STATEMENT OF JURISDICTION

I. JURISDICTION OF ENVIRONMENTAL APPEALS BOARD

The jurisdiction of the Environmental Appeals Board (the "Board") is based on 40 C.F.R. 124.19.

II. APPELLATE JURISDICTION

The Court of Appeals has jurisdiction of this matter pursuant to 42 U.S.C. 7607.

III. APPEALABILITY

The judgment of the Board herein appealed from is final as to all claims and all parties in this lawsuit, and properly appealable under 42 U.S.C. 7607.

IV. TIMELINESS OF THE APPEAL

The Board dismissed review in this case on August 10, 2001. Notice of the action was published in the Federal Register on September 13, 2001 (66 Fed. Reg. 47578). The Petition for Review in this case was filed on October 8, 2001. Appellants' Petition for Review in this Court was timely under 42 U.S.C. 7607(b)(1).

STATEMENT OF THE ISSUES

1. Whether the Board abused its discretion by:

   a. Failing to require the Bay Area Air Quality Management District (the "District") to reopen the public comment period, which would have allowed interested parties an opportunity to comment upon the new materials submitted by the Applicant after the close of the comment period;

   b. Allowing the District to base its Best Available Control Technology ("BACT") analysis upon "generally accepted" emissions limits rather than

requiring the District to conduct a true "case-by- case" BACT analysis as required by the Clean Air Act; and

c. Declining to exercise jurisdiction over the CEQA requirements imposed upon the District by the terms of the Delegation Agreement between the District and the Environmental Protection Agency.

2. Whether the District acted in an arbitrary and capricious manner, failing to comply with the Clean Air Act requirement for adequate, meaningful public participation in the process of issuing a Prevention of Significant Deterioration ("PSD") permit, by:

a. Conducting significant analysis after the comment period and refusing to reopen the public comment period, thereby denying interested parties an opportunity to comment on that analysis;

b. Accepting significant materials from the Applicant after the close of the comment period and then refusing to reopen the public comment period, thereby denying interested parties an opportunity to comment on those materials; and

c. Failing to consider or respond to significant public comments which, if properly considered, would have resulted in the use of an alternative, more environmentally protective emissions control technology.

3. Whether the District conducted an improper BACT analysis in violation of the Clean Air Act, thereby allowing emissions of NOx and CO in excess of levels

that could have been accomplished through a proper application of BACT, by:

a. Failing to require the facility to comply with BACT during start-up and shut-down periods, even though the District was aware of control technology that could have brought the facility into compliance with BACT during those periods;

b. Persistently denying that the more environmentally protective emissions control technology is both applicable to and technically feasible for use on this project, contrary to both EPA policy and data provided to the District during the public comment period;

c. Failing to impose the lowest feasible limits on NOx and CO emissions; and

d. Conducting an incomplete analysis of the potential collateral impacts of the chosen control technology and the alternative, more environmentally protective, control technology.

4. Whether the District acted in an arbitrary and capricious manner when it violated provisions of the California Environmental Quality Act by failing to read and consider an environmental impact report or a functional equivalent thereof prior to issuing the final permit decision, contrary to the requirements imposed upon the District by the Delegation Agreement between the District and the EPA.

STANDARD OF REVIEW

The standard of review for the Board's Order Denying Review ("ODR") is whether

the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *American Mining Congress v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992). Under this standard, the reviewing court must give deference to the EPA's interpretation of its own regulations, if its interpretation is not unreasonable. *Citizens for Clean Air v. United States EPA*, 959 F.2d 839, 844 (9th Cir. 1992).

The reviewing court applies the arbitrary or capricious standard to the underlying agency action – here, of the Bay Area Air Quality Management District – approving the PSD permit. *Citizens for Clean Air*, *supra*, 959 F.2d at 845. The court conducts a deferential review of the entire agency action, including the adequacy of the permitting body's response to petitioners' comments. *Id*. at 846. The court does not limit its review to the Board's rejection of petitioners' claims that the permitting body clearly erred; rather, the court examines the totality of both the Board's ruling and the permitting body's decision. *Id.*; 5 U.S.C. § 704 ("A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."); § 706 (providing for judicial review of "agency action"); § 551(13) (defining "agency action" as including "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"); and § 701(b)(2) (incorporating section 551 definition of "agency action" into APA judicial review provisions).

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This action is brought under the citizen suit provision of the Clean Air Act, 42 U.S.C. section 7607, to secure review of an Order Denying Review of the Environmental Appeals Board of the United States Environmental Protection Agency (the "Board"). The Order Denying Review by the Board denies petitioners' request for review of a decision of the Bay Area Air Quality Management District (the "District") granting a permit for a gas-fired power plant under the Prevention of Significant Deterioration ("PSD") provisions of the Clean Air Act. This petition accordingly focuses primarily on the violations of that statute.

II. COURSE OF PROCEEDINGS

On May 5, 1999, Calpine/Bechtel (the "Applicant") submitted a permit application to the District, seeking permission to construct a 600-megawatt combined-cycle electrical power plant, to be known as the "Metcalf Energy Center" ("MEC" Project). The facility will consist of two nominal 200-megawatt "F-class" natural-gas-fired combustion gas turbines, two heat recovery steam generators equipped with 200 MMBtu/hour duct burners, and a 235-megawatt steam turbine generator. April 30, 1999 Application for Certification for MEC (1 AR 0001-0688),[1] and May 4, 2001 District PSD Permit for MEC ("Permit") (9 AR 6213). The applicant proposed to site the plant in San Jose, California, in an area

designated as attainment or unclassified for NO_2, CO, SO_2, and PM. *See* 40 C.F.R. 81.305. As currently configured, the proposed facility has the potential to emit all of these pollutants in quantities sufficient to trigger the protections of the PSD program. Permit at 4 (9 AR 6216). Accordingly, the facility is subject to BACT for each of these pollutants. 40 C.F.R. 52.21(j)(2).

On April 20, 2000, the District issued its Preliminary Determination of Compliance ("PDOC") for the MEC project. 4 AR 2359-2436. On April 26, 2000, the District published a notice inviting public comment on the PDOC, with a deadline for comments of May 31, 2000. 4 AR 02437-02439. During the public comment period, petitioners and other interested parties submitted over 160 pages of comments. 6 AR 03138-03302. Coyote Valley Research Park ("CVRP") submitted particularly detailed comments regarding alternative emissions control technologies. 6 AR 03138-03223.

Following the close of the public comment period, the District prepared responses to the comments. 7 AR 4034-4075. In August of 2000, the District also conducted a so-called top-down BACT analysis, as explained in the Statement of the Facts, *infra*. 7 AR 04090-04098. The District also accepted a top-down BACT analysis from Calpine/Bechtel's consultant at this time. 7 AR 03771- 03831.

In late August 2000, the District issued its Final Determination of Compliance ("FDOC"). 7 AR 04077-04251. At that time the District noted that the FDOC did

not constitute the final PSD permit because the U.S. Fish and Wildlife Service had not yet completed consultation on the project pursuant to the Endangered Species Act. 7 AR 04082. The Fish and Wildlife Service's consultation process was completed in March 2001. 9 AR 06170-06171. The District issued the final PSD permit and FDOC on May 4, 2001. 9 AR 6206-6207. Notice of the issuance of the permit was published on May 17, 2001. 9 AR 6170-6171. The notice provided that any party wishing to contest the terms and conditions of the permit might file a petition for review with the Board by June 16, 2001. 9 AR 6189-6190.

On June 18, 2001, petitioners Santa Teresa Citizen Action Group ("STCAG"), the City of Morgan Hill, DemandCleanAir, and Californians for Renewable Energy ("CARE") timely filed petitions with the Board.[2] EAB Dkt. 1, 2.[3] EAB Dkt. Nos. 1 and 2. STCAG timely filed a supplement to its petition on June 19, 2001.[4] EAB Dkt. 7, 8.

