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No. 10-73870

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHABOT-LAS POSITAS COMMUNITY COLLEGE DISTRICT,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents,

RUSSELL CITY ENERGY COMPANY, LLC,

Intervenor.

On Petition for Review of a Final Order of the Environmental Appeals Board of the United States Environmental Protection Agency

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GLOSSARY

Air District	Bay Area Air Quality Management District
APA	Administrative Procedure Act, 5 U.S.C. §§ 701-06
AQIA	Air Quality Impacts Analysis
ASOB	The Air District's Additional Statement of Basis
BACT	Best Available Control Technology
BCDC	San Francisco Bay Conservation and Development Commission
BiOp	Biological Opinion
CAA	Clean Air Act, 42 U.S.C. §§ 7401, et seq.
CMP	Coastal Management Program
CZMA	Coastal Zone Management Act, 16 U.S.C. §§ 1451-66
EAB	Environmental Appeals Board of the U.S. EPA
EPA	United States Environmental Protection Agency
ESA	Endangered Species Act, 16 U.S.C. §§ 1531-99
FWS	United States Fish and Wildlife Service
LAER	Lowest Achievable Emissions Rate
NAAQS	National Ambient Air Quality Standards
NOAA	National Oceanic and Atmospheric Administration
NSR	New Source Review
PG&E	Pacific Gas & Electric Company
PM-10	Airborne Particulate Matter 10 microns or less in diameter
PM-2.5	Airborne Particulate Matter 2.5 microns or less in diameter
PSD	Prevention of Significant Deterioration
RCEC	Russell City Energy Center, the proposed power plant
RTC	The Air District's Responses to Comments
SIP	State Implementation Plan
SOB	The Air District's Statement of Basis

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STATEMENT OF JURISDICTION

The Bay Area Air Quality Management District ("Air District") – acting as delegate[1] under the federal Clean Air Act ("CAA" or "the Act") for the United States Environmental Protection Agency ("EPA") – issued a federal prevention of significant deterioration ("PSD") permit on February 3, 2010. *See* 42 U.S.C. § 7475; 40 C.F.R. § 52.21(u). That permit was issued to Intervenor Russell City Energy Company ("Russell City") to construct a new natural gas-fired electrical generating plant in Hayward, California. As allowed by EPA regulations (because the Air District was acting as EPA's delegate under federal law rather than under its own authority), Petitioner Chabot-Las Positas Community College District ("College District") appealed the issuance of the permit to EPA's Environmental Appeals Board ("EAB"), which is authorized to act for the EPA Administrator in reviewing appeals of final PSD permit decisions. On November 18, 2010, the EAB issued an order ("Order") pursuant to 40 C.F.R. § 124.19 in which it denied the College District's administrative appeal.

This petition by the College District seeks review of that Order. The College District also challenges two other decisions by the EAB relating to the

[1] *See* U.S. EPA – Bay Area Air Quality Management District Agreement for Delegation of Authority to Issue and Modify Prevention of Significant Deterioration Permits Subject to 40 C.F.R. § 52.21 (dated Feb. 4, 2008) ("Delegation Agreement"), Resp't Addendum 255.

Russell City permit. The first, a Remand Order on July 29, 2008 ("Remand Order"), remanded the first PSD permit issued to Russell City back to the Air District for failure to comply with the notice-and-comment requirements in 40 C.F.R. § 124.10. The second, issued by the EAB on December 17, 2010, denied the College District's motion for reconsideration and/or clarification and stay of the effectiveness of the Order ("EAB Denial of Motion"). The College District's corrected opening brief (Doc. 54, "Pet. Br.") addresses *almost exclusively* the Order.

Final agency action occurs when a final PSD permit decision is issued by EPA and EAB review procedures are exhausted. *See* 40 C.F.R. § 124.19(f)(1). CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1), confers jurisdiction on this Court to consider this petition for review, which the College District timely filed. However, as discussed below, the College District has not established Article III standing. Therefore, this Court does not have jurisdiction to consider this petition and it should be dismissed.

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STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction to hear this petition for review in light of the College District's failure to establish Article III standing and inability to rely on the doctrine of *parens patriae* to establish injury-in-fact.
2. Whether, in light of the CAA and longstanding EPA regulations that clearly state the PSD program does not apply to sources of a pollutant for which an area is designated nonattainment, this federal PSD permit must analyze particulate matter less than two-and-one-half microns in diameter under the 24-hour average National Ambient Air Quality Standard despite the Bay Area's designation as nonattainment for that standard, and whether the EAB's decision to deny review of this issue was reasonable.
3. Whether the College District's arguments about state-law nonattainment area and minor source permitting are beyond this Court's jurisdiction in a petition for review of a federal PSD permit.
4. Whether the Air District erred in following the CAA and EPA's PSD regulations in analyzing whether an auxiliary boiler was required as Best Available Control Technology, and whether the EAB's decision to deny review of this issue was reasonable.
5. Whether the record demonstrates that the College District is incorrect in arguing that the Air District did not consider all relevant data in determining

that an auxiliary boiler would not be required, and whether the EAB's decision to deny review of this issue was reasonable.

6. Whether EPA acted reasonably in meeting the applicable requirements of the Coastal Zone Management Act when it twice gave actual notice of Russell City's application for the PSD permit to the relevant coastal management agency.

7. Whether EPA acted reasonably in determining that the scope of its Section 7 consultation under the Endangered Species Act pertaining to this PSD permit did not include separate future projects by a different applicant, where those projects are not subject to EPA regulatory authority but are rather subject to regulation by the United States Army Corps of Engineers under the Rivers and Harbors Act of 1899, and subject to separate Section 7 consultation initiated by the Army Corps of Engineers.

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ADDENDUM TO THE BRIEF

Except for the material included in EPA's separately bound Addendum, all applicable statutes, etc., are contained in the brief or addendum of the College District.

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STATEMENT OF THE CASE

This petition challenges a federal PSD permit issued by the Air District on behalf of EPA Region IX under the federal CAA and the decision of the EAB to deny review of that permit. The permit authorizes Russell City to construct the Russell City Energy Center ("RCEC"), a new natural gas-fired electrical generating plant, in Hayward, California. To understand the issues presented by this petition, it is first necessary to set forth the relevant statutory and regulatory background of the CAA, specifically the New Source Review program. EPA addresses the statutory and regulatory backgrounds of the Coastal Zone Management Act ("CZMA") and Endangered Species Act ("ESA") in its merits discussion, *infra*.

I. THE CLEAN AIR ACT AND NEW SOURCE REVIEW

The CAA establishes a comprehensive scheme of shared responsibility between the federal government and the States for protecting and enhancing the nation's air quality. Pursuant to sections 108 and 109 of the Act, EPA has established National Ambient Air Quality Standards ("NAAQS") for six "criteria" air pollutants: sulfur dioxide, particulate matter under ten microns in diameter ("PM-10") and under two-and-one-half microns in diameter ("PM-2.5"), carbon monoxide, ozone, nitrogen dioxide, and lead. 42 U.S.C. §§ 7408, 7409. Each NAAQS is based on air quality "criteria" reflecting the latest scientific knowledge,

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and each is set to "protect the public health" with an "adequate margin of safety." *Id.* § 7409(b)(1).

The CAA requires that each State develop and submit to EPA for approval its own regulatory program, known as a state implementation plan ("SIP"), that details how the State will attain and then maintain compliance with each established NAAQS. *Id.* § 7410. The States enjoy wide discretion in developing their SIPs and determining how to attain and maintain the NAAQS within the State. *Id.* § 7416; *see Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 470 (2004).

Each SIP must include certain provisions as necessary to assure that the NAAQS are achieved, including those required by the Act's New Source Review ("NSR") program. 42 U.S.C. §§ 7470-7515. NSR and its implementing regulations set forth the permitting requirements for the construction of "major sources" of air pollutants as defined in the CAA through two programs: Prevention of Significant Deterioration, and nonattainment NSR. *Id.*; s*ee also* 40 C.F.R. §§ 52.21, 51.166, 52.24, 51.165. The PSD program, 42 U.S.C. §§ 7470-79, applies to areas of the country that have been formally designated by EPA either as in "attainment" with the NAAQS, *i.e.*, areas attaining the level of public health protection required by the NAAQS, or as "unclassifiable" because of a lack of sufficient data to determine compliance or noncompliance with the NAAQS. *Id.* §

7471; *see Alabama Power Co. v. Costle*, 636 F.2d 323, 368 (D.C. Cir. 1979); *see also* 45 Fed. Reg. 52,676, 52,677 (Aug. 7, 1980).

The PSD program is designed to protect the Nation's attainment/unclassifiable areas – those in which the air is relatively clean – while assuring economic growth consistent with such protection. 42 U.S.C. § 7470. If a State does not submit a SIP with an approvable PSD program, EPA establishes a Federal Implementation Plan for that State that incorporates the PSD regulations set forth at 40 C.F.R. § 52.21. *See id.* § 7410(c); *see also Sur Contra La Contaminacion v. EPA*, 202 F.3d 443, 446 n.1 (1st Cir. 2000). EPA can choose to administer this federal program or delegate to the State the authority to implement the *federal* PSD program under EPA's supervision. 40 C.F.R. § 52.21(u).

The PSD program applies to any stationary source that emits any pollutant in major amounts if the source proposes to locate in an area designated as attainment/unclassifiable for any criteria pollutant. *See* 45 Fed. Reg. at 52,710-11. A "major emitting facility" is a stationary source of one of several specified types that emits, or has the potential to emit, 100 tons per year of any air pollutant, or any other stationary source that emits or has the potential to emit 250 tons per year of any pollutant. 42 U.S.C. § 7479(1). If a source is subject to PSD review, then PSD will be applied to *each* pollutant that source emits in greater than *de minimis* amounts, unless the area is designated as nonattainment for the particular pollutant,

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in which case the nonattainment NSR program applies to that pollutant. 45 Fed. Reg. at 52,711; *see* 40 C.F.R. § 52.21(j)(2). A source subject to PSD requirements must, prior to construction, obtain a permit pursuant to section 165 of the Act. 42 U.S.C. § 7475(a).

Section 165 of the Act and EPA's implementing regulations establish two principal substantive requirements for a PSD permit. First, the applicant must demonstrate that the new source will not cause or contribute to air pollution exceeding the NAAQS or the applicable PSD "increment." *Id.* § 7475(a)(3); 40 C.F.R. § 52.21(k).[2] The regulations require the permit applicant to submit an analysis of the impact of the proposed source's emissions on air quality based on a combination of monitoring and sophisticated air quality modeling. 40 C.F.R. § 52.21(m). EPA regulations and guidelines address the extent of required analysis, which depends on the level of predicted impact. 40 C.F.R. § 52.21(l); *see also* 40 C.F.R. pt. 51, app. W; *Sur Contra La Contaminacion*, 202 F.3d at 446 n.3.

The second principal substantive requirement is that the facility must limit emissions through application of "best available control technology" ("BACT"). 42 U.S.C. § 7475(a)(4). BACT is defined as "an emission limitation based on the

[2] A PSD "increment" is the maximum allowable increase over baseline concentrations of, and maximum allowable concentrations of, sulfur oxide, nitrogen dioxide, and particulate matter, pursuant to CAA sections 163 and 166, 42 U.S.C. §§ 7473 and 7476. *See* 40 C.F.R. § 52.21(c).

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maximum degree of reduction of each pollutant subject to regulation" that the permitting authority determines is achievable by the facility "through application of production processes and available methods, systems, and techniques," taking into account, on a case-by-case basis, "energy, environmental, and economic impacts and other costs." *Id.* § 7479(3).

EPA has developed a widely utilized recommended approach for determining BACT.[3] *See* Order at 20 n.10, I ER 21.[4] Under this five-step "top-down" approach, all potentially available control alternatives are identified in the initial step.[5] Available control options are those that have "a practical potential for application to the emissions unit and the regulated pollutant under evaluation." *See id.* at 21, I ER 22. Control options that are not applicable to the proposed source or that prove to be technically infeasible or inappropriate (based on environmental,

[3] This approach, which was initially reflected in EPA guidance documents, has been followed in many decisions of the EAB. These decisions frequently cite a draft EPA training manual that compiled recommendations from several EPA guidance memoranda. *See New Source Review Workshop Manual* (Draft Oct. 1990) ("*NSR Manual*") (*available at* http://www.epa.gov/nsr/ttnnsr01/gen/wkshpman.pdf).

[4] References to the Excerpts of Record are denoted by "ER," with the Volume number listed to the left of ER, followed by the page numbers of the document to which reference is made. EPA notes that the College District's Excerpts of Record improperly include extensive material specifically barred by Circuit Rule 17-1.5 and/or not cited in the College District's opening brief.

[5] *See generally Alaska Dep't of Envtl. Conservation*, 540 U.S. at 475-76 (discussing the top-down approach and noting that it is "commonly" used by permitting authorities).

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economic or energy impacts) are eliminated from further consideration in subsequent steps of the analysis. Thus, for example, a control technology might be rejected because of disproportionately high costs. The most effective of the remaining options (and its corresponding emissions limit) is selected as BACT. *Id.* at 21-22, I ER 22-23.

