air quality issues) raises legitimate concerns about whether the District showed sufficient diligence in addressing public input into the permitting process for RCEC.

This is just one illustration of the nature of the confusion between the District PSD and broader CEC processes. In response to questions during the teleconference hearing, the CEC representative indicated that the public was entitled to comment, during the CEC process, on any air quality issues, including those covered by the PSD permit. However, he noted that the CEC was powerless to make any

changes to the permit based on these public comments. Adding further confusion, in response to a question about how the CEC staff handles comments that relate to PSD, the CEC representative went on to state that “our staff frequently comments on things without trying to discriminate between things that are PSD and non-PSD” and “[w]e don’t really attempt to determine \* \* \* whether these are PSD comments or not.” Teleconf. Hr’g at 12-18. This reinforces the fact that the CEC merely folded the PSD notice proceeding into its ongoing process without an attempt to ensure that the part 124 requirements, including public input requirements, were met.

In sum, despite the significant scope of CEC’s outreach for the proposed RCEC, the evidence in the record supports Mr. Simpson’s allegations that these efforts fell significantly short of section 124.10’s requirements in numerous important respects. Most significantly, by relying almost completely on the CEC to determine the scope of public outreach regarding the draft permit, the District, as EPA’s delegate, failed to provide the necessary oversight of CEC’s outreach to ensure that it conformed with section 124.10. The District’s complacent compliance approach is encapsulated in the District’s stated assumption that “because [CEC’s] outreach efforts [were] so broad \* \* \* all interested parties would be swept up” in that process. Teleconf. Hr’g at 32. Indeed, the record shows that in the absence of District supervision, the CEC simply carried out its own certification-related outreach process without adjusting it in any way to satisfy section 124.10’s specific notice requirements.

Furthermore, contrary to the District’s statements, one cannot dismiss the District’s omissions in this regard as “harmless error.” First, the kind of deficiencies we noted potentially affected more persons than Mr. Simpson. Second, even as to Mr. Simpson, the District’s assumption that, even with the proper notice, he would not have participated is purely speculative. Moreover, given the pivotal importance to Congress of providing adequate initial notice within EPA’s public participation regime under 40 C.F.R. part 124, *see supra* Part IV.B., we regard it as inappropriate to impose upon Mr. Simpson the burden of showing actual

prejudice as the result of the District's notice violations here. *See, e.g., In re Dist. of Columbia Water and Sewer Auth.*, NPDES Appeal Nos. 05-02, 07-10, 07-11, and 07-12, slip op. at 67-68 (EAB Mar. 19, 2008), 13 E.A.D. \_\_\_ (refusing to impose upon petitioner the burden of showing prejudice where the Region, in issuing an NPDES permit, failed to provide adequate notice and opportunity to comment pursuant to part 124).

In order to correct serious and fundamental deficiencies in the District's public notice of the draft permit and to remedy the resulting harm to the PSD program's public participation process, the Board finds it necessary to remand the Permit to the District to ensure that the District fully complies with the public notice and comment provisions of section 124.10.<sup>30</sup> On remand, the District must scrupulously adhere to all relevant requirements in section 124.10 concerning the initial notice of draft PSD permits (including development of mailing lists), as well as the proper content of such notice. *See* 40 C.F.R. § 124.10(d). Because the Board's remand will allow Mr. Simpson and other members of the public the opportunity to submit comments to the District on PSD-related issues during the new comment period, the Board refrains at this time from opining on such issues raised by Mr. Simpson in his appeal.

#### E. *Non-PSD Issues*

Because the purpose of this remand order is to remedy the District's flawed public notice of the draft permit and thus allow the public to fully exercise its public participation rights under part 124, the Board has no intention of circumscribing the range of PSD-related issues the public may raise on remand. However, in order to promote administrative efficiency and prevent unnecessary expense of legal

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<sup>30</sup> As noted above, while a delegated state agency may redelegate notice and comment functions to another state agency to the extent the federal delegation so permits, which in this case could include a delegation to the CEC, in all cases it is incumbent upon the delegated state agency to ensure strict compliance with federal PSD requirements.