The Board requested the District to provide a joint response brief together with the California Energy Commission ("CEC"). The Board also granted Calpine/Bechtel leave to file its own response to the petitions for review. See Joint Response of District/CEC (EAB Dkt. 21); Response of Calpine/Bechtel in Opposition to STCAG Review (EAB Dkt. 23); Response of Calpine/Bechtel in Opposition to CARE Petition for Review (EAB Dkt. 20). The Board received the District/CEC and Calpine/Bechtel responses on July 18, 2001. EAB Dkt. 20, 21. The Board

also directed EPA Region IX to file an amicus curiae brief responding to the petitions. EAB Dkt. 9. The Region IX brief was filed on August 1, 2001. EAB Dkt. 40. The Board issued an Order Denying Review of both petitions on August 10, 2001. EAB Dkt. 47. Notice of the Order Denying Review was published in the Federal Register on September 13, 2001. 66 Fed. Reg. 47578.

III. DISPOSITION OF BOARD

The Board issued an Order Denying Review ("ODR") of the District's action on August 10, 2001. EAB Dkt. 47.

STATEMENT OF THE FACTS

The Clean Air Act establishes national ambient air quality standards ("NAAQS"). CAA §§ 107, 160-169(b), 42 U.S.C. §§ 7407, 7470-7492. NAAQS are currently in effect for six pollutants: sulfur oxides (measured as sulfur dioxide ("SO_2"), particulate matter ("PM"), carbon monoxide ("CO"), ozone (measured as volatile organic compounds ("VOCs")), nitrogen dioxide, and lead. 40 C.F.R. § 50.4-.12. In areas classified as "attainment" for any of these pollutants, air quality meets or is cleaner than the NAAQS for that pollutant. CAA § 107(d)(1(A)(i), 42 U.S.C. § 7407(d)(1)(A)(i). In "unclassifiable" areas, air quality cannot be classified on the basis of available information as meeting or not meeting the NAAQS. CAA § 107(d)(1(A)(iii), 42 U.S.C. § 7407(d)(1)(A)(iii).

In areas that are in attainment or unclassifiable with respect to NAAQS, parties must obtain preconstruction approval in the form of a PSD permit before building

new major stationary sources or making major modifications to existing sources. CAA §§ 107, 160-169(b), 42 U.S.C. §§ 7407, 7470-7492. Applicants for PSD permits must demonstrate, through analyses of the anticipated air quality impacts associated with their proposed facilities, that the facilities' emissions will not cause or contribute to an increase in regulated pollutants such that the pollutant exceeds the NAAQS in the area. CAA § 165(a)(3), 42 U.S.C. § 7475 (a)(3); 40 C.F.R. § 52.21(k)-(m).

The proposed site of the MEC facility is San Jose, California, an area currently designated as attainment or unclassifiable for NO_2, CO, SO_2, and PM. ODR at 5. As proposed, the facility has the potential to emit all of these pollutants in quantities sufficient to trigger the PSD regulations. ODR at 5-6; 9 AR 6216. These regulations require that new major pollutant-emitting facilities and major modifications of such facilities employ the "best available control technology," or BACT, to minimize emissions of pollutants regulated under the Clean Air Act. CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 52.21(j)(2). The Clean Air Act and its PSD regulations define BACT as

> an emissions limitation . . . based on the maximum degree of reduction for each pollutant subject to regulation under [the CAA] which would be emitted from any proposed major stationary source . . . which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and costs, determines is achievable for such source.

CAA § 169(2)(C)(3), 42 U.S.C. § 7479(2)(C)(3); 40 C.F.R. § 52.21(b)(12). Under

the rules governing the PSD permitting process, the permit applicant must provide a detailed description of the proposed system of emissions reduction and any other information necessary to ensure that BACT is applied. 40 C.F.R. § 52.21(n)(1)(iii). The ultimate BACT decision is made by the permitting authority, in this case the District.

The EPA's New Source Review Workshop Manual (Draft Oct. 1990) ("NSR Manual") provides the most recent guide to BACT analyses. Although the NSR Manual is not a binding rule, it is commonly relied upon by the Board and by permit issuers as a statement of the EPA's thinking on PSD issues. *Rockgen Energy Center*, PSD App. No. 99-1, slip op. at 15, n. 10 (EAB Aug. 25, 1999). The NSR Manual directs permit issuers to use a "top-down" method for determining BACT:

> The top-down process provides that all available control technologies be ranked in descending order of control effectiveness. The PSD applicant first examines the most stringent – or "top" – alternative. That alternative is demonstrated as BACT unless the applicant demonstrates, and the permitting authority in its informed judgment agrees, that technical considerations, or energy, environmental, or economic impacts justify a conclusion that the most stringent technology is not "achievable" in that case.

NSR Manual at B.2.

The NSR Manual provides for a five-step procedure for implementing the top-down BACT analysis. The first step is to identify all "available" control options. NSR Manual at B.5. "Available" control options are "those air pollution

control technologies or techniques with a practical potential for application to the emissions unit and the regulated pollutant under evaluation." *Id.* The second step is to eliminate "technically infeasible" options. *Id.* at B.7. An option is technically feasible if it is demonstrated in practice, which means having been installed and operated successfully elsewhere. *Id.* If the option has not been demonstrated, it is technically feasible if it is "available" and "applicable." *Id.* "Available" in this context means commercial availability. *Id.* at B.17. An available technology is "applicable" if it can be installed and operated in the source under consideration. *Id.* If an option is not demonstrated and either not available or not applicable, it is eliminated under this step. The third step is to list the remaining options in order of stringency, with the most stringent option listed first. *Id.* at B.7. In step four, "collateral" energy, environmental, and economic impacts are considered, and the top alternative is either confirmed as appropriate or determined to be inappropriate. *Id.* at B.29. Finally, under step five, the most effective control alternative not eliminated in step four is selected as BACT. *Id.* at B.53.

In this action, neither the District nor the applicant conducted a top-down BACT analysis for the MEC facility until *after* the close of the public comment period. The comment period closed on May 31, 2000. 4 AR 02437-02439. Calpine/Bechtel submitted a top-down BACT analysis on August 3, 2000, and the District issued its own top-down BACT analysis on August 24, 2000. 7 AR 3771-3831; 7 AR 4077-4251. Notwithstanding the comments of petitioners and others

submitted during the comment period, the District set BACT for NOx at 2.5 ppmvd (parts per million dry volume) @ 15% O_2 averaged over 1 hour or 2.0 ppmvd @ 15% O_2 averaged over three hours, and BACT for CO at 6 ppmvd @ 15% O_2 averaged over 3 hours. 7 AR 4093, 4095. Because Calpine/Bechtel's proposed emissions control technology, Selective Catalytic Reduction ("SCR"),[5] was capable of meeting those BACT limits, the District deemed SCR to be an acceptable emissions control technology for the MEC facility. 7 AR 4093. During the public comment period, petitioners and other interested parties, including EPA Region IX, submitted numerous comments requesting the District to consider the use of SCONOx, an alternative emissions control technology,[6] to achieve BACT for the MEC facility. 6 AR 3149-3151, 3233, 3255, 3259, 3270, 3273, 3277, 3279, 3284-3287, 3288-3289, 3293. CVRP and EPA Region IX also submitted detailed comments refuting Calpine/Bechtel's allegation that SCONOx is not technically feasible for the MEC facility. 6 AR 3155-3170, 3286. Despite the comments of CVRP and EPA Region IX, the Final Determination of Compliance ("FDOC") stated that the District continued to deem SCONOx to be not technically feasible for the MEC facility, and instead approved the use of SCR as the emissions control technology for MEC. 7 AR 4093.

SUMMARY OF ARGUMENT

1. The Board abused its discretion by:

(1) failing to require the Bay Area Air Quality Management District (the "District") to reopen the public comment period, which would have allowed interested parties an opportunity to comment upon the new materials submitted by the Applicant after the close of the comment period;

(2) allowing the District to base its Best Available Control Technology ("BACT") analysis upon "generally accepted" emissions limits rather than requiring the District to conduct a true "case-by-case" BACT analysis as required by the Clean Air Act; and

(3) declining to exercise jurisdiction over the CEQA requirements imposed upon the District by the terms of the Delegation Agreement between the District and the Environmental Protection Agency.