In issuing federal PSD permits under its Delegation Agreement with EPA Region IX, as in this case, the Air District is subject to EPA regulations governing PSD permit issuance found at 40 C.F.R. part 124 and section 52.21(b)-(w). The Air District accordingly stands in EPA's shoes, acting as its delegate in issuing federal PSD permits. 45 Fed. Reg. 33,290, 33,413 (May 19, 1980); *In re: Desert Rock Energy Co.*, PSD Appeal No. 08-03, Slip. Op. at 58-59 (EAB 2009). To ensure that any decision to allow an increase in air pollution is made "only after careful evaluation of all the consequences of such a decision," the Act provides extensive opportunities for public participation in the PSD permitting process. 42 U.S.C. § 7470(5); *see also* 40 C.F.R. § 52.21(q), 40 C.F.R. pt. 124.

In contrast to PSD, the nonattainment NSR program, 42 U.S.C. §§ 7501-15, applies to emissions of particular pollutants emitted by new major sources in areas designated as having *not* attained the NAAQS for those pollutants, or "nonattainment areas." The purpose of the nonattainment NSR program is to improve air quality in areas where it has deteriorated to unacceptable levels,

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through requirements more stringent than those under the PSD program. New major stationary sources in nonattainment areas must, among other things, attain the "Lowest Achievable Emissions Rate" ("LAER") and "offset" any increases in emissions that result from the source's construction through corresponding decreases in emissions elsewhere in that nonattainment area. *See* 42 U.S.C. §§ 7501(3), 7503(c).

Consistent with the D.C. Circuit's holding in *Alabama Power*, EPA regulations specify that the *PSD* program does *not* apply to pollutants for which the area where the source proposes to locate is designated nonattainment for the NAAQS. 40 C.F.R. § 52.21(i)(2). The nonattainment NSR permitting program *may* apply to those pollutants if emitted above the major source thresholds.[6] 45 Fed. Reg. at 52,711. If a source proposes to locate in an area that is in attainment for some pollutants but nonattainment for others, both the PSD and nonattainment NSR permitting requirements may apply to the one *source* but each will cover *different pollutants*. *See id.* at 52,677 ("If a new major stationary source emits pollutants for which the area it locates in is designated nonattainment, then the source is exempt from PSD review for those pollutants. These sources must,

[6] For nonattainment areas, the Act defines lower major source thresholds for certain criteria pollutants. *See, e.g.*, 42 U.S.C. §§ 7511a(c), (d) and (e) (ozone) and § 7513a(b)(3) (PM-10). Any pollutant that is not subject to statutory thresholds uses the default major source definition in CAA section 302(j), 42 U.S.C. § 7602(j).

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however, meet the applicable requirements of NSR for each nonattainment pollutant."); *see also id.* at 52,711.

Additionally, as part of the Act's requirement that each SIP provide for the regulation of the construction of any new source as necessary to ensure that the NAAQS are achieved, *see* 42 U.S.C. § 7410(a)(2)(C), SIPs must include a NSR requirement for minor sources – those with the potential to emit a criteria air pollutant *below* the statutory major source thresholds of the PSD and nonattainment NSR programs.[7] Each State has the discretion to decide how to regulate minor sources within the framework established by the Act and EPA's regulations specifying the requirements for minor NSR programs at 40 C.F.R. §§ 51.160-51.164. For example, States can choose to require that new sources obtain preconstruction authorization under minor NSR through permits containing appropriate emission limitations and standards. *See, e.g.*, 59 Fed. Reg. 44,572, 44,574 (Aug. 29, 1994).

Once EPA has approved a SIP with a nonattainment NSR program, the State then has the power to implement the nonattainment NSR and minor NSR programs under its own authority. *See* 42 U.S.C. §§ 7410, 7416, 7471. When an area is first designated nonattainment for a criteria pollutant, a State has three years to revise

[7] Background information about nonattainment NSR and minor NSR is provided for the Court's convenience. However, as discussed *infra* at 36, the Court does not have jurisdiction to consider nonattainment or minor NSR issues in this petition.

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its SIP to regulate that pollutant under its nonattainment and minor NSR programs. *Id.* § 7502(b). Under longstanding major nonattainment NSR regulations, after an area is designated nonattainment for a pollutant but before a revised SIP is approved by EPA, new *major* sources of that pollutant are regulated under Appendix S to 40 C.F.R. part 51 ("Appendix S"), a transitional rule that applies to nonattainment areas that do not have an approved major nonattainment NSR program for that pollutant. *See* 40 C.F.R. § 52.24; *see also* 73 Fed. Reg. 28,321, 28,342-43 (May 16, 2008) (explaining how Appendix S applies during the PM-2.5 transition). Sources subject to Appendix S must meet the requirements for LAER control technology, emissions offsets and compliance certification. *See* 40 C.F.R. pt. 51 app. S.

Thus, a single source may be required to obtain a PSD permit, a major nonattainment NSR permit, *and* a minor source permit, depending on the attainment or nonattainment designations for the area of the proposed source, and the specific pollutants and amounts thereof that will be emitted. *See* 45 Fed. Reg. at 52,711-12.

II. STATEMENT OF FACTS

In November 2006, Russell City submitted to the Air District an application for a PSD permit to construct RCEC, a 600-megawatt natural gas-fired power

plant. Russell City proposed to site the new plant in Hayward, Alameda County, California, part of the San Francisco Bay Area.

The Bay Area is designated as attainment or unclassifiable for carbon monoxide, nitrogen dioxide, sulfur dioxide, PM-10, and lead, all of which are therefore regulated under the PSD program. *See* 40 C.F.R. § 81.305. The pollutant primarily at issue in this petition, PM-2.5, is measured by an annual standard and a 24-hour standard. The Bay Area is designated attainment/unclassifiable for PM-2.5 under the annual standard, and nonattainment for PM-2.5 under the 24-hour standard.[8] *Id*. Because RCEC is a major source of nitrogen dioxide, carbon monoxide, and PM-10, the *PSD* regulations require it to apply BACT to control its emissions of each pollutant it emits in greater than *de minimis* amounts,[9] *except* for those pollutants for which the Bay Area is designated as nonattainment. *See* 40 C.F.R. §§ 52.21(b)(23) & (j)(2). The Air District regulates new major sources of air pollutants for which the Bay Area is designated

[8] This "split" designation became effective December 14, 2009, when the San Francisco Bay Area, including Alameda County, was designated nonattainment for the 2006 24-hour PM-2.5 NAAQS. *See* 74 Fed. Reg. 58,688, 58,709 (Nov. 13, 2009) (codified at 40 C.F.R. § 81.305).

[9] EPA has established significance thresholds below which facilities are exempt from PSD permitting as *de minimis* sources. 40 C.F.R. § 52.21(b)(23)(i). RCEC's emissions of sulfur dioxide are below the significance threshold, *see id.*, and therefore sulfur dioxide is not regulated under the PSD program, but instead by the Air District under California state law.

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nonattainment under its nonattainment NSR program.[10] The Air District has until December of 2012 – three years from the December 2009 effective date of the nonattainment designation for the 24-hour PM-2.5 NAAQS – to promulgate a revised SIP that regulates PM-2.5 for the 24-hour NAAQS under its nonattainment and minor NSR programs. *See* 42 U.S.C. § 7502(b); 74 Fed. Reg. at 58,689. In the interim, Appendix S regulates new *major* sources of PM-2.5. *Minor* sources of PM-2.5 are presently *not* regulated in the Bay Area for that pollutant, and will not be until California promulgates the SIP containing the minor NSR program for PM-2.5 that is due in December 2012.

RCEC was originally licensed in 2002 by the California Energy Commission and the Air District; however, the Air District did not finalize the proposed PSD permit at that time. Statement of Basis ("SOB") 6, III ER 715; Additional Statement of Basis ("ASOB") 5; III ER 582. Russell City withdrew its proposal, subsequently relocated the power plant, and re-applied for a permit in November 2006. SOB 6, III ER 715. On November 1, 2007, the Air District issued an amended Authority to Construct and a federal PSD permit. *Id.* The Authority to Construct regulated RCEC's emissions under California state law and included both major nonattainment NSR and minor NSR requirements; it was appealed to

[10] EPA most recently approved the Air District's nonattainment NSR program in 1999. *See* 64 Fed. Reg. 3850 (Jan. 26, 1999).

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the Air District's Hearing Board, which denied the appeal. The PSD permit was appealed to the EAB, which remanded the permit back to the Air District with instructions to re-notice the permit consistent with the federal public participation requirements at 40 C.F.R. § 124.10. Remand Order at 42, I ER 199.

On remand, the Air District issued a draft PSD permit and Statement of Basis and published notice thereof on December 8, 2008. IV ER 935. After holding a public hearing and accepting written comments, the Air District subsequently modified the permit conditions and released a revised draft PSD permit and Additional Statement of Basis, and published notice thereof on August 3, 2009. IV ER 936. A second public hearing and notice-and-comment period followed and concluded on September 16, 2009. *Id.*

Although EPA's authority to process and issue the PSD permit was delegated to the Air District, EPA retained the responsibility to fulfill any obligations under the ESA, discussed more fully below. Accordingly, EPA Region IX consulted with the U.S. Fish and Wildlife Service ("FWS") regarding the potential impacts from RCEC to federally-listed threatened or endangered species. FWS concurred in writing with EPA's determination that there would be *no* likely adverse effects (VII ER 1837), and EPA accordingly notified the Air District that ESA consultation had concluded on January 28, 2010. Resp't ER001. The Air District subsequently issued the PSD permit on February 3, 2010. II ER 558.

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As noted above, the Bay Area has been recently designated nonattainment for the 24-hour PM-2.5 NAAQS. *See* 40 C.F.R. § 81.305. When Russell City applied to the Air District for a PSD permit in 2007, the Bay Area was designated attainment/unclassifiable for PM-2.5 under both the annual and 24-hour standards. Accordingly, *at that time* the PSD program regulated RCEC's PM-2.5 emissions. In December 2008, the then-Administrator of the EPA signed a notice designating the Bay Area as *nonattainment* for the 2006 24-hour PM-2.5 NAAQS. However, publication of the notice in the Federal Register was delayed[11] and therefore the new nonattainment designation did not immediately take effect; as such, during both of the two notice-and-comment periods on the draft PSD permit, the Bay Area remained formally designated as attainment/unclassifiable for the 24-hour PM-2.5 NAAQS (as well as for the annual standard), and the PSD program continued to apply with respect to *both* standards. *See* Responses to Comments ("RTC") 76-79; II ER 398-401.[12]

[11] As is customary during a transition between Administrations, pending regulatory actions that have not yet been published in the Federal Register are delayed pending review by the incoming Administration, as was the case with the notice designating the Bay Area as nonattainment for PM-2.5 under the 24-hour NAAQS.

[12] EPA notes that there is a typographical error in this portion of the Response to Comments. The draft PSD permit and Additional Statement of Basis discussed therein were issued in August 2009, not in 2008.

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The Air District, recognizing the uncertainty created by the pending but unpublished nonattainment designation, explained its anticipated regulatory approach for the final PSD permit in the Additional Statement of Basis. ASOB 52-55; III ER 629-32. Specifically, the Air District stated that if the Bay Area remained designated attainment/unclassifiable for the 24-hour PM-2.5 standard, then the PSD permit would address compliance with both the 24-hour and annual PM-2.5 standards. ASOB 53-54; III ER 630-31. Additionally, the Air District noted that an Air Quality Impacts Analysis ("AQIA") would be required to demonstrate that RCEC would not "cause or contribute to an exceedance of the [NAAQS] or PSD increment for PM-2.5." ASOB 54; III ER 631. The Air District had already done the AQIA and determined that RCEC's PM-2.5 emissions would "not cause or contribute to an exceedance of *any* PM-2.5 NAAQS or increment." *Id.* (emphasis added).

The Air District then explained how it would proceed should the new nonattainment designation for the 24-hour PM-2.5 standard take effect before the final permit was issued: the Air District would continue to apply PSD to the *annual* PM-2.5 standard, and nonattainment NSR would apply to the *24-hour* PM-2.5 standard. ASOB 54-55; III ER 631-32. The Air District explained that Appendix S applies to new *major* sources during the three-year period between a nonattainment designation and the approval of a revised SIP for that area. *Id.* The

Air District had determined, however, that the requirements of Appendix S would *not* apply to RCEC because the facility would emit less than 100 tons per year of PM-2.5 and thus would not be considered or regulated as a major source of PM-2.5. ASOB 55; III ER 632.

As the Air District explained in its Responses to Comments, the nonattainment designation became effective on December 14, 2009, *prior* to the issuance of the PSD permit. RTC 78, II ER 400; *see* 74 Fed. Reg. at 58,709. Nonetheless, because RCEC will be located in an area designated as attainment/unclassifiable for the *annual* PM-2.5 NAAQS, the Air District issued a PSD permit with stringent BACT requirements for RCEC's PM-2.5 emissions and determined that RCEC would not contribute to a violation of the annual standard. The permit did not contain any additional requirements to further reduce RCEC's PM-2.5 emissions to avoid a violation of the *24-hour* PM-2.5 NAAQS: as a consequence of the area's formal redesignation as nonattainment for the 24-hour PM-2.5 standard, PSD no longer applied to that standard; instead, nonattainment NSR applied.[13] 40 C.F.R. § 52.21(i)(2). The Air District concluded that there were no applicable regulatory requirements under nonattainment NSR because RCEC's emissions would be below the applicability threshold of Appendix S (*i.e.*,

[13] As discussed *supra* at 19 and *infra* at 43-44, the Air District had determined that if the Bay Area were still designated attainment/unclassifiable, RCEC would not contribute to a violation of the 24-hour PM-2.5 NAAQS.