resources, the Board considers it advisable to alert potential parties of several issues raised in Mr. Simpson's appeal that are clearly beyond the Board's jurisdiction. As we have stated, "[t]he Board will deny review of issues that are not governed by the PSD regulations because it lacks jurisdiction over them." See *In re Sutter Power Plant*, 8 E.A.D. 680, 688 (EAB 1999); see also *Zion Energy, L.L.C.*, 9 E.A.D. 701, 706 (EAB 2001).<sup>31</sup> Among such issues raised by Mr. Simpson, the following come to our attention:

(1) Contemporaneous Emissions Reduction Credits ("ERCs")

Mr. Simpson's allegations regarding the proposed RCEC's employment of "contemporaneous [ERCs]" to offset its emissions of NO<sub>x</sub> and precursor organic compounds ("POCs"), see Pet. at 1-2; Pet'r Opposition at 11-12; *supra* Part III, are outside the Board's jurisdiction because they emanate from State of California requirements, not the PSD regulations. As the District correctly observes, the ERCs are a product of District regulation 2-2-302, and thus a California state law, not a federal PSD requirement. See District Response at 14-15, 20; *In re Sutter Power Plant*, 8 E.A.D. at 690 (denying review of petitioner's objection to use of ERCs on grounds that requirement to offset emissions with ERCs was not a federal PSD mandate).

(2) Endangered Species Act Concurrence

The Board does not have jurisdiction over Mr. Simpson's arguments challenging the adequacy of FWS's concurrence with Region 9, following informal consultations between the two entities, that the proposed RCEC would not adversely effect any federal listed species under the administration of the FWS. See Pet'r Opposition at 16-20, (Ex. 20); *supra* Part II.B. The Board has previously declined to entertain

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<sup>31</sup> As the Board has held, "[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." See *In re Knauf Fiber Glass*, 8 E.A.D. 121, 126-27 (EAB 1999)

substantive challenges to FWS actions pursuant to the ESA in keeping with the Board's longstanding principle of declining to hear substantive challenges to earlier, predicate determinations that are separately appealable under other statutes. *See Indeck-Elwood, LLC*, PSD Appeal No. 03-04, slip op. at 118-19 & nn.162-63 (EAB Sept. 27, 2006), 13 E.A.D. \_\_\_\_ (holding that the Board did not have jurisdiction over the petitioner's challenge to FWS's concurrence decision given the availability of judicial review through the Administrative Procedure Act).

(3) Various Non-PSD Statutes

Mr. Simpson's allegations that the District violated provisions of the Clean Water Act (including NPDES program), ESA, Migratory Bird Treaty Act, and Coastal Zone Management Act, as well as their implementing regulations, are outside the scope of this proceeding, as the allegations do not address violations of the CAA's PSD program. *See* Pet'r Opposition at 19-20.

(4) Toxic Air Contaminant Health Screening

Mr. Simpson's allegation regarding the District's alleged failure to include "Acrolein" as part of the District's "Toxic Air Contaminant health risk screening," *see* Pet. at 3, clearly refers to a California rather than a federal PSD requirement, and consequently is not reviewable by the Board.

*V. CONCLUSION*

The Permit for RCEC is hereby remanded to the District. The District is directed to reopen the public comment period on the draft permit, providing public notice fully consistent with the requirements of 40 C.F.R. § 124.10.<sup>32</sup>

So ordered.

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<sup>32</sup> The District is free, of course, to make any modifications to the draft permit it deems appropriate prior to noticing it for public comment.

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Remand Order in the matter of *Russell City Energy Center*, PSD Appeal No.08-01, were sent to the following persons in the matter indicated:

By Certified U.S. Mail,  
Return Receipt Requested:

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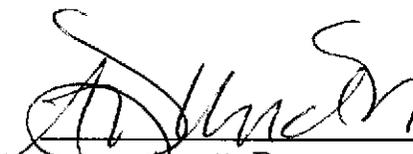
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Annette Duncan  
Secretary

# Power of Vision

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June 5, 2009

California Energy Commission  
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To Whom It Concerns:

Rob Simpson provides valuable information to Power of Vision and other Intervenors in the Carlsbad Energy Center Project. It is critical that Mr Simpson remain a participant in the proceedings.

Regards,  
Julie Baker  
Power of Vision