2. The District acted in an arbitrary and capricious manner, failing to comply with the Clean Air Act requirement for adequate, meaningful public participation in the process of issuing a Prevention of Significant Deterioration ("PSD") permit, by:

(1) conducting significant analysis after the comment period and refusing to reopen the public comment period, thereby denying interested parties an opportunity to comment on that analysis;

(2) accepting significant materials from the Applicant after the close of the comment period and then refusing to reopen the public comment

period, thereby denying interested parties an opportunity to comment on those materials; and

(3) failing to consider or respond to significant public comments which, if properly considered, would have resulted in the use of an alternative, more environmentally protective emissions control technology.

3. The District conducted an improper BACT analysis in violation of the Clean Air Act, thereby allowing emissions of NOx and CO in excess of levels that could have been accomplished through a proper application of BACT, by:

(1) failing to require the facility to comply with BACT during start-up and shut-down periods, even though the District was aware of control technology that could have brought the facility into compliance with BACT during those periods;

(2) persistently denying that the more environmentally protective emissions control technology is both applicable to and technically feasible for use on this project, contrary to both EPA policy and data provided to the District during the public comment period;

(3) failing to impose the lowest feasible limits on NOx and CO emissions; and

(4) conducting an incomplete analysis of the potential collateral impacts of the chosen control technology and the alternative, more environmentally protective control technology.

4. The District acted in an arbitrary and capricious manner when it violated provisions of the California Environmental Quality Act by failing to read and consider an environmental impact report or a functional equivalent thereof prior to issuing the final permit decision, contrary to the requirements imposed upon the District by the Delegation Agreement between the District and the EPA.

ARGUMENT

I. THE DISTRICT FAILED TO ALLOW FOR MEANINGFUL, ADEQUATE PARTICIPATION IN THE PERMITTING PROCESS.

As a delegate of EPA, the District must comply with the Clean Air Act's public participation requirements. See 40 C.F.R.§§ 124 and 52.21(q), (u); STCAG Petition. EAB Dkt. 1 at 10. The District's provision for public participation in the permitting process for the MEC facility was inadequate because (1) the District's erroneous top-down BACT analysis was performed after the close of the public comment period; (2) the District accepted significant post- comment period submissions regarding BACT from the applicant; and (3) the public was not afforded an opportunity to comment on the top-down BACT analyses or the applicant's supplemental BACT submissions. STCAG Petition (EAB Dkt. 1) at 9-10; CARE Petition(EAB Dkt. 2) at 37.

The Standard of Review before the Board was whether the challenged permit condition was based on: (1) A finding of fact or conclusion of law which is clearly erroneous, or (2) an exercise of discretion or an important policy consideration which the Board should, in its discretion, review. 40 C.F.R. § 124.19(a).

A. The Clean Air Act Mandates Adequate Opportunity For Informed Public Participation In The Decisionmaking Process.

One of the stated purposes of the PSD program is "to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process." CAA § 160(5), 42 U.S.C. 7470(5). Both STCAG and CARE petitioners specifically cited this language, arguing that in this instance, the procedure for public participation in the District's decisionmaking process was inadequate. STCAG Petition (EAB Dkt. 1) at 10, CARE Petition (EAB Dkt. 2) at 36-37, ODR (EAB Dkt. 47) at 27.

B. Post-Comment Period Justifications For Rejecting Control Measures Should Be Available For Public Comment When Such Control Measures Are Essential Provisions Of The Clean Air Act.

Under the principles set forth in *Ober v. U.S. E.P.A.*, 84 F.3d 304, 313-315 (9th Cir. 1996), when new information that addresses an "essential provision" of the Clean Air Act is submitted after the close of the comment period, and is relied upon by the agency in making the final agency decision, the agency should reopen the comment period to allow for public comment on the new information. In *Ober*, this Court disallowed agency reliance on "post-hoc" justifications by an applicant for rejecting reasonably available control measures, where those control measures were essential to a state implementation plan.[7] The *Ober* Court held that the

justifications should have been available for public comment *before* the agency took final action:

> The challenged post-comment period justifications did not merely expand on prior information and address alleged deficiencies. Instead, they addressed the submitted Implementation Plan's failure to comply with an essential provision of the Clean Air Act. Therefore, they were relied on and were critical to the EPA's approval of the Implementation Plan.

Id. at 314.

Ober is on point and controlling here. In this action, the top-down BACT analyses that were provided *after* the close of public comment were an "essential provision" of the PSD program, and the BACT analyses were or should have been relied upon in the EPA's final approval of the permit decision. STCAG Petition (EAB Dkt. 1) at 12. Indeed, the Board has explained that the BACT analysis is "one of the most critical elements of the PSD permitting process." *In re: Knauf Fiberglass, GbmH*, PSD Appeal Nos. 98-3 through 98-20, slip op. at 7 (EAB, February 4, 1999); *In re: AES Puerto Rico L.P.*, PSD Appeal Nos. 98-29, 98-30 & 98-31, slip op. at 7 (EAB, May 27, 1999).

Furthermore, EPA Region IX agreed with petitioners that the Board should allow petitioners to submit additional materials regarding the supplemental BACT analyses. Region IX Amicus Brief (EAB Dkt. 40) at 9 (citing 40 C.F.R. § 124.18(c)).

The Board ignored both Region IX's suggestion and petitioners' *Ober* argument.

Instead, the Board responded that: (1) under 40 C.F.R. section 124.17(b), a permit issuer may add new materials to the administrative record; and (2) there is Board precedent holding that such new materials may include information from the permit applicant. ODR (EAB Dkt. 47) at 27-30, citing 40 C.F.R. § 124.17(b); *In re Am. Soda*, UIC Appeal Nos. 00-1 & 00-2, slip op. at 28 (EAB June 30, 2000); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 586-88; review denied *sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3rd Cir. 1999).

The Board's response misses the point. The applicable Clean Air Act regulation, 40 C.F.R. section 124.17(b), provides that "if new points are raised or new material supplied during the public comment period, EPA may document its response to those matters by adding new material to the administrative record." By so doing, the agency is ensuring "that interested parties have an opportunity to adequately prepare a petition for review and that any changes in the draft permit are subject to effective review on the merits under 40 C.F.R. § 124.19." *In re Amoco Oil Company*, 4 E.A.D. 954, 980 (EAB, Nov. 23, 1993).

Petitioners do not dispute that 40 C.F.R. section 124.17(b) grants the District the authority to add new material to the record in order to "document its response" to petitioners' and others' comments about the relative effectiveness of SCONOx and SCR technologies. Rather, petitioners argue that, under *Ober*, when the "new material" added to the record following the close of the comment period is more than a mere response – where that new material concerns a critical provision of the

Clean Air Act, and is relied upon by the permitting body in issuing the final permit – interested parties should have an opportunity to comment on that new information. The District has admitted that its decision was based in part on information supplied by Calpine following the close of the comment period. 6 AR 3463-81.

NE Hub Partners, L.P., cited by the Board as precedent for its premise that new material added *after* the comment period may include materials submitted by the applicant, merely notes that late-filed information "does not necessarily give rise to a substantial new question simply because the information is supplied by a permittee." *NE Hub*, 7 E.A.D. at 586. In contrast, petitioners here argue that the top-down BACT analysis submitted by Calpine *does* give rise to a substantial new question about the methodology of that BACT analysis, and therefore should have been available for public comment.[8] *American Soda*, cited by the Board for the same proposition, is distinguishable from the instant action because there, EPA specifically argued that the post-comment-period new information was *not* critical to its permit decision. See *Am. Soda*, 9 E.A.D. __, slip op. at 27.

The Board closed its analysis of this issue with language from the Federal Register: "if all new material in a response to comments required reproposal, the agency would be put to the unacceptable choice of either providing an unacceptable response or embarking on the same kind of endless cycle of reproposals [that] the

courts have already rejected." ODR (EAB Dkt. 47) at 30 (citing 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)). However, this Circuit faced this same argument in *Ober*, and held that

> Although there is merit to EPA's argument that agencies are not required to review an endless cycle of comments from interested parties, the nature and extent of the additional information in this case required another round of comment and review. Petitioners were prejudiced when they did not have notice of or an opportunity to comment on the post-comment period justifications which were submitted by the State and were critical to the EPA's approval decision.

Ober v. EPA, supra, 84 F.3d at 315.