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RCEC will emit less than 100 tons of PM-2.5 per year), which was all that applied to the area for the 24-hour NAAQS pending approval of a revised SIP containing a minor NSR program for PM-2.5. RTC 78-79, II ER 400-01.

III. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

The final PSD permit resulted from a careful process of environmental review of the proposed project, first by EPA's delegate – the Air District – and then by the EAB. Before issuing the permit, the Air District considered a voluminous record, including extensive public comment received during two public hearings and comment periods. Five petitions for review were timely filed with the EAB, including the College District's. Order at 7, 17; I ER 8, 18. The EAB considered extensive briefing and oral argument by the College District, the four other petitioners, the Air District, and Russell City.

On November 18, 2010, the EAB issued its Order Denying Review, upholding the Air District's issuance of the permit. I ER 1. The EAB noted that, to justify a remand of the permit to the Air District, petitioners had to make a sufficient showing that at least one challenged condition of the PSD permit was clearly erroneous or involved an important matter of policy or exercise of discretion warranting further review. Order at 13, I ER 14. The Board determined that this showing had not been made.

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The EAB identified a total of eight issues raised among the five petitions.[14] Order at 10-11, I ER 11-12. The Board noted that the College District made several arguments regarding the Air District's AQIA and conclusion that the RCEC's emissions would not lead to a violation of the 24-hour PM-2.5 NAAQS. Order at 117, I ER 118. Before turning to the merits of the College District's arguments, the EAB examined whether the designation of the Bay Area as nonattainment for the 24-hour PM-2.5 NAAQS mooted the challenges to the Air District's AQIA and conclusion that the federal PSD permit was not required to demonstrate that RCEC would not cause or contribute to a violation of the 24-hour PM-2.5 NAAQS. Order at 118-27; I ER 119-28.

The EAB determined that the nonattainment designation mooted the College District's arguments regarding analysis of RCEC's impact on the 24-hour PM-2.5 NAAQS. Order at 127, I ER 128. The Board noted that the PSD program only applies to areas designated attainment/unclassifiable, and *not* to nonattainment areas. Order at 119, I ER 120. The Board ruled that the College District's argument that the *PSD* permit must address *nonattainment* pollutants was a "conclusory disagreement" with the Air District's approach, and that the College District had not explained the legal basis for its theory that "PSD permitting

[14] Only the EAB's decision on the issues actually raised in this petition are discussed herein.

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requirements – which, by statute, apply to areas that *are* designated attainment or unclassifiable – [apply] to an area that has been designated nonattainment." Order at 125, I ER 126 (emphasis original). Accordingly, the EAB found that the College District had failed to show that the Air District "clearly erred in concluding that it need not address the 24-hour PM-2.5 standard in the PSD permit because of the recent nonattainment designation," determined that the remainder of the College District's 24-hour PM-2.5 arguments were moot, and denied review. Order at 126, I ER 127.

As to the College District's arguments that the Air District had improperly determined that an auxiliary boiler (which reduces emissions during startups of the power plant) was not required as BACT, the EAB found: 1) the Air District did not clearly err in considering cost-effectiveness of a technology as part of its BACT analysis (Order at 28, I ER 29); 2) the College District's argument that the Air District's BACT Workbook applies to its cost-effectiveness analysis was procedurally barred because the College District raised the issue for the first time in its reply brief and never raised the issue in its comments or administrative petition for review (Order at 45 n.35, I ER 46); 3) the College District's challenge to the annualized cost estimate for an auxiliary boiler was procedurally barred because it was not raised in the College District's comments on the draft permit (Order at 55, I ER 56); and 4) the record demonstrates that the Air District's cost-

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effectiveness approach was rational (Order at 56, I ER 57). As to the cost-effectiveness analysis, the EAB found that contrary to the College District's assertions, the Air District *had* specifically considered the issues raised and data submitted by the College District. Order at 55-56, I ER 56-57. The EAB thus affirmed the Air District's cost-effectiveness analysis and its determination that an auxiliary boiler would not be cost-effective, and therefore could not be required as BACT.

For these reasons, after a rigorous, carefully reasoned and rational analysis of all of the issues, the EAB denied review and the PSD permit became final.

The College District's many arguments in this petition regarding the CZMA and the ESA were not presented to the EAB.

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SUMMARY OF THE ARGUMENT

The College District has not established that it has Article III standing, and thus has not established that this Court has jurisdiction to hear this petition for review. The College District appears to premise its standing on *parens patriae* grounds of a generalized allegation of harm to its employees and students, and to the public health and welfare. As a subdivision of the State, the College District cannot sue the federal government as *parens patriae*. Because the College District has otherwise failed to establish that it has suffered a concrete injury, that the cause of any injury is fairly traceable to EPA's issuance of this PSD permit, and that a favorable decision of this Court will redress its injury, this petition should be dismissed for lack of jurisdiction.

Even if the Court determines it has jurisdiction, the EAB did not act arbitrarily, capriciously or otherwise contrary to law in declining to overturn the Air District's grant of a PSD permit for construction of RCEC. The Air District's final permit decision was based on a voluminous record and a thorough analysis of all significant issues, and the EAB in its exacting review of the Air District's decision correctly found no basis to reverse the issuance of the permit.

First, the EAB – looking at CAA statutory and regulatory authorities – correctly determined that the PSD program does not apply to a pollutant for which the area is designated nonattainment, and therefore, as a result of the designation of

the Bay Area as nonattainment for the 24-hour PM-2.5 NAAQS in 2009, the federal PSD permit record was not required to demonstrate that RCEC would not cause or contribute to a violation of the 24-hour PM-2.5 NAAQS. The College District's substantive challenges to the PSD permit were therefore properly determined by the EAB to be moot, as they remain in this petition. Further, this Court does not have jurisdiction in this petition for review of a federal PSD permit to hear challenges to nonattainment and minor NSR permitting decisions made by the Air District pursuant to *state law*.

Second, the EAB also properly concluded that the Air District's analysis of the cost-effectiveness of an auxiliary boiler, and its resulting determination that an auxiliary boiler would not be cost-effective and thus is not BACT, was rational in light of all of the information in the record. Specifically, the EAB found that the Air District considered all of the relevant data, and that the College District's arguments otherwise were factually inaccurate.

Third, EPA fully complied with the CZMA by *twice* giving actual notice of Russell City's application for a PSD permit to the appropriate coastal management agency, which subsequently waived its opportunity to review the project for consistency with its coastal management program, precluding any further CZMA requirements. Finally, EPA properly determined that the scope of its consultation under Section 7 of the ESA was limited to the federally-permitted power plant and

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did not include separate transmission line projects, owned and operated by a third party (Pacific Gas & Electric Co.), under the regulatory oversight of the Army Corps of Engineers ("Corps").

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STANDARD OF REVIEW

A challenge to EPA action under section 307(b) of the Act, 42 U.S.C. § 7607(b), is reviewed under the Administrative Procedure Act ("APA") to determine whether the Agency's decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance in the law." 5 U.S.C. § 706(2)(A); *see Alaska Dep't of Envtl. Conservation*, 540 U.S. at 496-97; *Citizens for Clean Air v. EPA*, 959 F.2d 839, 844 (9th Cir. 1992). The "scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). When, as here, the court is reviewing an agency's scientific and technical determinations, the court should exercise its highest level of deference. *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983); *Nat'l Wildlife Fed'n v. United States Army Corps of Eng'rs*, 384 F.3d 1163, 1174 (9th Cir. 2004) ("Where scientific and technical expertise is necessarily involved in agency decision-making, …a reviewing court must be highly deferential to the judgment of the agency."). Further, EPA's interpretation of its own regulations is entitled to an extremely high level of deference: it is to be given "controlling" weight unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citation omitted).

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This Court's standard of review is also informed by the standard of review applied by the EAB. As the Board explained, EPA's regulations and the Board's precedent place the burden on a petitioner to demonstrate that review is warranted to correct "clearly erroneous" findings of fact or conclusions of law, or to resolve an important matter of policy or exercise of discretion. *See id.* (citing 40 C.F.R. § 124.19(a)); *accord*, *Citizens for Clean Air*, 959 F.2d at 845. Thus, the standard of review in this case can be viewed more specifically as asking whether the EAB acted arbitrarily or capriciously in determining that the petitioners had failed to meet this "clearly erroneous" standard.

This Court does not review only whether *the EAB* arbitrarily or capriciously rejected the College District's claims that the Air District clearly erred; rather, the court "conduct[s] a deferential review of the entire agency action," including *the Air District's* decisionmaking as a delegate exercising EPA's regulatory authority, and EPA's actions in compliance with the CZMA and the ESA. *See Citizens for Clean Air*, 959 F.2d at 845-46.

Because the CZMA and ESA contain no standard of review, agency decisions under each statute are also reviewed pursuant to section 706 of the APA. *See Pyramid Lake Paiute Tribe of Indians v. United States Dep't of the Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990), citing *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 981 (9th Cir. 1985) (standard of review under ESA); *City of*

Sausalito v. O'Neill, 386 F.3d 1186, 1205-06 (9th Cir. 2004) (standard of review under CZMA). The court examines whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Pyramid Lake*, 898 F.2d at 1414 (quotations and citations omitted). If the agency did so, then the action must be upheld.

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ARGUMENT

I. THIS COURT LACKS JURISDICTION TO CONSIDER THE COLLEGE DISTRICT'S PETITION FOR REVIEW

Before addressing the College District's substantive claims, this Court must first address the "threshold jurisdictional question" of whether the College District possesses Article III standing to pursue this action. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). The "irreducible constitutional minimum" of standing requires proof of three elements: injury in fact, causation, and redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The College District, as the party asserting federal court jurisdiction, has the burden of establishing its standing. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). Rule 28(a)(4) of the Federal Rules of Appellate Procedure requires the College District to include a jurisdictional statement in its brief setting forth "the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction." Fed. R. App. P. 28(a)(4)(B). The College District has not complied with this requirement. Indeed, it has not asserted *any* facts or otherwise attempted to establish *any* of the elements of constitutional standing.

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A. The College District Has Not Alleged a Sufficient Basis for Article III Standing.

Although the College District recounts its participation in the administrative proceedings below, *see* Pet. Br. 2, the College District fails to establish its standing to maintain this petition for judicial review. The College District appears to premise its standing on the alleged risk of injury to the health and welfare *of its employees and students*, and that of the general public in the surrounding communities. *See, e.g.*, Pet. Br. 1-2 ("Many of the students…lack medical insurance coverage"); 4, 14, 26, 34, 52 (noting concerns about health risks and safety of the public). Such claims fall within the rubric of *parens patriae*, a common law doctrine that permits a State to sue under certain limited circumstances to enforce what the Supreme Court has called "quasi sovereign" interests, such as the rights of its citizens. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 603-04, 606-07 (1982).

It is well established, however, that neither a State nor a political subdivision thereof can sue as *parens patriae* against the federal government for claims brought pursuant to federal law. *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923); *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011) ("California, like all states, does not have standing as *parens patriae* to bring an action against the Federal Government.") (quotation omitted); *Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 848 (9th Cir. 1985) ("political

subdivisions …cannot sue as *parens patriae* because their power is derivative and not sovereign"); *Citizens Against Ruining the Envt. v. EPA*, 535 F.3d 670, 676 (7th Cir. 2008) (distinguishing *Massachusetts v. EPA*, 549 U.S. 497 (2007)). This is because with regard to federal interests, it is the United States, not the State, that represents citizens as *parens patriae*. *Mellon*, 262 U.S. at 485-86.

The College District is part of the State of California Community College System. Pet. Br. 1. As an entity of the State, the College District is analogous to a city or county: its power is derived from the State, and is not sovereign. *See City of Sausalito*, 386 F.3d at 1197. The College District therefore cannot sue the federal government as *parens patriae*. The College District also has not made any attempt to meet its burden to demonstrate that it has sufficient interests at stake independent of its *parens patriae* interests such that it will suffer a cognizable and concrete injury in fact, such as a particularized injury to its property ownership interests. *See Massachusetts v. EPA*, 549 U.S. at 522-23. To the contrary, the opening brief contains only vague references to the College District's concerns about the public health and welfare. As the United States represents members of the public as *parens patriae* – including the staff and employees of the College District – the College District cannot establish standing here based on its allegations of injury to the public health and welfare from emissions from the power plant authorized by the challenged federal PSD permit.