Ober is controlling because the additional information in this case is of precisely the same nature as that in *Ober*. The EPA's "post-comment-period justifications" for rejecting various control measures for NAAQS in *Ober* are analogous to the District's post-comment-period BACT analyses rejecting SCONOx for the control of NOx and CO in the instant case. *Both control measure analyses are integral* to implementation of their respective sections of the Clean Air Act and both are, or should have been, critical to approval of the permit at issue. The Board's response simply ignored the key question posed: was the additional information "critical to the [agency] approval decision"? *Ober, supra*, 84 F.3d at 315.

The Board may argue that *Rybachek v. EPA*, 904 F.2d 1276, 1286 (9th Cir.1990), holding that "nothing prohibits the Agency from adding supporting documentation for a final rule in response to public comments," is the controlling authority. See

Rybachek, 904 F.2d at 1286.[9] However, *Rybachek* is distinguishable because there, the additional information submitted after the close of the comment period (1) was entirely EPA-generated in response to comments made during the comment period, and (2) was not relied upon in the EPA's final decision. See *Ober*, 84 F.3d at 314. Unlike *Rybachek*, the additional information in the instant action (1) was partially generated by the Applicant, and (2) due to its nature as an "essential provision" of the PSD program, was relied upon in the District's final decision to issue the PSD permit. Therefore, *Ober*, rather than *Rybachek*, is the controlling authority in this action.

C. Additional Information Submitted After the Close of the Public Comment Period Raises Substantial New Questions About the Methodology of The District's and Applicant's BACT Analyses.

Petitioners explained to the Board that the comments submitted by petitioners and other concerned citizens during the District's comment period provided significant additional data and information that "raised substantial new questions concerning the draft permit." STCAG Petition (EAB Dkt. 1) at 13.

The Board responded that the standard for reopening the public comment period is whether a substantial new question has arisen, and that petitioners had not demonstrated the existence of a substantial new question. ODR (EAB Dkt. 47) at 29 (citing *NE Hub*, 7 EAD at 586-87; *Ash Grove Cement Co.*, 7 EAD at 431). The Board's rationale was that in the comments submitted during the comment period,

"which discuss in detail the technical capabilities and environmental and economic impacts of the SCONOx and SCR technologies," petitioners and the public in general had ample "opportunity to address the relative merits" of SCONOx and SCR. ODR (EAB Dkt. 47) at 30. Thus, concluded the Board, no "substantial new questions" had been raised by the additional information submitted after the close of the comment period. *Id.*

However, the Board's response glosses over the fact that while petitioners and other members of the public may have had "an opportunity to address the relative merits" of the SCONOx and SCR technologies, petitioners were *denied* the opportunity to comment on *the methodologies actually used by the District and Calpine in performing the top-down BACT analyses in question*. The Board's determination that no "substantial new questions" were raised simply misses the point. An opportunity to comment upon the technical capabilities of the two systems is not equivalent to an opportunity to comment on the agency's *methodology* used to *evaluate* the two technologies. Petitioners argue that the methods used in the top-down BACT analyses performed after the close of the comment period were erroneous, for the reasons described in the STCAG Petition (EAB Dkt. 1) at 13, 15-22, 30-35.

In *Ober v. EPA,* this Court found significance in the fact that petitioners questioned the accuracy of the supplemental justifications. *Ober*, 84 F.3d at 314. Similarly, this Circuit held in *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1403

(9th Cir. 1995) that the opportunity for public comment is particularly crucial when the accuracy of important material in the record is in question, particularly when that material is "central . . . to the decision." *Id.* These decisions require reversal of the Board's decision in this case.

D. This Court Is Not Constrained By The Board's Purported Proscription Against Reopening The Public Comment Period To Consider Post-Comment Period Information.

The Board noted that the top-down BACT analyses were submitted after, not during, the public comment period, and asserted that the "appropriate avenue for raising questions about post-comment-period information is via the permit appeals process" rather than through the opening of a new public comment period. ODR (EAB Dkt. 47) at 29 (citing *In re Ash Grove Cement Co.*, *supra*, 7 EAD at 431). Petitioners have indeed pursued a remedy through the permit appeals process, as evidenced by the petitions for review filed before the Board and now before this Court.

At any rate, the Board's argument is disingenuous, as the Board has veered from this "appropriate avenue" in the past. Petitioner STCAG cited three Board decisions in which, on facts similar to this case, the Board remanded portions of PSD and RCRA permits with orders to reopen the public comment period and respond to all significant comments.[10] STCAG Petition (EAB Dkt. 1) at 12. Furthermore, in view of the Board's failure to do so in this case, this Court has the authority to remand with orders for the permitting body to open a new comment

period and to take any comments received into account when issuing a new decision. See *Ober*, 84 F.3d at 315; see also *Idaho Farm Bureau, supra*, at 1402, 1404.

II. THE DISTRICT DID NOT COMPLY WITH THE CLEAN AIR ACT REQUIREMENT THAT IT RESPOND TO ALL SIGNIFICANT PUBLIC COMMENTS.

Under the procedural rules for PSD permits, permitting agencies must "briefly describe and respond to all significant comments on the draft permit . . . raised during the public comment period, or during any hearing." 40 C.F.R. § 124.17(a)(2). A significant comment is more than "an unsupported claim." *State of Cal. ex rel. Air Resources Board v. U.S. E.P.A.*, 774 F.2d 1437, 1441 (9th Cir. 1985). A significant comment "raise[s] relevant points and . . . if adopted, would require a change in the agency's proposed rule." *American Mining Congress v. U.S. E.P.A.*, 965 F.2d 759, 771 (9th Cir. 1992) (citing *Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977)). "The comment cannot merely state that a particular mistake was made . . .; it must show why the mistake was of possible significance in the results." *Citizens for Clean Air v. U.S. E.P.A.*, 959 F.2d 839, 845 (9th Cir. 1992), citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553, 98 S.Ct. 1197, 1216, 55 L.Ed.2d 460 (1978).

The response to comments must demonstrate that all significant comments were considered, even if the permit issuer ultimately disagrees with the substance of the

comments. See *NE Hub*, 7 E.A.D. at 583; ODR (EAB Dkt. 47) at 31. "An agency decision may not be reasoned if the agency ignores vital comments regarding relevant factors, rather than providing an adequate rebuttal." *Western Coal Traffic League v. U.S.*, 677 F.2d 915, 927 (D.C. Cir. 1982), *cert. denied* 459 U.S. 1086 (1983).

In the past, the Board has remanded cases for an agency's failure to respond to a significant comment. *In re: Steel Dynamics, Inc.*, PSD Appeal Nos. 99-4 & 99-5, slip op. at 22-23 (E.A.B. June 22, 2000). There the commenter had alleged that the agency underestimated certain air emissions, the commenter provided "a detailed alternative analysis of such emissions," and the Board concluded that such submission was "significant enough to warrant consideration and at least some form of acknowledgment and response." *Id*. So too in the case at bar STCAG's, EPA's, CARE's and CVRP's comments were detailed, highly substantive and directed to the District's core methodology. 6 AR 3138-3223, 3233-3240, 3243-3248, 3257-3271, 3279-3280, 3284-3302. Accordingly, Board review should have been granted and the District's comment period reopened.

A. <u>The District's Complete Failure to Respond to Comments Was Arbitrary and Capricious.</u>

Petitioner STCAG explained to the Board that the District had failed to comply with the requirement that it respond to significant public comments related to BACT for NOx, the collateral impacts of SCONOx and SCR, and BACT for partial load emissions during start-up and shut-down. STCAG Petition (EAB Dkt.

1) at 15-22, 30-35.[11] STCAG specifically identified each comment at issue, the District's response, and the comment's relevance to the District's permitting decision. *Id.*

The Board responded that the regulations do not require a permit issuer to respond to each comment individually, nor must the permit issuer's response be of the same length or level of detail as the comment. ODR (EAB Dkt. 47) at 31 (citing *N.E. Hub*, 7 E.A.D. at 583). Rather, the response "must demonstrate that all significant comments were considered." *Id.*

The Board acknowledged that the District had entirely failed to respond to three "instances" of comments made by Coyote Valley Research Park ("CVRP").[12] See ODR (EAB Dkt. 47) at 32. (EAB Dkt. 47). These instances were (1) challenges to the technical conclusions of the Stone & Webster Report, upon which the District primarily relied in finding SCONOx to be technically infeasible; (2) comments that permits had been issued in both Massachusetts and Connecticut, establishing NOx BACT for large gas turbines at 2 ppmvd @ 15% O_2 averaged over one hour; and (3) identification of thirteen source tests for combined-cycle plants showing that "BACT for CO for large combined cycle gas turbines in merchant operation is no more than 2 ppmvd @ 15% O_2 averaged over 1 hour." *Id.*; 6 AR 3162-64, 6 AR 3154, and 6 AR 3179.

The Board conceded that these three comments "may well have been significant

enough to warrant at least some response" from the District, and that the District "may have committed procedural errors by failing to respond," but held nonetheless that the District's failure to respond was not "clear error." ODR (EAB Dkt. 47) at 32-34. The Board speculated that even if the District had responded to the above comments, it was "unlikely" that the District would have altered the BACT determinations, and therefore the Board was unwilling to find clear error that would have justified review. *Id.* at 33-34.

The Board's refusal to grant review based on sheer speculation as to the District's "likely" response to these critical comments effectively scuttles informed public comment and review. Each of these comments raised clearly significant issues, and were fully supported by technical data. All three comments presented crucial information or pointed out critical gaps in the District's analysis. The District acknowledged that its conclusions were based in part on the Stone & Webster report. 6 AR 3463-3481. In the top-down BACT analysis contained in the FDOC, the District referred repeatedly to the Stone & Webster report and concluded that the District "do[es] not consider SCONOx to be a technically feasible control alternative for this project." (7 AR 4091). Thus, if properly considered, all three comments should have had a substantial impact on the decisionmaking process. The District's failure to respond to these comments, and the Board's denial of review, are bereft of reasoned support in the record, and should be reversed.

B. <u>The District's Response to Comments About Meteorological Data and Toxic Emissions Was Inadequate.</u>

In addition to the District's complete failure to respond to the three comments above, several of the District's responses were nonresponsive. For example, STCAG cited CVRP's comments regarding the need for a top-down BACT analysis for startup and shutdown emissions, and the availability of control technology to reduce those emissions. STCAG Petition (EAB Dkt. 1) at 28-29. The District's sole response to STCAG's comments was that "it is not possible for the turbines to comply with their BACT emission limitations during start-up [and shut-down]." 7 AR 4068. This response failed to acknowledge STCAG's and CVRP's contention that control technology *was* available that could reduce startup and shutdown emissions and thereby bring those emissions within BACT. 6 AR 3187-3189.

Petitioner CARE commented that the District's reliance upon just one year of offsite data was inadequate for three reasons: First, the offsite location is 5 km away from the MEC site, and the District is supposed to use 5 years of data (rather than 1 year, as it did) if the data location is not "site specific." Second, the data is not representative of the meteorological conditions at the site. Third, the District also failed to take into account the complex terrain near the site. CARE Petition (EAB Dkt. 2) at 25-29. When the District dismissed these comments with conclusory responses, CARE appealed to the Board. *Id.*

In response, the Board failed to address the merits of CARE's thoughtful comments. Instead, the Board merely repeated without analysis the District's

conclusory dismissal of CARE's comments. ODR (EAB Dkt. 47) at 39-40. Although the District's conclusions defending its reliance on the offsite monitoring data might ultimately be correct, it is impossible to make this determination based on the superficial responses that the District provided. 7 AR 4074.

The Clean Air Act demands, and District was obliged to provide, a reasoned response of sufficient detail and specificity to permit the commenter, and the public at large, to independently evaluate the District's decision to rely on the offsite data. The District's generalized response, that data taken at a closer location was found to be in "very good agreement," and that the "gentle sloping hills" at the project site did not present significant downwash conditions likely to trap pollutants near ground level, lacked the specificity and citation to reviewable data essential to informed public review. 7 AR 4074-4075. The fact that the topographic bowl in which the MEC facility is proposed to be sited is surrounded by "gentle sloping hills" rather than steep cliffs, as noted by the District, for example, hardly negates the reality that air inversions form and confine air contaminants, in this small basin. 6 AR 3237-3240. CARE's comments warranted a searching, good faith response, rather than the dismissive treatment they received.

The Board's failure to direct the District to provide an adequate response frustrates review of STCAG's and CARE's sensible and useful questions. Accordingly, this Court should remand this matter to the Board with instructions to direct the District

to respond to STCAG's and CARE's comments with sufficient detail to permit the public independently to evaluate whether the meteorological data on which the District relies is adequate and representative. Such a remand order is entirely consistent with this Court's authority to review the "entire agency action," including the District's inadequate response to STCAG's and CARE's comments. *Citizens for Clean Air v. U.S. E.P.A.*, 959 F.2d 839, 846 (9th Circuit 1992).

III. THE DISTRICT DID NOT COMPLY WITH THE REQUIREMENTS FOR DETERMINING BACT IN ISSUING THE FINAL PERMIT.

Petitioners pointed out below that the District acted arbitrarily and capriciously by allowing emissions of NOx and CO in excess of levels that can be accomplished through a proper application of BACT. STCAG Petition (EAB Dkt. 1) at 30. Based on the comments of CVRP, it is clear that SCONOx can achieve a NOx emission limit of 1.3 ppm @ 15% O_2 averaged over 1 hour with no ammonia slip. 6 AR 3152-3155. However, the District chose a BACT for NOx that allows roughly *twice* the pollution – 2.5 ppm @ 15% O_2 averaged over 1 hour using dry low NOx combustors and SCR. 7 AR 4093. The District acted arbitrarily and capriciously in doing so.

A. SCONOx is Both Applicable and Available to This Facility

The Board has held that "an agency should reject the more environmentally protective technology only if the record demonstrates clearly that it is inapplicable or not available to a particular case." *In Re Masonite Corp.*, 5 E.A.D. 551, PSD

Appeal No. 94-1 (EAB November 1, 1994). SCONOx is clearly the more environmentally protective technology, in that it achieves lower emissions levels of both NOx and CO, reduces PM_{10}[13] formation due to the elimination of ammonia slip, and reduces emissions of toxic pollutants. 6 AR 3170-3174, 3179-3180, 3185.

Furthermore, SCONOx is both applicable and available in this case. The NSR Manual provides that a technology is "applicable" to a facility "if it has been or is soon to be deployed (*e.g.*, is specified in a permit) on the same or similar source type." NSR Manual at B.18. Several permits specifying SCONOx have been issued to large gas turbine facilities similar to this project, as demonstrated in CVRP's comments. 6 AR 3157. Thus SCONOx is "applicable." SCONOx is also "available" for this type of facility as it is currently being offered for sale with performance guarantees "specifically targeting the largest gas turbines made." 6 AR 3156-3157.

B. SCONOx is Technically Feasible for This Facility

As a delegate of the EPA, the District must comply with the requirements of 40 C.F.R. 52.21 and 40 C.F.R. 124. *In Re: West Suburban Recycling and Energy Center*, PSD Appeal Nos. 95-1 and 96-1 (EAB, Dec. 11, 1996). The District must also follow the EPA's new source review guidance, including the New Source Review Workshop Manual (Draft Oct. 1990) ("NSR Manual"). STCAG (EAB Dkt. 1) Petition at 7.[14]

According to the NSR Manual, before a technology may be eliminated for infeasibility:

> The applicant should make a factual demonstration of infeasibility based on commercial unavailability and/or unusual circumstances which exist with application of the control to the applicants' emission units. Generally, such a demonstration would involve an evaluation of the pollutant-bearing gas stream characteristics and the capabilities of the technology.

NSR Manual at B.19. The NSR Manual is clear that

> Demonstration of technical infeasibility is based on a technical assessment considering physical, chemical and engineering principles, and/or empirical data showing that the technology would not work on the emissions unit under review, or that irresolvable technical difficulties would preclude the successful deployment of the technique. Physical modifications needed to resolve technical obstacles do not in and of themselves provide a justification for eliminating the control technique on the basis of technical infeasibility.