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The College District has not submitted *any* evidence to show that *it* (rather than its employees and students) has suffered a concrete injury in fact; that its injury is fairly traceable to the actions of EPA, and that any injury is likely to be redressed by a favorable decision by this Court. *See Lujan*, 504 U.S. at 561. Specifically as to redressability, the Court cannot grant the relief sought by the College District. First, under the CAA, it seeks remand of the PSD permit to the EAB to consider matters that are not within the EAB's jurisdiction. Second, under the ESA, the College District's request for relief is moot as all of the analyses it desires have already been performed. Third, under the CZMA, the College District seeks as relief notice and a public hearing from the San Francisco Bay Conservation and Development Commission ("BCDC"). BCDC is not a party to this case; even if it were, any decision by it to seek review of a project such as RCEC that is located outside its jurisdictional coastal zone is within BCDC's sole discretion, and therefore it is unclear whether the Court could grant the relief sought by the College District. Significantly, BCDC itself has concluded that it does not have jurisdiction to review Russell City's PSD permit for federal consistency and that it considers the matter closed.[15] It is therefore highly

[15] EPA requests that the Court take judicial notice of a letter dated April 29, 2011, sent from the Executive Director of BCDC to counsel for the College District in which BCDC informed the College District's counsel of this conclusion. The letter is attached to this brief as Exhibit 1.

speculative that following a favorable decision by this Court, the relief sought by the College District would be provided by BCDC, a third party that has already disclaimed its jurisdiction over these issues. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40-46 (1976). The College District therefore cannot establish standing for its CZMA arguments. Accordingly, even if the College District could point to a concrete injury in fact *to its own interests*, the College District cannot establish that a favorable decision here would cure the alleged harms or provide the relief sought.

Where a petitioner's standing is not self-evident (and it is not here), the petitioner *must* demonstrate its standing at the first opportunity; here, the first opportunity for the College District to establish its standing was its opening merits brief, yet it made no attempt to do so. This is fatal. *See Sierra Club v. EPA*, 292 F.3d 895, 900-01 (D.C. Cir. 2002); Fed. R. App. P. 28(a)(4)(B); *see also Knight v. Kenai Peninsula Borough School Dist.*, 131 F.3d 807, 817 (9th Cir. 1997) ("We will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in appellant's opening brief.") (citation omitted); *but see Northwest Envtl. Defense Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997) (holding that "because standing was not at issue in earlier proceedings…petitioners in this case were entitled to establish standing anytime during the briefing phase").

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The College District has not met its burden to establish that it has standing to seek judicial review of the PSD permit. This Court therefore lacks jurisdiction to hear this petition for review, and this case must be dismissed.

B. This Court Does Not Have Jurisdiction to Review State Law Nonattainment and Minor NSR Issues.

The College District presents extensive argument on alleged minor NSR requirements and violations. Pet. Br. 42-50; 52-56. However, this Court lacks jurisdiction to hear challenges to permitting decisions made by the Air District under *state* law pursuant to its SIP-approved program. Under the CAA, this Court only has jurisdiction under section 307(b)(1), 42 U.S.C. § 7607(b)(1), to hear a petition for review of a final *federal* PSD permit. The State has the power to implement an approved SIP *under its own state law authority*. *See* 42 U.S.C. §§ 7410, 7416, 7471. EPA most recently approved the Air District's nonattainment NSR program in 1999. *See* 64 Fed. Reg. 3850 (Jan. 26, 1999). Nonattainment and minor NSR permits are thus handled by the Air District under state law pursuant to its approved program. *See In re: Carlton, Inc. North Shore Power Plant* ("*In re: Carlton*"), 9 E.A.D. 690, 693 (EAB 2001) ("state-issued minor NSR permits in approved States…are regarded as creatures of state law that can be challenged only under the state system of review."). Any challenges to the Air District's decisions pursuant to its nonattainment NSR program must therefore go through the Air District's own administrative appeals process and then be brought in the California

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state courts. *See* 72 Fed. Reg. 72,617, 72,619 (Dec. 21, 2007) (discussing how permits issued under approved programs are reviewed under state law procedures); 61 Fed. Reg. 1880, 1882 (Jan. 24, 1996) (discussing congressional intent and supporting legislative history for state court review of permits issued under EPA-approved programs).

The Air District issued required state law, major nonattainment NSR and minor NSR permits (consolidated in the Authority to Construct) to Russell City in 2007.[16] That Authority to Construct was appealed to the Air District's Hearing Board; further review was available in California state court. *See* RTC 199, 216 n.385, 218; II ER 521, 538, 540. As the Air District explained in its Responses to Comments: "Non-Attainment NSR is a *state*-law permitting program conducted in accordance with the [Air] District's SIP-approved Non-Attainment NSR regulations." RTC 218, II ER 540 (emphasis added). The Air District further explained that nonattainment NSR permitting is "separate and distinct" from federal PSD permitting, is "subject to different regulatory requirements under different legal authority," and is "not part of the Federal PSD permitting process." *Id.*

[16] At the time, the PSD program still regulated emissions of PM-2.5 under the 24-hour NAAQS. As explained *supra* at 19-21, after the nonattainment designation, the Air District determined there were no further applicable nonattainment NSR requirements because Appendix S regulates only major sources of PM-2.5.

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Therefore, *this* Court lacks jurisdiction in this petition for review of the issuance of the *federal PSD permit*, to consider the College District's arguments regarding the Air District's implementation of its SIP-approved nonattainment NSR and minor NSR programs.

C. The Administrative Waiver Doctrine Bars Judicial Review of Arguments Not Raised Before the Agency.

In its opening brief, the College District advances arguments that the EAB expressly ruled had been waived because they had not been raised in public comments or (as required by EPA regulations) in the College District's petition for review to the EAB. Other arguments – namely, those the College District now makes regarding minor NSR – are raised *for the first time* in this litigation, having never been raised in public comments or in briefing before EAB. Judicial review of all such arguments is precluded by the administrative waiver doctrine.

Under the administrative waiver doctrine, "a reviewing court will not consider arguments that a party failed to raise in timely fashion before an administrative agency." *Sims v. Apfel*, 530 U.S. 103, 1114 (2000); *see also Marathon Oil Co. v. United States*, 807 F.2d 759, 767 (9th Cir. 1986) (judicial review precluded of issues that were not properly raised during an administrative proceeding); *Portland General Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1023 (9th Cir. 2007) (judicial review precluded of issue raised for the first time on appeal). "The waiver rule protects the agency's prerogative to apply its

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expertise, to correct its own errors, and to create a record for [judicial] review." *Portland General*, 501 F.3d at 1024. EPA regulations expressly require issue exhaustion in appeals of PSD permits. 40 C.F.R. § 124.19.

The EAB considers whether an administrative petitioner has met the threshold pleading requirement of issue preservation before it reviews any administrative petition for review on the merits. Order at 12 (citing 40 C.F.R. § 124.19(a)), I ER 13. Under longstanding EPA regulations, petitioners must "raise all reasonably ascertainable issues and all reasonably available arguments" in support of their position during the public comment period on a draft permit. *Id.* (citing 40 C.F.R. § 124.13). "[I]ssues must be raised with a reasonable degree of specificity and clarity…to be preserved for review." *Id.* at 13 (citations omitted), I ER 14. Petitioners must then demonstrate in their petition for review to the EAB that the issues raised therein were properly preserved for review. 40 C.F.R. § 124.19(a); *see also In re: ConocoPhillips Co.*, 13 E.A.D. 768 (EAB 2008). Issue preservation plays an integral role supporting "the efficiency and integrity of the overall administrative scheme," "promoting the longstanding policy that most permit decisions should be decided at the regional level," and providing "predictability and finality" in permitting. *In re: ConocoPhillips Co.*, 13 E.A.D. at 800.

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The essential nature of administrative issue exhaustion has led the EAB to "routinely den[y] review of issues raised on appeal that were reasonably ascertainable, but were not raised during the public comment period." *In re: ConocoPhillips Co.*, 13 E.A.D. at 801. The Supreme Court has stated that when regulations require issue exhaustion, "courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues." *Sims*, 530 U.S. at 108, citing in part *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 398, n.26 (9th Cir. 1982); *see also, e.g.*, *Marathon Oil Co.*, 807 F.2d at 768.

The Ninth Circuit has recognized two exceptions to the waiver rule that apply where a statute does not require exhaustion. Waiver may be excused in: 1) exceptional circumstances; or 2) where the agency lacked the jurisdiction or power to review an issue. *Portland General*, 501 F.3d at 1024; *Marathon Oil*, 807 F.2d at 768. To determine whether exceptional circumstances warrant review of an otherwise waived issue, the court balances:

> [T]he agency's interests in applying its expertise, correcting its own errors, making a proper record, enjoying appropriate independence of decision and maintaining an administrative process free from deliberate flouting, and the interests of private parties in finding adequate redress for their grievances.

Marathon Oil, 807 F.2d at 768 (internal quotations and citations omitted). The College District has not demonstrated that exceptional circumstances exist to

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warrant review of any of the waived issues, which are: 1) their arguments regarding the "construction moratorium" provision at 40 C.F.R. § 52.24 (Pet. Br. 31-35, 52-56); 2) their arguments regarding minor NSR (Pet. Br. 42-50; 52-56); and 3) their arguments regarding the applicability of the Air District's BACT Workbook (Pet. Br. 61-63). The specific application of the administrative waiver doctrine to each of these issues is discussed in the appropriate portion of EPA's merits argument, *infra*.

II. THE EAB DID NOT ACT ARBITRARILY OR CAPRICIOUSLY IN DISMISSING THE COLLEGE DISTRICT'S PM-2.5 ARGUMENTS AS MOOT

As noted in the Background section of this brief, *before* the challenged PSD permit was issued to RCEC, the Bay Area was formally designated nonattainment for the 24-hour PM-2.5 NAAQs. This fact is critical. The College District challenges the Air District's decision, in light of this redesignation, that it was not necessary to show that RCEC will not contribute to a violation of the NAAQS for 24-hour PM-2.5. Simply put, such a showing of non-contribution only makes sense in an area that is designated attainment or unclassifiable, as by definition all emissions from a source located in an area that is designated as *nonattainment* must necessarily contribute to a violation of the NAAQS. The College District's argument, if accepted, would thus bar construction of any new source in any area designated nonattainment for a pollutant emitted by that source. The EAB, after

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carefully reviewing the College District's comments and briefing in an attempt to understand the College District's allegations, properly determined that the College District's argument – that the federal PSD permit was required to address compliance with the 24-hour PM-2.5 standard – were mooted by the designation of the Bay Area as nonattainment for the 24-hour PM-2.5 NAAQS in 2009. Order at 122-26, I ER 123-27.

The Board, examining the CAA, EPA's regulations, and its own precedent, correctly determined that the PSD program simply does not apply to pollutants for which the relevant area has been designated as nonattainment. *Id.* at 119-20; I ER 120-21. The EAB noted that "a permit issuer must apply the statute and implementing regulations in effect at the time" of issuance. *Id.* at 126, I ER 127 (citations omitted). The Board then held that the Air District was not required to show that RCEC would not cause or contribute to a violation of the 24-hour PM-2.5 NAAQS after the Bay Area was designated as nonattainment for that standard, and therefore the College District's substantive challenges to the Air District's AQIA for 24-hour PM-2.5 were moot. *Id.* at 126-27, I ER 127-28. The EAB's decision is consistent with the D.C. Circuit's decision in *Alabama Power* and EPA's subsequent PSD regulations, which specify that PSD requirements do not apply to pollutants for which an area has been designated nonattainment. *See*

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Alabama Power, 636 F.2d at 368; 40 C.F.R. § 52.21(i)(2); *see also* 45 Fed. Reg. at 52,710-11.

Although the federal PSD permit was not required to address compliance with the 24-hour PM-2.5 NAAQS since the Bay Area had been designated as nonattainment, the record shows that the Air District did conduct an analysis of the RCEC's air quality impacts during the permitting process *prior to* the area's designation as nonattainment. The College District's substantive attacks on the Air District's AQIA for 24-hour PM-2.5 – now moot and legally irrelevant in the PSD context – are factually inaccurate and further are without merit. The Air District properly performed a thorough and conservative AQIA that demonstrated that *if the Bay Area were still designated attainment/unclassifiable* for 24-hour PM-2.5, RCEC's emissions of PM-2.5 would *not* result in an exceedance of the 24-hour PM-2.5 NAAQS. *See* ASOB 84-89, III ER 661-66; RTC 141-69, II ER 463-91; *see particularly* RTC 166-67, II ER 488-89 ("Conclusion of No Contribution to a Violation of NAAQS of PSD Increment").[17] This issue is moot, however, because as explained above, the PSD program does not apply to a pollutant for which the area is designated nonattainment. Therefore, a demonstration that RCEC's emissions would not cause or contribute to a violation of the 24-hour PM-2.5

[17] For an explanation of the basis for the Air District's conclusion, *see* Pet. Br. 20 (excerpt from ASOB 87-88, III ER 664-65).

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NAAQS was not necessary prior to the issuance of the federal PSD permit to Russell City.

The College District fails to demonstrate that the EAB's decision denying review of the PM-2.5 arguments was arbitrary or capricious. The EAB properly upheld the Air District's determination that as a matter of law when the nonattainment designation for 24-hour PM-2.5 became effective, the PSD program no longer applied and the nonattainment NSR provisions immediately took effect. Both the Act and EPA's regulations allow a period of three years for newly designated nonattainment areas to develop their SIPs. *See, e.g.*, 74 Fed. Reg. at 58,689; 42 U.S.C. § 7502(b). During the interim period between a nonattainment designation and the approval of a SIP, Appendix S applies. However, Appendix S regulates only *major* sources, which are defined as sources with the potential to emit 100 or more tons per year of a regulated pollutant. *See* 40 C.F.R. pt. 51 app. S, ¶ II.A.4(i)(a). Under the PSD permit issued to it, RCEC will emit no more than 71.8 tons of PM-2.5 and 12.2 tons of sulfur dioxide per year.[18] II ER 568. Thus, it is not a major source covered by Appendix S.