NSR Manual at B.20.

Where, as here, a control technology has been applied to only a limited number of sources, the NSR Manual provides an opportunity for the applicant to demonstrate that the technology should not be required for its facility. It directs that the applicant may:

> identify those characteristic(s) unique to those sources that may have made the application of the control appropriate in those case(s) but not for the source under consideration. In showing unusual circumstances, objective factors dealing with the control technology and its application should be the focus of the consideration. The specifics of the situation will determine to what extent an appropriate demonstration has been made regarding the elimination of the more effective alternative(s) as BACT. In the absence of unusual circumstances, *the presumption is that sources within the same category are similar in nature, and that cost and other impacts that*

> *have been borne by one source of a given source category may be borne by another source of the same source category*.

NSR Manual at B.29, emphasis added.

The District has not made the required demonstration, responsive to this guidance, that proves SCONOx infeasible for the MEC facility. STCAG Petition (EAB Dkt. 1) at 34. Instead, the District simply dismissed SCONOx as technically infeasible based on a misreading of the Stone and Webster report. 7 AR 4091. This explanation is inadequate, as discussed above.

In addition, Alstom Power released a document in June 2001 specifically addressing the references in the Stone and Webster report and showing that (1) the problems were never significant, and (2) even these problems have now been eliminated. See June 7, 2001 paper from Alstom Power re: Independent Technical Review of the SCONOx Technology and Design Review as Reported by Stone & Webster Management Consultants, Inc. STCAG Petition (EAB Dkt. 1), Exhibit L. As the Alstom paper shows, Alstom is now offering the SCONOx technology – with performance guarantees – to all owners and operators of natural gas-fired combined cycle combustion turbines, regardless of size or OEM. *Id*. at 3. Furthermore, EPA has stated unequivocally that SCONOx is technically feasible for large combined cycle projects such as this one. 6 AR 3444. The South Coast Air Quality Management District has also concluded that:

> the SCONOx control technology can be scaled up in comparison to the 32 MW demonstration plant since the exhaust characteristics of the turbines are similar. Based on staff review of AQMD source test

> reports for different turbines, staff finds that the NOx reduction process and the characteristics of the exhaust gases from natural gas fired turbines are similar regardless of size above 3 MW.

6 AR 3160.

This position is echoed throughout the documentation supporting the SCAQMD's BACT/LAER determination that is currently used throughout California. 6 AR 3160. The record is replete with authoritative evidence that: "[t]here is no known technical limitation that would render the exhaust flue gas of a large industrial turbine to have different characteristics than exhaust from a 30 MW aeroderivative turbine;" and "[s]ince there is no known technical reason that will render the exhaust flue gas from a large gas-fired turbine to have different characteristics than exhaust from a 30 MW turbine, AQMD staff has concluded that LAER, as presented in the Staff Report, must apply to gas turbines over 3 MW size." 6 AR 3160-3161.

C. The District's Analysis Did Not Include the Lowest NOx Limit

The District did not properly carry out the third step of the top-down BACT analysis required by the NSR Manual. In the third step, the District is to rank all remaining control technologies by control effectiveness, with the most effective at the top. A key question at this level is "How should control techniques that can operate over a wide range of emission performance levels . . . be considered in this analysis?" NSR Manual at B.22. The NSR Manual answers: "the applicant should use the most recent regulatory decisions and performance data for identifying the

emissions performance level(s) to be evaluated in all cases." NSR Manual at B.23. The NSR Manual provides some latitude to consider special circumstances, if the basis is "documented in the application." *Id.*

In the absence of a showing of differences between the proposed source and previously permitted sources achieving lower emissions limits, the permitting agency should conclude that the lower emissions limit is representative for that control alternative. NSR Manual at B.23.

As discussed above, the District entirely ignored recent regulatory decisions and performance data placed in the record by CVRP, and refused to perform its own analysis of the relative performance levels achievable by the different control technologies. STCAG Petition (EAB Dkt. 1) at 19-20; 6 AR 3152-3155; 7 AR 4068-4071. The District's failure to conduct this analysis constitutes clear error. Had the District conducted this analysis, the result would have been to establish a NOx limit that is lower than the limit contained in the permit, for the reasons discussed in CVRP's comments. 6 AR 3152-3155.

D. The Collateral Environmental Impacts of SCR Were Not Adequately Evaluated

Selective Catalytic Reduction ("SCR"), the technology selected by the District as BACT, requires the use of ammonia. 6 AR 3170. Some of this ammonia, termed "ammonia slip" or simply "slip," is emitted into the atmosphere, where it can form secondary PM_{10}. Secondary PM_{10} results from precursor emission (*e.g.*, NOx,

SO_2, ammonia, organics) that undergo physical processes and chemical reactions in the atmosphere, as opposed to direct, primary PM_{10} emissions formed during combustion. 6 AR 3170-3171. Secondary PM_{10} is very fine particulate matter of the size largely responsible for health effects attributable to PM_{10}, and causes visibility impairment. 6 AR 3171.

Secondary PM_{10} is a significant environmental impact of SCR that must be evaluated in a BACT analysis. 6 AR 3170-3174. Petitioners maintain that where two technologies provide equivalent control for a regulated pollutant, but one would also control pollutants not directly regulated by the PSD program, the one controlling the unregulated pollutants should be chosen as BACT. 6 AR 3171. In response to Comments, the District lowered the allowable ammonia slip from 10 ppm to 5 ppm. FDOC, 7 AR 4092. While this was a step in the right direction, it fails to mitigate all the significant *collateral* environmental impacts of SCR, and falls far short of the *complete* mitigation available through the use of SCONOx. Moreover, as EPA Region IX noted, SCONOx has the collateral *benefit* of controlling CO and VOC emissions. 6 AR 3294. Furthermore, SCONOx and an oxidation catalyst can control emissions of toxics. 6 AR 3185. Petitioner CARE pointed out that toxic emissions such as formaldehyde, acrolein, benzene, toluene, methane, and non-methane hydrocarbons are especially problematic during facility startup and shutdown operations. CARE Petition (EAB Dkt. 2) at 24-25. A CVRP

expert testified to the California Energy Commission that toxic emissions calculations during these operation modes were based on flawed data and assumptions and are much higher than previously estimated. *See* Group 3B Testimony on Air Quality and Public Health, submitted by CVRP to CEC on February 13, 2001 (STCAG Petition (EAB Dkt. 1), Exhibit M).[15]

The Board improperly sidestepped consideration of these dispositive points. It failed to address the availability of SCONOx – a matter clearly within its jurisdiction – and instead raised extraneous objections.[16] The Board's failure to direct the District to consider SCONOx further, in light of its availability, feasibility and effectiveness, is clear error.

E. The District Failed to Require BACT for CO Startup and Shutdown Emissions

The final permit contains no concentration-based (ppm) BACT limit for CO except for full load operations. The NSR Manual is clear that "BACT emission limits or conditions must be met on a continual basis *at all levels of operation* (*e.g.*, limits written in pounds/MMbtu or percent reduction achieved), demonstrate protection of short term ambient standards (limits written [as] pounds/hour) and be enforceable as a practical matter . . . ." NSR Manual at B.56, emphasis added. The California Air Resources Board has also stated that startup and shutdown emissions should be subject to BACT analyses. 6 AR 3188. However, the District failed to establish limits and compliance procedures that would accomplish this

goal. The District's sole response to CVRP's comments is that it is "not possible for the turbines to comply with their BACT emission limitations during start-up [and shut-down]." Response to CVRP Comments, 7 AR 4068. CVRP further provided documentation of several different available controls "that could be used to satisfy BACT and reduce startup and shutdown emissions." 6 AR 3188. As discussed above, the District completely failed to respond to this comment.

The PDOC concluded that BACT for CO was an emission limit of 10 ppm averaged over 3 hours, achieved using an oxidation catalyst and good combustion controls. 4 AR 2373. The CO limit for full load operations was lowered in the FDOC in response to comments, to an emission limit of 6 ppm at 15% O_2 averaged over 3 hours. FDOC, 7 AR 4095. Again, this is a step in the right direction, but not in compliance with the Clean Air Act. This BACT determination suffers from the same problems already discussed for NOx, namely: (1) it improperly eliminates SCONOx, the most effective control technology; (2) it fails to consider lower limits required in other permits; and (3) it fails to consider lower limits demonstrated by performance data. Accordingly, the District's failure to comply with the Clean Air Act's BACT requirements for CO warranted review – and reversal – by the Board.

IV. THE BOARD'S FAILURE TO GRANT REVIEW WAS ARBITRARY AND CAPRICIOUS.

The Board declined to grant review of the District's permitting decision in part on

the grounds that the Board had "very recently" considered the permit of a similar facility with the same BACT limits for NOx and CO, and had denied review in that case. *See In re Three Mountain Power, L.L.C.*, PSD Appeal Nos. 01-05 (EAB May 30, 2001), 10 E.A.D. __ ("TMP")."[17]

The Clean Air Act calls for BACT determinations to be made on a "case- by-case" basis. CAA § 169(3), 42 U.S.C. § 7479(3)[18]; *accord*, 40 C.F.R. § 52.21(b)(12). The Board noted that the limits imposed in this case (2.5 ppm for NOx and 4-6 ppm for CO) have been "determined on a case-by-case basis to be BACT for large gas-fired turbines and are generally accepted as such by Region IX and other air quality districts within California." ODR (EAB Dkt. 47) at 16, citing *TMP*, slip. op. at 18-19, 10 E.A.D. __.

The Board failed, however, to explain how "general acceptance" translates into "case-by-case basis." The Board's decision on this issue appears to be that, rather than engaging in an active analysis of the control technologies and the proven achievements of those technologies at other, similar facilities, the District may safely rest upon *old* BACT determinations and never seek to surpass the pollution control achievable by older technologies.

If BACT limitations continue to be determined based upon old pollution control technologies without reference to the capabilities of newer technologies that have been proven, in practice, to achieve lower emissions with lesser collateral

environmental impacts, the legitimacy of the BACT analysis as a whole is called into question. EAB's decision would allow the District, and other air quality districts in California, to continue to set BACT at 2.5 ppm for NOx and 6 ppm for CO, *regardless of the proven ability of SCONOx* to achieve NOx emissions of 2.0 ppm @ 15% O_2 and CO emissions of 2.0 ppm or less @ 15% O_2. ODR (EAB Dkt. 47) at 17-18.

By presenting the *TMP* decision as dispositive of this issue, failing to consider the data introduced by petitioners, considering "generally accepted" emissions levels *in lieu of* the required case-by-case determination, and failing to grant review on these grounds, the Board acted contrary to law.

V. THE DISTRICT'S FAILURE TO COMPLY WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT WAS ARBITRARY AND CAPRICIOUS.

Petitioner CARE argued that the District's actions violated the California Environmental Quality Act, California Public Resources Code section 21000 *et seq*. ("CEQA"). CARE Petition (EAB Dkt. 2) at 44. The Board declined review of this issue on the grounds that the Board only has jurisdiction over federal PSD permit issues, and CEQA is a state law. ODR (EAB Dkt. 47) at 42- 43. However, the Delegation Agreement between the District and EPA Region IX requires the District to comply with the CEQA EIR requirement by reading and evaluating a certified EIR or its functional equivalent before issuing a permit. The District failed to comply with this requirement, instead choosing to issue the PSD permit

before receiving or reading the EIR or its equivalent. The District acted arbitrarily and capriciously in doing so.

A. CEQA Applies to the District's Issuance of a PSD Permit Under Authority Delegated by the EPA.

Sections 21061, 21100 and 21151 of the California Public Resources Code require every public entity that proposes to approve a discretionary activity or "project" that may significantly affect the environment to read and consider the project's environmental impact report ("EIR").[19] An EIR is required to be prepared, or caused to be prepared, and certified by any state or local agency for any project they intend to carry out or approve which may have a significant effect on the environment.[20] Only one EIR need be prepared and where a project requires multiple approvals by various state and local agencies, one agency becomes the project "lead" agency[21] and the other agencies are "responsible" agencies.[22] The EIR is prepared by the "lead" agency, and reviewed and considered by the other "responsible agencies approving the project. In this action, CEC was the lead agency and the District was a responsible agency; therefore CEC was required to prepare the EIR. Under the CEQA Guidelines, 14 C.C.R. section 15000, *et seq.*, the CEC licensing process serves as a "functional equivalent" of an EIR.[23]

The Delegation Agreement between the District and EPA Region IX provides that "District permits issued pursuant to this Agreement must meet the requirements of District Rule 2 of Regulation 2."[24] That Rule requires that when the District is not

the lead agency under CEQA, the lead agency must prepare or supervise the preparation of a draft or final environmental impact report (EIR), and the District must receive a copy of that EIR.[25] Subsection (b)(1) of section 15253 of the CEQA Guidelines allows for use of a functional equivalent to an EIR prepared under a certified program such as the CEC power plant licensing program, if the certified agency "is the first agency to grant a discretionary approval for the project." Subsection (c) of section 15253 prohibits the District from issuing a PSD permit based upon a substitute document if the CEC is not the first agency to grant a discretionary approval for the project.

In short, the Delegation Agreement requires that the District receive a CEQA-compliant EIR or its functional equivalent from the CEC prior to issuing a permit under District Rule 2 of Regulation 2. The CEC licensing program as a whole constitutes the "functional equivalent" of an EIR. Therefore, the District may not issue a permit until the issuance of the CEC license.

B. The District Violated CEQA By Improperly Issuing a PSD Permit Prior to the Issuance of a Project License by the CEC.

Under the Delegation Agreement, permits issued by the District must comply with District Rule 2 of Regulation 2. District Regulation 2-2-407 instructs the District to not take final action upon issuance of a PSD permit until it has read and considered the EIR prepared pursuant to CEQA requirements:

> Rule 2-2-407.1 Notwithstanding the requirement of this Section 2-2- 407 that the APCO shall act within 180 days after the application is accepted as complete, the APCO shall not take final action on the

> application for any project for which an Environmental Impact Report or a Negative Declaration has been prepared pursuant to the requirements of CEQA until a final EIR for that project has been certified and the APCO has considered the information contained in that Final EIR, or a Negative Declaration for that project has been approved. If the specified 180 day period has elapsed prior to the certification of the final EIR or the approval of the Negative Declaration, the APCO shall take final action on the application within 30 days after the certification of the Final EIR or approval of the Negative Declaration.

The District's issuance of the PSD permit is considered to be the District's final permit decision. May 17, 2001 "Notice of Determination of Compliance" (9 AR 6170-6171); 40 C.F.R. § 124.15(a) ("a final permit decision means a final decision to issue, deny, modify, revoke and reissue, or terminate a permit.")

The District's local rules and CEQA both prohibit the District from issuing a PSD permit until the APCO has read and considered the certified project EIR or its functional equivalent. Here, the APCO made the final permit decision prior to the issuance of the CEC license. The APCO's issuance of the PSD permit therefore constitutes arbitrary and capricious action in violation of CEQA, CEQA Guidelines section 15252, and District Rule 2 of Regulation 2.

C. The Board's Jurisdiction Includes CEQA Compliance

The Board has consistently refused to exercise jurisdiction over what it characterizes as "non-PSD issues," including state and local laws. ODR (EAB Dkt. 47) at 42-43; see also *In re Sutter Power Plant*, PSD Appeal Nos. 99-6 & 99-73 (EAB, Dec. 2, 1999) and *In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 98-3 to 98-20 (EAB, Feb. 4, 1999). However, the Delegation Agreement between

EPA Region IX and the District requires the District to include more than just the federal PSD requirements in its evaluation. 56 Fed. Reg. 4944 (Feb. 7, 1991). As discussed above, Rule 2 of Regulation 2 requires the District to read and consider an EIR (or its functional equivalent) pursuant to CEQA prior to issuing a final permit decision. Here, EAB declined to review the District's compliance with District rules and with CEQA, entirely ignoring the terms of the Delegation Agreement that specifically incorporate CEQA compliance. ODR (EAB Dkt. 47) at 42-43.