[18] The College District relies on outdated numbers in contending RCEC will emit 99 tons of PM-2.5 per year. *See* Pet. Br. 26, 34, 45 n.17, and 47. In the draft PSD permit proposed on August 3, 2009, the Air District lowered the BACT limit on PM-2.5 emissions from 9 pounds per hour (86.8 tons per year) to 7.5 pounds per hour (71.8 tons per year). ASOB 51, III ER 628. Emissions of sulfur dioxide, a

(footnote continued…)

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The College District contends that, as a consequence, "nothing regulates RCEC's PM2.5 emissions" and an "important criteria pollutant affecting the people's health and safety" is being "ignore[d]." Pet. Br. 40, 52. This is simply untrue. Here, RCEC's emissions of PM-2.5 *are* regulated in the PSD permit, pursuant to the *annual* PM-2.5 NAAQS. RTC 78-79, II ER 400-01. The PSD permit thus includes express BACT limits for hourly, daily, and annual emissions of PM-2.5. II ER 566-68. In setting this stringent BACT limit, the Air District did not find any similar facilities with a lower limit on PM-2.5 emissions. RTC at 84, II ER 406. RCEC is not subject to *PSD* permitting requirements based on the *24-hour* PM-2.5 NAAQS because the area has been designated as nonattainment for that standard.[19] The facility is not subject to the transitional major source nonattainment NSR program in Appendix S because its PM-2.5 emissions are below the major source threshold. This Court's jurisdiction is limited to review of the federal PSD permit, and does not include review of the application of *state* major nonattainment NSR and minor source permitting requirements.

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precursor to PM-2.5, are included in determining the applicability of Appendix S. *See* 73 Fed. Reg. at 28,342-43.

[19] If the Bay Area were still designated as attainment/unclassifiable for the 24-hour PM-2.5 NAAQS, PSD would apply to RCEC under that standard because while 84 tons per year is below the major source level, it is above the significance level that triggers PSD requirements. However, the BACT limit on RCEC's emissions of PM-2.5 would not change, because BACT determinations are the same regardless of whether the annual or 24-hour NAAQS triggers PSD requirements.

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Accordingly, there is nothing pertaining to the impact of RCEC on the 24-hour PM-2.5 NAAQS for this Court to review. The EAB did not act arbitrarily or capriciously in denying review on these grounds.

A. The College District's Argument Regarding the Construction Moratorium Provision, Which is Inapplicable to a PSD Permit, is Waived.

The College District contends that issuance of the challenged PSD permit is prohibited by a "construction moratorium" provision codified in EPA's regulations at 40 C.F.R. § 52.24. Pet. Br. 31-35, 52-56. This argument fails for two reasons: first, the cited provision simply does not apply to PSD permits such as the PSD permit issued to RCEC, and it does not apply even to nonattainment NSR permits *except* where EPA has determined that the area in question has failed to adequately implement its existing SIP. Not only has no such determination been made here, but the SIP in question is not even due until December 2012. Second, like many of its other arguments, the College District waived this argument by failing to raise it in comments on the draft permit or to present it properly to the EAB.

The regulation cited by the College District – 40 C.F.R. § 52.24 – is a particularly harsh provision that precludes issuance of permits for construction or operation of major stationary sources in areas designated nonattainment under CAA Section 172(c), *where EPA has determined that the State is not adequately*

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implementing its SIP for that nonattainment area. 40 C.F.R. § 52.24(b); *see also* 42 U.S.C. § 7502(c), 45 Fed. Reg. at 52,711.

As the foregoing description of the provision suggests, it is utterly inapplicable here. First, it applies only to *major* stationary sources of a pollutant located in areas designated *nonattainment* under CAA Section 172(c) for *that* pollutant. 40 C.F.R. § 52.24(e); 42 U.S.C. § 7502(c); *see also* 45 Fed. Reg. at 52,711. While the Bay Area is designed nonattainment for the 24-hour PM-2.5 NAAQS, RCEC is *not* a major source of PM-2.5. Second, the entire provision is addressed to the issuance of *nonattainment NSR* permits; the permit at issue here is a *PSD* permit. Third, and critically, the construction moratorium provision *only* applies where EPA has determined a State is not adequately implementing its *existing* SIP for the nonattainment area in which the proposed source would be built. 40 C.F.R. § 52.24(b). As previously noted, *supra* at 16, the Air District's revised SIP regulating PM-2.5 for the 24-hour NAAQS under its nonattainment NSR program is not due until December 2012. *See* 74 Fed. Reg. at 58,689. It would be impossible for EPA to determine that the Air District is not adequately implementing that SIP, because that SIP is not yet even due.

In any event, the College District did not raise this issue during public comment on the draft final permit, and it did not raise it in its administrative petition for review before the EAB. Rather, it raised the construction moratorium

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provision in its reply brief before the EAB. Like the federal courts of appeals, the EAB considers issues raised for the first time in a reply brief to be waived. Order at 125-26, I ER 126-27; Pet. Br. 32-33. Here, the EAB specifically found that the College District's construction moratorium argument was based on a "completely different regulatory provision" from the one the College District raised, that the issue could have been, but was not, raised in comments and the petition for EAB review, and therefore the argument was procedurally barred. Order at 126, 1 ER 127.

The College District curiously does not attempt to argue that the EAB acted arbitrarily or capriciously in ruling that the construction moratorium argument was waived. Instead, the College District asks this Court to review the construction moratorium argument *despite* the EAB's ruling that it was waived. Pet. Br. 33-34. The College District, however, has not met its burden of establishing exceptional circumstances warranting review of a waived argument: all of the factors listed in *Marathon Oil* tip in favor of EPA – particularly EPA's interest in "enjoying appropriate independence of decision and maintaining an administrative process free from deliberate flouting" – and the College District had ample opportunity to raise the argument in its petition for review before the EAB and in its comments before the Agency. *Marathon Oil*, 807 F.2d at 768. The College District has thus

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not established exceptional circumstances justifying an exception to the administrative waiver doctrine.[20]

B. The Court Lacks Jurisdiction to Review the College District's PM-2.5 Arguments.

The College District contends that the EAB erred in determining that its jurisdiction is limited to issues relating to the federal PSD program, and argues that the EAB's jurisdictional determinations are subject to *de novo* review by the Court. Both assertions are incorrect.

An agency's interpretation of its own regulations is to be given "controlling" weight unless "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (citation omitted). The EAB's limited jurisdiction is authorized by statutes, regulations, and delegations. *See* 57 Fed. Reg. 5320 (Feb. 13, 1992). EPA regulations confer jurisdiction on the EAB to hear the appeals regarding the issuance of federal PSD permits. 40 C.F.R. § 124.19. The Board's interpretation

[20] The College District's reliance on *Kimes v. Stone*, 84 F.3d 1121 (9th Cir. 1996) – establishing when the Court will review issues raised for the first time on appeal from a *federal district court* – is unavailing in this petition for review of *agency action*, as a different standard applies to review of agency action. Further, the College District's alleged "miscarriage of justice" argument is without merit. The Air District reviewed the potential public health impacts of authorized emissions from RCEC and determined that there would be "no adverse impact on any community due to air emissions from [RCEC]." III ER 775. Finally, *Natural Resources Defense Council v. EPA*, 571 F.3d 1245 (D.C. Cir. 2009), which, *inter alia*, vacated the removal of the 18-month limit on the applicability of Appendix S, has no bearing on this case as Appendix S does not apply to RCEC because it is not a major source of PM-2.5 emissions.

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of EPA regulations is controlling and not subject to *de novo* review but rather is reviewable only for plain error. *See Auer*, 519 U.S. at 461. The College District cites *Hall v. Norton*, 266 F.3d 969 (9th Cir. 2001) (Pet. Br. 28), which states that the courts of appeals review "*de novo* the district court's determination that it lacked subject matter jurisdiction." *Hall*, 266 F.3d at 974. This case, however, is a petition for review of *final agency action*, and *not* an appeal of a decision by a *district court*. The standards regarding review of administrative agencies' determinations are different from those regarding review of district court decisions; this makes sense, given the complex policymaking entrusted to executive branch agencies. *See, e.g., Chevron v. NRDC*, 467 U.S. 837, 843-45 (1984).

The EAB has consistently held that in administrative appeals of federal PSD permits, the Board *does not* have jurisdiction over issues not governed by the federal PSD program and EPA's PSD regulations at 40 C.F.R. part 124. *See, e.g.*, Order at 132, I ER 133, citing *inter alia*, *In re: Sutter Power Plant*, 8 E.A.D. 680, 688 (EAB 1999); *In re: Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 127 (EAB 1999). This interpretation precludes administrative review by the EAB of state-law nonattainment and minor NSR applicability determinations and permitting, and it is consistent with *Alabama Power* and EPA's regulations excluding from the PSD program those pollutants for which an area has been designated as nonattainment. 636 F.2d at 368; *see also* 45 Fed. Reg. at 52,710-11.

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The Board has specifically looked at the question of whether it has jurisdiction over nonattainment NSR and minor NSR issues and permits in States with SIP-approved nonattainment programs, and it has repeatedly held that "state-issued minor NSR permits in approved States…are regarded as creatures of state law that can be challenged only under the state system of review." *In re: Carlton*, 9 E.A.D. at 693, citing *In re: Sutter Power Plant*, 8 E.A.D. at 690 ("The Board may not review, in a PSD appeal, the decisions of a state agency made pursuant to non-PSD portions of the CAA"); *In re: Milford Power Plant*, 8 E.A.D. 670, 673 (EAB 1999); *In re: Knauf Fiber Glass, GmbH*, 8 E.A.D. at 161-62; *In re: Great Lakes Chem. Corp.*, 5 E.A.D. 395, 396-97 (EAB 1994).

In *In re: Carlton*, a challenge to the issuance of a minor NSR permit, the EAB explained that minor NSR permits issued pursuant to a State's SIP-approved minor NSR program "fall[] outside the body of federal permits subject to Board review." *In re: Carlton*, 9 E.A.D. at 693. Just as in *In re: Carlton*, here the College District has raised numerous arguments implicating the Air District's state-law-based nonattainment NSR and minor NSR programs – programs over which the EAB lacks jurisdiction. The EAB correctly held in its denial of the College District's motion for reconsideration (in which the College District reiterated its substantive challenges to the Air District's 24-hour PM-2.5 air quality analysis) that *the Board's mootness analysis and conclusion were correct*, but even

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if the EAB had incorrectly denied the College District's PM-2.5 arguments as moot, the EAB nonetheless lacked jurisdiction to hear the College District's challenges to the nonattainment NSR requirements for 24-hour PM-2.5 because those challenges are to state, rather than federal, requirements. EAB Denial of Motion at 5-6, 6 n.5; I ER 143-44.

Further, the administrative waiver doctrine bars consideration of the College District's minor NSR arguments. The College District concedes in its opening brief that it did not present argument on minor NSR in the administrative proceeding (Pet. Br. 55), but it contends that minor NSR is similar to the construction moratorium provision, and that therefore judicial review of the minor NSR issue is available. This argument must fail. First, as discussed *supra* at 47-48, the EAB properly held the construction moratorium issue was waived; since no exception to the waiver doctrine applies to allow judicial review here, premising reviewability of the minor NSR issue based on that argument's similarity to *another waived argument* cannot establish a basis for review. Second, to be preserved, issues must be raised with reasonable specificity: minor NSR is a completely distinct regulatory requirement from the construction moratorium, and raising the latter thus does not preserve the former. Third, minor NSR was not addressed in any comments submitted on the draft PSD permit, and it was never raised during the EAB proceeding. Because the waiver doctrine precludes judicial

review of the College District's minor NSR arguments, and because the College District has not established exceptional circumstances warranting review, this Court cannot consider the College District's minor NSR arguments.[21] *See Marathon Oil*, 807 F.2d at 768 (holding that the waiver rule applied where petitioner – like the College District here – failed to raise its argument before the agency or provide any justification on appeal for its failure to do so).

C. The EAB's Decision Is Neither Arbitrary Nor Capricious in Light of *Alabama Power Co. v. Costle.*

The College District next argues that the EAB "committed prejudicial error" in light of *Alabama Power*. Its argument is, however, based on an utterly incorrect reading of the decision. Pet. Br. 50-52. In *Alabama Power*, the D.C. Circuit ruled that the statutory framework for the PSD program precludes application of its requirements to pollutants for which the relevant area is designated nonattainment. *Alabama Power*, 636 F.2d at 368.

Alabama Power in no way demonstrates that the federal PSD permit issued to RCEC is faulty or that the EAB erred in its review; it does not hold (contrary to the College District's suggestions) that PSD requirements apply to minor sources of a pollutant in a nonattainment area, and it does not conflict with the EAB's

[21] The following portions of the corrected opening brief thus should be disregarded as raising waived arguments: pp. 25-26; Argument VI.B (pp. 35-41); Argument VI.C (pp. 42-50), and Argument VI.E (pp. 52-56).

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conclusion that the College District's argument – that RCEC will violate the 24-hour PM-2.5 NAAQS – has been mooted by the area's nonattainment designation. Further, PM-2.5 emissions have not been ignored at RCEC: the PSD permit includes express BACT limits for PM-2.5. The record is clear that RCEC's emissions will *not* contribute to any violation of the annual NAAQS.