The Board's decision fails to provide a basis for its premise that the scope of the Board's review excludes the District's compliance with the EPA Delegation Agreement. The governing EPA regulations provide that any person who filed comments on a draft permit may petition the Board to "review any condition of the permit decision." 40 C.F.R. § 124.19(a) (emphasis added). Alternatively, the Board "may also decide on its initiative to review any condition of any RCRA, UIC, or PSD permit." 40 C.F.R. § 124.19(b) (emphasis added). Thus, the Board has clear regulatory authority to consider petitions seeking enforcement of permit conditions such as compliance with EPA's Delegation Agreement.

The Board does not explain how it arrived at the *opposite* conclusion, that a regulation *permitting* the Board to review "any condition" of a PSD permit operates to *deny* jurisdiction over issues *that are specifically incorporated into the Delegation Agreement.* The Board's failure to exercise its jurisdiction over this

issue is clear error, and must be reversed.

CONCLUSION

For all the foregoing reasons, the Board's Order Denying Review of August 10, 2001, should be reversed in its entirety and this case remanded for further proceedings consistent with this Court's opinion.

Dated: February 26, 2002 Respectfully submitted,

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STATEMENT OF RELATED CASES REQUIRED BY NINTH CIRCUIT COURT OF APPEALS RULE 13(b)(4)

Petitioners know of no related cases pending in this Court.

Dated: February 26, 2002 Respectfully submitted,

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[1] There are two administrative records in this proceeding. The first, of the District's underlying permitting decision, is referenced as "[Vol. #] AR [Page #]."

The second, of the Board's review, is referenced as "EAB Dkt. [#]."

[2] The petitions were timely filed pursuant to 40 C.F.R. 124.20(c). June 16, 2001, fell on a Saturday, so the filing deadline was automatically extended to the next working day, which was Monday, June 18, 2001.

[3] As explained in footnote 1, *supra*, references to documents filed with the Environmental Appeals Board on review of the District's PSD permitting decision are denominated by their Board docket number (*e.g.*, EA Dkt. 1).

[4] The supplement was also timely filed. Where service of notice occurs by mail, as it did here, the permitting regulations add three days to a filing deadline. See 40 C.F.R. 124.20(d).

[5] SCR is a post-combustion technique that controls NOx emissions by reducing NOx with a reagent (generally ammonia or urea) in the presence of a catalyst to form water and nitrogen. 7 AR 3777-3778. SCR is used in conjunction with other wet or dry NOx combustion controls. *Id*. SCR requires the consumption of a reagent (ammonia or urea) and requires periodic catalyst replacements. *Id*.

[6] SCONOx is a catalytic emissions control system that simultaneously oxidizes CO to carbon dioxide ("CO_2"), hydrocarbons to CO_2 plus water, and nitrogen oxide to nitrogen dioxide ("NO_2"). 6 AR 3149. The NO_2 is then absorbed onto a ceramic based catalyst, which is continuously regenerated by passing a dilute hydrogen reducing gas across the surface of the catalyst in the absence of oxygen. *Id*. The hydrogen reacts with nitrites and nitrates to form water and elemental nitrogen. *Id*. CO_2 in the regeneration gas reacts with potassium salts to form potassium carbonate, which is the absorber coating that was on the surface of the catalyst before the oxidation/absorption cycle began. *Id*. SCONOx does not require the use of ammonia or other hazardous materials. 6 AR 3150.

[7] *Ober* concerned submissions made by the state of Arizona, whose SIP was being reviewed by the EPA for approval. In its Petition for Review by the Board, STCAG argued that the state of Arizona in *Ober* was in a similar position to an "applicant" under the PSD permitting program and is thus analogous to Calpine in this action. EAB Dkt. 1 at 11-13. STCAG further argued that the fact that *Ober* involves an agency rule-making decision rather than a PSD permitting decision does not render *Ober* inapplicable to the instant action, because the rules governing use of supplementary data in the rule-making and PSD permitting contexts are similar. *Id*. The rule applying to PSD permitting decisions is that "if new points are raised or new material supplied during the public comment period, EPA may document its response to those matters by adding new materials to the administrative record." 40 C.F.R. § 124.17(b).

[8] See section I(C) of this brief for discussion of "substantial new question."

[9] The Standard of Review before the Board was whether the challenged permit

condition is based on: (1) A finding of fact or conclusion of law which is clearly erroneous, or (2) an exercise of discretion or an important policy consideration which the Board should, in its discretion, review. 40 C.F.R. § 124.19(a). *Rybachek* concerned the EPA's addition of over 6,000 pages to the Administrative Record after the close of a public comment period on EPA-promulgated effluent regulations for placer mining.

10 *See In re Steel Dynamics, Inc.*, PSD Appeal Nos. 99-4 & 99-5, slip op. at 62 (EAB, June 22, 2000) (requiring agency to perform a supplemental cost-effectiveness analysis, reopen the comment period, and consider and respond to significant public comments on the analysis); *In re: Knauf Fiberglass, GmbH*, PSD Appeal Nos. 98-3 through 98-20, slip op. at 72 (EAB, February 4, 1999) (remanding for a supplemental BACT analysis and requiring the agency to reopen the public comment period and respond to public comments); and *In re: Ash Grove Cement Company*, RCRA Appeal Nos. 96-4 & 96-5, slip op. at 72 (EAB, November 14, 1997) (requiring agency to supplement the record, reopen the public comment period and respond to comments).

11 CARE also argued that the District ignored comments dealing with "impacts on air quality, public health, and biological resources, particularly endangered, threatened or sensitive species of special concern." CARE Petition (EAB Dkt. 2) at 37.

12 Although CVRP is not a petitioner in this appeal, issues raised by another party during the public comment period may be raised by petitioners, even if the petitioner did not raise the issue in his or her own comments. The issue must simply have been raised by "some party" during the comment period. 40 C.F.R. § 124.13.à

13 PM_{10} is "particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers." 42 U.S.C. 7602(t).

14 Although the NSR Manual is not a binding rule, the Board relies upon it as a statement of the EPA's thinking on certain PSD issues. *RockGen Energy Center*, PSD App. No. 99-1, slip op. at 15, n. 10 (EAB Aug. 25, 1999).

15 Before the Board, Calpine/Bechtel argued that this testimony was "extra-record" evidence that was not available to the District when it initially issued the FDOC, and had not been included in the Administrative Record. The Board concluded that this testimony before the CEC constituted the parties' first opportunity to submit their views on the District's top-down BACT analysis, and elected to treat the testimony as "part of the administrative record for this case." ODR (EAB Dkt. 47) at 22, n. 13.

16 It asserted that toxic pollutants are not subject to PSD regulations, and denied review of this issue on the grounds that toxic pollutants not regulated by the PSD regulations are outside Board jurisdiction. ODR (EAB Dkt. 47) at 43. Toxic

pollutants are regulated under section 112(b) of the Clean Air Act (42 U.S.C. § 7412(b)); PSD permits are regulated under Clean Air Act sections 160-169.

17 The Three Mountain Power facility is located in Shasta County, California.

18 "The term "best available control technology" means an emission 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 each such pollutant." 42 U.S.C. § 7479(3), emphasis added.

19 ". . . An environmental impact report is an informational document which, when its preparation is required by this division, shall be considered by every public agency prior to its approval or disapproval of a project." Pub. Res. Code § 21061.

20 Pub. Res. Code §§ 21100, 21151.

21 "Lead Agency" is "the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect on the environment." Pub. Res. Code § 21067."

22 A "responsible agency" is "a public agency, other than the lead agency, which has responsibility for carrying out or approving a project." Pub. Res. Code § 21069.

23 14 C.C.R. § 15251(k).

24 56 Fed. Reg. 4944, section 1 (February 7, 1991). *See* Rules 2-2-208, 2-2-213, 2-2-401.3 (incorporating 2-1-426), 2-2-404.1, 2-2-405.1, 2-2-407 and 2-2-407.1.

25 District Rule 2-2-401: "In addition to the requirements of Regulation 2-1-402, applications for authorities to construct facilities subject to Rule 2 shall include . . . CEQA-related information which satisfies the requirements of Regulation 2-1-426." Regulation 2-1-426 requires the Lead Agency under CEQA to prepare an EIR.