Because this Court does not have jurisdiction over the College District's nonattainment NSR or minor NSR arguments, because judicial review of the minor NSR arguments is barred by the administrative waiver doctrine, and because the College District has not established any basis for remand of the PSD permit for reasons related to impacts on 24-hour PM-2.5 concentrations, its petition for review must be dismissed for lack of jurisdiction or denied on the merits.

III. THE EAB DID NOT ACT ARBITRARILY OR CAPRICIOUSLY IN AFFIRMING THE AIR DISTRICT'S ANALYSIS THAT AN AUXILIARY BOILER WOULD NOT BE BACT

As noted *supra* at 23-24, the Air District determined that an auxiliary boiler would not be the best available control technology for RCEC due to concerns about the cost-effectiveness of that technology. The EAB affirmed the Air District's determination. The College District challenges this determination, but in so doing merely reiterates its prior arguments without demonstrating that the EAB's decision was arbitrary or capricious. As demonstrated by the EAB's detailed analysis of BACT issues and the auxiliary boiler in particular, the College

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District's arguments that an auxiliary boiler should have been required as BACT are without merit. *See* Order at 22-107 (examining three BACT-related challenges), 22-56 (analysis pertaining to the auxiliary boiler); I ER 23-108, 23-57. The EAB, properly affording substantial deference to the Air District's technical decisionmaking, found that the Air District had considered all relevant data, and that the Air District's analysis in determining that an auxiliary boiler was not cost-effective and therefore not BACT for RCEC was rational in light of the record. Order at 54-56; I ER 55-57.

The College District argues that the Air District's BACT analysis was not rational because it utilized data from dissimilar facilities, while ignoring data from similar facilities: the Lake Side Power Plant and Caithness Long Island Energy Center. Pet. Br. 58-61. In reviewing this issue, the EAB noted that a challenge to the data used for cost-effectiveness calculations involves technical matters, and therefore the Board accords "substantial deference" to the Air District. Order at 52, I ER 53. On appeal, this Court likewise is required to afford significant deference to the agency's decision. *Nat'l Wildlife Fed'n*, 384 F.3d at 1174.

The Air District determined during the permitting process that an auxiliary boiler was not cost-effective and therefore not required as BACT. *See* RTC 114-16, II ER 436-38. The record shows that the Air District analyzed data from the auxiliary boiler installed at the Mankato Energy Center, which has a capacity of 70

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million British thermal units per hour (MMBtu/hr). ASOB 69-70, III ER 646-47; *see also* VIII ER 1961. The Air District did not, as the College District argues, rely on data from the 320 MMBtu/hr auxiliary boiler installed at the Los Medanos Energy Center as a basis for analyzing whether an auxiliary boiler would be BACT for RCEC. Pet. Br. 59-60. Auxiliary boilers themselves emit small amounts of pollutants, which offset the reductions in emissions they generate during startup periods. *See* ASOB 70 n.128, III ER 647. To estimate what *the emissions* would be from an auxiliary boiler with a capacity of 70 MMBtu/hr at RCEC, the Air District scaled down the emissions rates from the Los Medanos auxiliary boiler. *See* VIII ER 1958-59. The Air District used the Los Medanos auxiliary boiler for this limited purpose because it – like RCEC – is subject to strict California regulations. *Id.* The Air District did *not* use data from the Los Medanos auxiliary boiler in its BACT analysis of the cost-effectiveness of an auxiliary boiler at RCEC. The College District's allegation that the Air District improperly relied on data from auxiliary boilers significantly larger than the boiler that would be needed at RCEC is thus factually incorrect.

The College District also argues here that the Air District did not consider in its analysis data from the Caithness facility submitted by the College District during the permitting process. The College District alleged that data demonstrated an auxiliary boiler would be cost-effective and thus BACT for RCEC. However,

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as the EAB found, the record clearly demonstrates that the Air District *did* consider the Caithness data and determined that the College District's numbers did not show an auxiliary boiler would be sufficiently cost-effective to require as BACT. RTC 115, II ER 437; *see also* Order at 54, I ER 55. The EAB thus held: "Notably, in its petition, the College District does not challenge [the Air District's] conclusion that the College District's $11,515 value is not cost-effective; it only challenges [the Air District's] alleged failure to consider the applicable Caithness data, *an argument that has been demonstrated to be factually incorrect*." Order at 55, I ER 56 (emphasis added).

Further, even if the Air District had not considered the data from the Caithness or Lake Side facilities – which it did – the College District has not offered any explanation to this Court or before the EAB of why the small difference in size relative to the Mankato auxiliary boiler would change the results of the Air District's analysis. In fact, as affirmed by the EAB, even using the Air District's calculations for the Caithness plant – the smallest of the three – the cost per ton of emissions reductions is still many times higher than what the Air District determined would be cost-effective and qualify as BACT.[22]

[22] The Air District quantitatively analyzed this issue. *See* RTC 115, II ER 437. The College District makes only a conclusory allegation that an auxiliary boiler "half the size" is therefore "half the expense" (Pet. Br. 63) and fails to demonstrate

(footnote continued…)

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The College District next contends that the Air District's BACT analysis cannot have been rational because it ignored its own regulations, specifically its BACT Workbook. Pet. Br. 61-63. The EAB held that this issue was reasonably ascertainable during the permitting process, but the College District had failed to demonstrate that it had raised the issue in its comments on the draft permit. Order at 45 n.35, I ER 46 (citations omitted). Further, the Board noted that the College District did not raise the argument in its petition, but instead raised it for the first time in its reply brief. *Id.* As such, the Board determined that the argument was waived. With no exception to the waiver doctrine established, that doctrine bars consideration of this issue by the Court.

Even if the issue were not waived, the EAB specifically addressed this matter in its decision, finding that the delegation of federal authority from EPA Region IX to the Air District required the Air District to perform its PSD determinations utilizing EPA's longstanding "top-down" BACT analysis, rather than using the Air District's own BACT workbook. Order at 28, I ER 29; *see* Delegation Agreement VI.2, at 5; Resp't Add. 260. As explained *supra* at 10-11, a "top-down" BACT analysis includes consideration of costs in step four. The Air District as EPA's delegate is *required* to comply with the Delegation Agreement

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any fault in the Air District's analysis or the EAB's ruling, or overcome the substantial deference to the agency's technical decisionmaking.

and to follow EPA regulations governing PSD permit issuance found at 40 C.F.R. part 124 and 40 C.F.R. § 52.21(b)-(w). *See* RTC 196, II ER 518 (discussing the Air District's compliance with the delegation agreement). Thus, in performing a top-down BACT analysis, the Air District did precisely what it was required to do.

The College District has failed to explain why the EAB's decision was arbitrary or capricious; instead, it has merely reiterated previous arguments that lack factual or legal merit. The agency's technical and scientific decisions are entitled to substantial deference, and the record provides ample support for the Air District's analysis and the EAB's ruling. The petition for review should therefore be denied.

IV. EPA FULFILLED ALL OF ITS OBLIGATIONS UNDER THE COASTAL ZONE MANAGEMENT ACT

As discussed *supra* at 34-35, the College District lacks standing to raise CZMA arguments because it has not established that a favorable decision will provide the relief it seeks from BCDC, a non-party to this suit. This Court accordingly lacks jurisdiction to consider the CZMA issues. Even if the Court determines to reach them, the College District's CZMA arguments fail on the merits. To understand these arguments and why they lack merit, a brief discussion of the relevant statutory and regulatory background of the CZMA is necessary.

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A. Federal Consistency Review under the CZMA

In 1972, Congress enacted the CZMA, 16 U.S.C. §§ 1451-66. It described the purpose of the legislation, as pertinent, accordingly:

> to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.

16 U.S.C. § 1451(i). The CZMA is administered by the National Oceanic and Atmospheric Administration ("NOAA"), the designee of the Secretary of Commerce. Under the CZMA and its implementing regulations, coastal States may develop and implement a NOAA-approved coastal management program ("CMP"). *See* 16 U.S.C. §§ 1454, 1455(d); 15 C.F.R. pt. 923. BCDC administers the NOAA-approved CMP for the San Francisco Bay Area. *See* Cal. Gov't Code §§ 66600-94; *see also City of Sausalito*, 386 F.3d at 1221.

The CZMA promotes cooperation and coordination between state authorities and federal agencies through the "federal consistency review" process. CZMA Section 307(c)(3) establishes a process for consistency review that applies to a "Federal license or permit."[23] 16 U.S.C. § 1456(c)(3). An applicant for a required

[23] A "Federal license or permit" means "any authorization that an applicant is required by law to obtain in order to conduct activities affecting any land or water

(footnote continued…)

federal license or permit to conduct an activity "in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone" must certify to the relevant State agency that the proposed activity complies with the "enforceable policies" of the State's CMP. *Id.* § 1456(c)(3)(A). The federal agency cannot issue the license or permit until the State concurs with this consistency certification. *Id.*; 15 C.F.R. § 930.53(d).

Under regulations implementing the CZMA, States do not automatically review projects, such as RCEC, located *outside of* the coastal zone. Rather, a State has discretionary authority to review such projects if either: 1) the CMP specifically lists such permit activities as being subject to federal consistency review and the State has described in its program those geographic locations outside the coastal zone where such activities are subject to review ("listed activities"); or 2) within 30 days of receiving notice of a permit application that has been submitted to the approving federal agency, the State requests and is granted permission by NOAA to review the project for consistency ("unlisted activities"). 15 C.F.R. §§ 930.53-.54.

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use or natural resource of the coastal zone and that any Federal agency is empowered to issue to an applicant." 15 C.F.R. § 930.51(a). In addition to actions that require a federal license or permit, the CZMA authorizes review of actions directly undertaken by a federal agency. 16 U.S.C. § 1456(c)(1)(A). In this instance, the PSD permit is a federal license or permit, and CZMA review is governed by the provisions of 16 U.S.C. § 1456(c)(3)(A), not the provisions for review of federal agency actions set forth at 16 U.S.C. § 1456(c)(1)(A).

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To aid States in monitoring unlisted activities for the purpose of requesting discretionary review, the CZMA regulations provide that federal agencies should give notice to the coastal management agency of the submission of applications for unlisted federal permits implicating coastal resources. *Id.* § 930.54(a)(2). To review an unlisted activity, the coastal management agency must affirmatively seek review of the project by notifying the approving federal agency, project applicant and NOAA of its intent to review the project for consistency purposes. *Id.* § 930.54(a)(1). If the coastal management agency does not seek review within 30 days, its right to review under the CZMA is waived. *Id.* Waiver does not occur if the coastal management agency is not given notice of the project. *Id.*

B. EPA Complied with its Notification Obligations, and BCDC's Right to Review the PSD Permit Has Been Waived.

Because the relevant coastal management agency – the BCDC – does not list PSD permits associated with activities *outside* the coastal zone as subject to *automatic* review for federal consistency,[24] EPA's only obligation under the CZMA was to provide notice of Russell City's PSD permit application to BCDC

[24] The College District's assertion that PSD permits are listed activities under BCDC's CMP is incorrect. Pet. Br. 65 n.22. First, the referenced list of federal licenses and permits applies only to activities within the coastal zone. *See* BCDC CMP at 42-46, Pet. Add. 320-24. Second, the list includes only "[p]ermits and applications for reclassification of land areas" under CAA section 164, 42 U.S.C. § 7474. *Id.* at 43, Pet. Add. 321. PSD permits, such as the PSD permit issued to RCEC, are issued pursuant to CAA section 165 and therefore are not a listed activity in BCDC's CMP.

so that BCDC could determine whether it wished to review RCEC pursuant to the procedures for unlisted activities. EPA complied with this obligation, and that ends the matter.

BCDC's CMP specifically discusses federal licensing and permit activities that occur outside of the coastal zone, but it does not identify *any* activities outside the coastal zone for which CZMA review is automatic. BCDC CMP at 45-46, Pet. Add. 323-24. Rather, the CMP only identifies certain limited circumstances in which BCDC will request discretionary approval from NOAA to review an activity outside the coastal zone pursuant to 15 C.F.R. § 930.54.[25] *Id.*

EPA (*i.e.*, through the Air District acting as EPA's delegate) fully complied with 15 C.F.R. § 930.54 by providing actual notice to BCDC of Russell City's application for a PSD permit. Written notice of the application was sent by the Air District directly to the Executive Director and the Chair of BCDC in December 2008 and again in August 2009. IV ER 935, 936, 937. BCDC thus had the opportunity to seek review of the project if it so desired. By not notifying EPA, Russell City, and NOAA of its intent to review the project for federal consistency

[25] In discussing review of activities outside the coastal zone, BCDC's CMP provides that "BCDC must comply with 15 C.F.R. part 930, Subchapter D and obtain NOAA approval to review an unlisted activity." BCDC CMP at 45, Pet. Add. 324.

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within 30 days of its receipt of such notice, BCDC waived any opportunity to review the project for consistency. 15 C.F.R. § 930.54(a)(1).

Because BCDC's CMP does not specifically list PSD permits as subject to consistency review, under the CZMA regulations EPA's only obligation was to provide BCDC with notice of the application for the PSD permit. EPA (through its delegate the Air District) satisfied this obligation by providing notice to BCDC on two separate occasions, and therefore the College District's petition must be denied.

C. Russell City's Power Plant and PG&E's Transmission Lines Are Not Associated Facilities.

It is undisputed that RCEC is *not* located in the coastal zone[26] and, as discussed above, BCDC has waived its opportunity to review RCEC for federal consistency by failing to affirmatively seek review pursuant to the procedures for unlisted activities following its receipt of notice on two separate occasions in 2008 and 2009. The College District attempts to avoid this definitive waiver and to resuscitate the possibility of review of RCEC for CZMA consistency by contending now that the project includes, as "associated facilities," upgrades to two transmission lines that traverse the coastal zone but that are owned by a third party

[26] *See, e.g.*, Resp't ER040, an email from BCDC to the California Energy Commission confirming that RCEC is not within BCDC's jurisdiction (i.e., RCEC is not in the coastal zone).

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unrelated to Russell City. In short, the College District contends that, even though RCEC is *not* situated in the coastal zone and even though these two transmission lines upgrade projects are owned by another entity, their existence subjects RCEC to CZMA consistency review under the automatic review provisions applicable to activities that *are* located in the coastal zone. This argument fails because the two transmission lines projects are not "associated facilities" of RCEC within the meaning of the CZMA and applicable regulations.

Specifically, a company unrelated to Russell City – Pacific Gas & Electric Company ("PG&E") – has proposed to reconductor (*i.e.*, to upgrade and increase the transmission capacity of) its 230-kilovolt (kV) Eastshore-San Mateo transmission line and its 115-kV Eastshore-Dumbarton transmission line. Both of PG&E's transmission lines are situated in part within the portion of the coastal zone that is in BCDC's jurisdiction, and both carry power in the San Francisco Bay Area. The College District argues that these transmission lines are "associated facilities" of RCEC. It further argues that because *PG&E's* reconductoring projects (*i.e.*, PG&E's transmission lines) lie within the coastal zone, the entire "project" (including the RCEC, even though RCEC is owned by an entirely separate entity) is subject to federal consistency review. Pet. Br. 72-73. As explained herein, the College District frames the inquiry incorrectly and regardless is wrong in its legal assertion.

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A project applicant must provide a certification that its proposed activity complies with and will be conducted in a manner consistent with the State's CMP. 15 C.F.R. § 930.57(a). The applicant also must furnish to the State all necessary data and information needed to evaluate the proposed activity, including "a detailed description of the proposed activity, its associated facilities, the coastal effects, and any other information relied upon by the applicant to make its certification." *Id.* § 930.58(a)(1)(ii). Project proponents must thus consider whether the federal action and its associated facilities will affect any coastal use or resource. *Id.* § 930.11(d). Under these requirements, a permit applicant for a proposed activity located primarily *outside* the coastal zone must submit a consistency certification to the State if facilities associated with that activity are located *within* the coastal zone. *See* Decision and Findings by the Secretary of Commerce in the Consistency Appeal of the Foothill/Eastern Transportation Corridor Agency at 10 (Dec. 18, 2008).[27]

"Associated facilities" are "all proposed facilities which are specifically designed, located, constructed, operated, adapted, or otherwise used, *in full or in major part*, to meet the needs of a federal action … and without which the federal action, as proposed, could not be conducted." 15 C.F.R. § 930.11(d) (emphasis

[27] *Available at* http://www.ogc.doc.gov/czma.htm (select Decisions, then Decisions of the Secretary) (last visited Sep. 9, 2011).

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added). NOAA has explained this definition to mean that "associated facilities are *indispensible parts* of the proposed federal action." 65 Fed. Reg. 77,124, 77,129 (Dec. 8, 2000) (emphasis added). They are *not*, however, separate facilities that are merely *related* to the proposed federal action. Since associated facilities are *indispensible parts* of a federal action, permit applicants are able to address potential concerns about such facilities raised by the State during consistency review. If, as the College District appears to contend, associated facilities include all facilities that are *related* to the federal action, even those that are separately owned, permit applicants could unfairly become subject to conditions imposed on activities that are "related" but outside the applicant's control. So here: Russell City, the owner and operator of RCEC, has no control over the transmission lines owned and operated by PG&E. Thus, it would be beyond Russell City's ability to address any conditions imposed by BCDC on the transmission lines, if such transmission lines were considered "associated facilities" of RCEC. To the extent that the College District contends the existing transmission lines are associated facilities and should have been considered in determining whether a CZMA consistency determination was required for RCEC, that argument is without merit.

Indeed, in asking whether the *existing* transmission lines are associated facilities of RCEC, the College District asks the wrong question. As established *supra* at 62-64, BCDC has waived its right to review RCEC for consistency

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because it twice received actual notice of the permit application but did not avail itself of its opportunity to review. In fact, the only federal actions still *potentially* subject to BCDC's review relate to PG&E's *planned* reconductoring projects – that is, PG&E's permit applications to the Corps under section 10 of the Rivers and Harbors Act to perform the reconductoring on the two transmission lines.[28] Given this, the *proper* question is whether RCEC is an associated facility of the transmission lines and thus must be considered by the BCDC in determining whether the reconductoring project complies with the CZMA. However, even if analyzed as the College District suggests, the answer remains the same: RCEC and the transmission lines are not associated facilities.

RCEC is not being constructed to meet the needs of the transmission lines, and neither is RCEC an indispensable part of the federal action to permit the reconductoring of the transmission lines, nor vice versa. The separate nature of each action is established by several factors. First, PG&E's reconductoring projects serve purposes beyond those related to the operation of RCEC. PG&E's two transmission lines are existing electricity corridors in the San Francisco Bay Area, carrying electricity from numerous sources, not just from the planned RCEC. PG&E's reconductoring projects will upgrade the transmission lines to improve the

[28] PG&E's reconductoring projects involve work within the footprint of regulated tidal waters and are thus subject to the Corps' jurisdiction under the Rivers and Harbors Act.

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overall system, both accommodating the power generated by RCEC and alleviating existing overloads. Resp't ER011-020.

Second, Russell City's RCEC project and PG&E's reconductoring projects are subject to *separate and independent* licensing and permitting processes. At the state level, RCEC was licensed by the California Energy Commission and permitted by the Air District for required state and nonattainment NSR permits, and federally by EPA (through its delegate, the Air District) for its required federal PSD permit under the CAA. PG&E's reconductoring projects, on the other hand, are subject to state regulation by the California Public Utilities Commission, and are subject to federal regulation by the Corps under the Rivers and Harbors Act. Unlike Russell City's RCEC project, PG&E's transmission lines are *not* subject to CAA permitting: EPA has no authority or jurisdiction under the CAA over PG&E's transmission lines, and therefore no authority to impose any conditions on the reconductoring through an air permit. Further, as explained *infra* at 73-81, the two actions were subject to separate and independent consultations under section 7 of the ESA, since EPA and the Corps were only authorized to impose mitigation measures associated with the activities subject to their respective jurisdictions.

Third, RCEC and the transmission lines are separately and independently owned and controlled. RCEC is owned and controlled by Russell City. The transmission lines are owned and operated by PG&E. State coastal management

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review of a federal action and its associated facilities presupposes that the applicant controls *both*, and that the proponent has the ability to ensure that the entire action is consistent with the State's CMP. Here, Russell City has no authority or control over PG&E's transmission lines, and it would be unable to satisfy any conditions that may emerge from BCDC review of the reconductoring proposal. Simply put, Russell City would be powerless to fulfill mitigation measures imposed on PG&E's project as a condition of approval of Russell City's PSD permit for its separate project.

In an analogous situation, the Secretary of Commerce considered a consistency appeal involving a proposal to dredge a water intake canal that serviced a nuclear power station. *Decision and Findings of the Sec. of Commerce in the Consistency Appeal of Long Island Lighting Co. from an Objection by the New York Dep't of State* ("*Long Island Lighting*") (Feb. 26, 1988).[29] In *Long Island Lighting*, New York argued that the scope of its consistency review included both the dredging project and the nuclear power station itself, contending that the power station was an associated facility of the canal. *Id.* at 7. The Secretary rejected New York's characterization of the power plant as an associated facility, holding that a common sense reading of the definition "compels the conclusion

[29] *Available at* http://www.ogc.doc.gov/czma.htm (select Decisions, then Decisions of the Secretary) (last visited Sep. 9, 2011).

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that an associated facility occupies a role subordinate to the Federal action." *Id.* at 8. Applying the Secretary's reasoning to this matter, RCEC is clearly not subordinate to the reconductoring of the transmission lines, nor is it an indispensable part of the transmission lines where PG&E has stated in applications for federal permits that the reconductoring is necessary in part to address *existing* system capacity needs. Accordingly, given the separate nature of the two actions and *Long Island Lighting*, RCEC cannot be considered an associated facility of the transmission lines for purposes of determining the scope of BCDC's review.

Even if the proper inquiry is, as the College District contends, whether the transmission lines are associated facilities of RCEC, the answer is still no. The College District bears the burden of establishing that EPA acted arbitrarily or capriciously. The College District, however, merely cites to the definition of associated facilities and makes one conclusory statement that PG&E's reconductoring projects fit within the definition of an "associated facility" of RCEC because the "entire purpose of RCEC is to generate electricity… and without those transmission lines, RCEC's turbines cannot operate." Pet. Br. 72. The reconductoring of the transmission lines is not necessary for RCEC to operate. RCEC generates electricity and sells it to PG&E; what PG&E does with the power is beyond the control or influence of Russell City. Moreover, the College District's argument encompasses too much. Under its theory of "associated

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facilities," *any* transmission line *anywhere* on a transmission grid would be an associated facility of *any* power plant located *anywhere else* on that grid, because (as the College District says) the purpose of the plant is to generate electricity, and it cannot do so without the grid to transmit that electricity. Under such a capacious definition of "associated facility," it would become virtually impossible to approve any project, because some portion of the grid somewhere might raise CZMA issues. For both these reasons, the College District's argument must fail.

Significantly, as discussed *supra* at 34, BCDC itself has concluded that it does not have jurisdiction to review Russell City's PSD permit for federal consistency, that the reconductoring projects do not provide it jurisdiction to do so, and that BCDC considers the matter closed. Ex. 1. It is therefore highly speculative that BCDC, a third party, would provide the relief sought by the College District if this Court were to issue a favorable decision.

In sum, because BCDC's opportunity to review RCEC and its PSD permit for consistency has been waived, the only proper inquiry is whether RCEC is an associated facility of the transmission lines. For all of the foregoing reasons, RCEC is not an associated facility of the transmission lines, nor are the transmission lines associated facilities of RCEC. Accordingly, the RCEC project is entirely outside the coastal zone, and EPA fully satisfied the applicable requirements under the CZMA by providing notice to BCDC, which then waived

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review. Lastly, BCDC itself has concluded that it does not have jurisdiction to review Russell City's PSD permit for federal consistency for the same reasons explained here. The College District has failed to establish *any* violation of the CZMA in this case, and if not dismissed for a lack of standing due to the College District's failure to establish an injury-in-fact or redressability in its CZMA claims, the petition must be denied on the merits.

V. EPA PROPERLY DETERMINED THE SCOPE OF ITS CONSULTATION UNDER SECTION 7 OF THE ENDANGERED SPECIES ACT

The College District alleges that EPA prejudicially "split" the RCEC project into two by not including PG&E's reconductoring projects as part of the RCEC project, and that as a result EPA's Section 7 consultation with FWS under the ESA was flawed. The College District contends that, as a consequence, the PSD permit must be remanded to EPA to allow a wholly new consultation to proceed.

Again, this argument is without merit. EPA's determination of the scope of its federal CAA permitting action, and thus of the project subject to ESA consultation, was entirely reasonable and appropriate. EPA considered all the relevant factors and concluded that PG&E's reconductoring projects were not within the scope of its own ESA consultation obligations because the Corps, not EPA, has regulatory oversight of PG&E's activities and had separately commenced formal consultation with FWS about that reconductoring. In any event, the

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College District's own brief demonstrates that the Court can grant no relief for the harm it alleges, as all of the ESA analyses it seeks have already been conducted. In sum, then, the College District's claim is moot.

The ESA, 16 U.S.C. §§ 1531-99, was enacted in 1973 "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species."[30] 16 U.S.C. § 1531(b).

Section 7(a)(2) of the ESA requires each federal agency, "in consultation with" FWS, to "insure that any action authorized, funded, or carried out" by the agency "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat of such species. *Id.* § 1536(a)(2). Through formal rulemaking, FWS has defined the obligation to consult under Section 7 to apply "to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. To meet this requirement, the federal agency proposing an action (the "action agency") evaluates its action to determine whether it may affect a listed species or the designated critical habitat of a listed species. *Id.* § 402.14. If

[30] The Secretary of the Interior has responsibility for the administration of the ESA for the species in question in this case, and administers the ESA through the Fish and Wildlife Service. 16 U.S.C. § 1532(15).

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so, the agency must initiate consultation – formal or informal – with FWS. *Id.* §§ 402.13, 402.14.

Informal consultation is a "process that includes all discussions, correspondence, etc., between [FWS] and the Federal agency or the designated non-Federal representative prior to formal consultation, if required." *Id.* § 402.02. Informal consultation allows FWS to assist the action agency in determining whether an action will likely adversely affect a listed species. If an action agency determines, with written concurrence of FWS, that the action "is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary." *Id.* § 402.13(a); *see also Ground Zero Ctr. for Non-Violent Action v. Dep't of Navy*, 383 F.3d 1082, 1091 (9th Cir. 2004).

If the action agency determines that the proposed action *may* affect a listed species, formal consultation is required. *Id.* § 402.14(a). "Formal consultation" is a process between FWS and the action agency that commences with the agency's written request for consultation and concludes with FWS's issuance of a biological opinion. *Id.* § 402.02; § 402.14(l). A biological opinion ("BiOp") assesses the likelihood that the proposed action will jeopardize the continued existence of the listed species and/or result in the destruction or adverse modification of designated

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critical habitat. *See id.* § 402.14(g) (discussing FWS' responsibilities during formal consultation).

The informal and formal consultation procedures allow an action agency to avail itself of "the expertise of [FWS] in assessing the impact of the proposed project [on protected species] and the feasibility of adopting reasonable alternatives." *Lone Rock Timber Co. v. United States Dep't of Interior*, 842 F. Supp. 433, 440 (D. Or. 1994). The action agency (here, EPA) disregards the recommendations of the consulting agency at its own peril. *Bennett v. Spear*, 520 U.S. 154, 169-70 (1997). As a threshold matter, however, it is the action agency that is ultimately responsible for determining the need for consultation, and how to proceed with its proposed action to ensure compliance with its obligations under Section 7, 16 U.S.C. § 1536(a)(2). 50 C.F.R. § 402.15; *see Pyramid Lake*, 898 F.2d at 1415.

In June 2007, EPA initiated informal consultation with FWS regarding the proposed PSD permit for RCEC. Resp't ER027. The next month, FWS concurred in writing with EPA's determination that there would be no likely adverse effect on any listed species. Resp't ER026. After the initial PSD permit was remanded by the EAB to the Air District due to the Air District's failure to comply with notice-and-comment requirements, EPA assessed whether an issue raised during the public comment period – nitrogen deposition – required re-initiation of

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consultation. EPA concluded in March 2009 that re-initiation of consultation was not necessary because an additional analysis of nitrogen deposition demonstrated that the rates of deposition were sufficiently low that they resulted in no change to the prior determination that RCEC was not likely to adversely affect any listed species or critical habitat. Resp't ER021. The next month, FWS specifically inquired in response to the additional information as to whether PG&E's reconductoring projects should be included in the informal consultation for the RCEC PSD permit. *See* VIII ER 1948-49. In May 2009, EPA responded and explained that while the reconductoring projects *may* be indirectly related to RCEC, biological opinions previously issued to the Corps and to the San Francisco Bay National Wildlife Refuge (the Salt Pond BiOp) had addressed the possible effects of the reconductoring projects on listed species and designated habitats. *Id.*, *see also* IX ER 2274-76. FWS subsequently informed EPA that it did not believe the Salt Pond BiOp addressed PG&E's reconductoring projects. *See* Supplemental ER ("SER") 11-12.

In December 2009, the Corps initiated its own ESA Section 7 consultation with FWS after receiving permit applications from PG&E for these specific reconductoring projects pursuant to Section 10 of the Rivers and Harbors Act of 1899. SER 13-14, 15-16. After receiving copies of PG&E's permit applications and of the Corps' requests to initiate ESA consultation with FWS, EPA wrote to

FWS on January 15, 2010, and explained its conclusions regarding the scope of EPA's PSD permit and ESA consultation thereon:

> The Army Corps is the federal agency with regulatory control over the PG&E reconductoring projects, and any effect on endangered species resulting from the reconductoring projects will be evaluated in the Section 7 consultation for the Army Corps authorization. EPA lacks discretionary authority to require PG&E to implement any needed conservation measures. PG&E is not seeking any permit or authorization from EPA for these reconductoring projects, and PG&E could proceed with the reconductoring projects even if no PSD air permit were issued to [Russell City]. For all of the foregoing reasons, EPA has therefore determined that the reconductoring projects do not need to be considered by FWS in this consultation with EPA.

SER 12. In a letter to EPA sent ten days later, FWS wrote that it had reviewed information related to deposition of nitrogen emissions, noise levels and lighting, and had "determined that the proposed action is not likely to adversely affect any federally listed or proposed species or their critical habitats." VII ER 1840. This written concurrence demonstrated FWS' agreement with EPA's determination regarding the scope and effects of the RCEC PSD permit, and affirmed the initial written concurrence from July 2007. *Id.*

As outlined above, EPA, as the action agency, is required to evaluate its proposed action and determine whether it may affect listed species, and pursuant to 50 C.F.R. § 402.14, provide a description of the action and its effects on listed species. To successfully conclude informal consultation, EPA was required to obtain FWS' written concurrence in EPA's determination that the RCEC project

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was not likely to adversely affect a listed species. Here, EPA did precisely that. If FWS had disagreed with EPA's finding of no likely adverse effect, it could have declined to concur with EPA's finding, which would have then lead to formal consultation. Indeed, FWS had previously expressed disagreement with EPA's initial understanding that the effects of PG&E's reconductoring projects were analyzed in the Salt Pond BiOp. The record demonstrates that EPA, having considered the relevant factors, ultimately and properly determined that PG&E's reconductoring projects were not within the scope of EPA's PSD permitting action for purposes of ESA consultation. SER 11-12. FWS, in turn, concurred with EPA's analysis and determination that the RCEC PSD permit would have no likely adverse effect on listed species or designated critical habitat. Similar to the analysis above under the CZMA, since the reconductoring projects were separate federal actions subject to their own Section 7 consultation, EPA did not act arbitrarily or capriciously in concluding that PG&E's reconductoring projects were not within the scope of EPA's federal action, *i.e.*, the PSD permit.

Further, under the ESA regulatory definition, an agency need not consider the effects of a wholly separate future federal action, because that future activity will be subject to its own Section 7 consultation. *See* 50 C.F.R. § 402.02 (definition of "cumulative effects"); *see also* 51 Fed. Reg. 19,926, 19,933 (June 3, 1986) ("Since all future Federal actions will at some point be subject to the section

7 consultation process … their effects on a particular species will be considered at that time and will not be included in the cumulative effects analysis.”). That is precisely the situation here. The College District contends EPA’s Section 7 consultation was insufficient because it did not include PG&E’s reconductoring projects, yet the permitting of PG&E’s reconductoring projects are separate future Federal actions subject to the Corps’ separate regulatory authority and a separate Section 7 consultation on the Corps’ actions. As such, EPA was not required to consider PG&E’s reconductoring projects in its Section 7 consultation on the RCEC PSD permit.

RCEC and PG&E’s reconductoring projects are also not “interrelated actions” or “interdependent actions.”[31] As a threshold matter, the College District raised this issue for the first time in its motion to supplement the record, filed two months after its opening brief. Doc. 64 at 13. As such, the Court should decline to review this issue as improperly raised. *See Knight*, 131 F.3d at 817. This argument is further without merit. As explained above, separate ownership, purposes of the projects and regulatory requirements establish that RCEC and the reconductoring projects are separate actions, and not two parts of a larger action. EPA’s PSD permit for RCEC is not the “but for” cause of PG&E’s reconductoring

[31] “Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.” 50 C.F.R. § 402.02.

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projects. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (9th Cir. 1987) (noting "but for" causation is the test for interrelatedness or interdependency); *see also Medina County Envtl. Action Assoc. v. Surface Transp. Bd.*, 602 F.3d 687, 700-01 (5th Cir. 2010). PG&E's reconductoring projects have independent utility apart from the proposed RCEC power plant, as the reconductoring will improve PG&E's overall transmission system and alleviate existing overloads. Resp't ER011-020. Additionally, as EPA explained to FWS, PG&E could proceed with its reconductoring projects regardless of whether EPA issued the PSD permit to Russell City. SER 12.

Because the Corps is the federal agency with regulatory control over PG&E's activities and the authority to approve PG&E's applications for Department of the Army permits, the Corps was the proper agency to engage in Section 7 consultation regarding the reconductoring projects. EPA was not required to include the reconductoring projects in its Section 7 consultation on the PSD permit as cumulative effects, or as interdependent or interrelated actions. The College District has failed to show that EPA's decision was arbitrary or capricious; to the contrary, as is clear from the administrative record, EPA's decision was rational and easily satisfies the deferential standard of review.[32]

[32] The College District cites the definition of "site" in EPA's regulations implementing the PSD program and makes the conclusory contention that the

(footnote continued…)

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In addition, it is significant here that irrespective of the scope of the ESA consultation on EPA's PSD permit, all of the activities at issue, including PG&E's reconductoring projects, have been subjected to full ESA Section 7 compliance. The College District seeks as relief an order that the PSD permit be remanded so that "FWS may conduct a consultation of the entire 'site' and 'associated facilities.'" Pet. Br. 77. As the College District states in its brief, FWS issued two BiOps in the course of the Corps' formal consultation on PG&E's reconductoring projects.[33] The BiOps thoroughly examined PG&E's proposed reconductoring projects and determined that those projects may result in incidental take of two species.[34] As such, everything the College District seeks to have analyzed by FWS has, in fact, already been analyzed. FWS concurred in EPA's finding of no likely

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definition clearly shows the transmission lines to be reconductored are part of the same "site" as RCEC. Pet. Br. 71-72. This contention is meritless. Transmission lines in the regional electric grid, which are not adjacent to the stationary source and are not under common control and ownership, are not part of the "site" for PSD purposes.

[33] These two BiOps are the subject of the College District's motion to supplement the administrative record. Doc. 64 ("Mot."). EPA opposed and further moved to strike all but the last section of the College District's motion as an improper supplemental merits brief. Doc. 67. As of this filing, EPA's motion to strike is pending, and we therefore incorporate our response to the College District's late-raised merits arguments herein. The College District's petition does not seek review of the BiOps themselves, so challenges to the sufficiency of the BiOps are beyond the scope of this proceeding.

[34] Contrary to the College District's assertions (Mot. 10), neither BiOp found that PG&E's reconductoring projects would jeopardize the continued existence of a listed species.

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adverse impact from RCEC. FWS found limited potential incidental take resulting from PG&E's reconductoring projects, but approved the reconductoring contingent on the Corps requiring, through its permits, PG&E to take reasonable and prudent measures to minimize the impact of any incidental take. The College District has not identified *any* basis – and there is none – to suggest that a new consultation analyzing the combined effects of the separate and independent RCEC project and PG&E's reconductoring projects would result in different findings than those contained in the analyses already performed.[35] The College District's request for relief is therefore moot, because the relief they request has already been provided. *See Northwest Envtl. Defense Ctr. v. Gordon*, 849 F.2d 1241, 1244-45 (9th Cir. 1988).

[35] The College District asserts that RCEC's emissions of mercury were not considered in the ESA analysis of the reconductoring projects. Mot. 14-15. The record excerpts cited by the College District make plain that RCEC's natural gas-fired turbines will not emit *any* mercury, and the cooling tower will emit at most 0.00186 pounds of mercury per year, an infinitesimal amount. Mot. Att. D, III ER 724, 854-55. Further, the College District acknowledges that FWS analyzed the effects of lighting and noise from RCEC on listed species (Mot. 6), but offers no reasoned argument why EPA's conclusion and FWS's concurrence that there would be no likely adverse effect on any listed species from RCEC is arbitrary or capricious. The College District instead merely quotes at length excerpts from a California Energy Commission analysis of possible noise and lighting impacts (Mot. 15-18) – an analysis FWS itself specifically reviewed in formulating its concurrence with EPA's determination. VII ER 1838. The College District has failed to meet its burden of establishing EPA's Section 7 consultation was arbitrary or capricious.

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EPA's determination of the scope and effects of its action – that the PSD permitting did not include PG&E's reconductoring activities[36] – and thus of its informal consultation with FWS, is reasonable and entitled to deference from the Court. Under the APA standard of review, the Court's role is "not to make its own judgment" on the matters considered and resolved by the agencies, as the APA simply "does not allow the court to overturn an agency decision because it disagrees with the decision or with the agency's conclusions about environmental impacts." *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010). This Court's "task is to ensure that the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Northwest Ecosystem Alliance v. FWS*, 475 F.3d 1136, 1140 (9th Cir. 2007) (citation omitted). EPA did so here. Applying its technical expertise, EPA determined that RCEC was not likely to adversely affect any listed species; it considered all relevant factors and determined that PG&E's reconductoring activities were not within the scope of EPA's PSD permitting action; and FWS provided its written concurrence with EPA's finding of no likely adverse effect. Further, without regard to the scope of EPA's ESA consultation on the PSD

[36] The College District misconstrues EPA's past positions by asserting that EPA has previously agreed that the projects are interrelated or interdependent. Mot. at 13. This is incorrect. EPA, early in the permitting process post-remand, merely stated that the reconductoring projects *may* be indirectly related. IX ER 2276.

permit, all activities at issue in the College District's petition, including PG&E's reconductoring projects, have in fact undergone ESA Section 7 review. Thus, the College District's request for relief is moot.

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CONCLUSION

For the foregoing reasons, the petition for review should be dismissed for lack of jurisdiction or denied for lack of merit.

Respectfully submitted,

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Dated: September 30, 2011

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STATEMENT OF RELATED CASES

EPA is unaware of any cases pending in this Court related to this proceeding.

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CERTIFICATE OF COMPLIANCE

I certify that this brief is accompanied by a motion for leave to file an oversized brief pursuant to Circuit Rule 32-2 and contains 19,604 words in a proportionally spaced typeface, Times New Roman, in 14-point font, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: September 30, 2011

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