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ENVIRONMENTAL APPEALS BOARD

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

In the Matter Of:
Gateway Generating Station

PSD Appeal No. 09-02

Motion to Intervene of Californians for
Renewable Energy, Inc. (CARE) and Robert
Sarvey

CALifornians for Renewable Energy, Inc. (CARE) and Robert Sarvey respectfully request to intervene in the above captioned proceeding.

On the issue of Rob Simpson's standing to bring the Appeal PSD 09-02, Mr. Simpson is a member of CARE in good standing so any standing CARE would have should apply to Mr. Simpson as a CARE member.

CARE has an interest in the above captioned proceeding. In 2001 CARE filed comments on the preliminary determine of compliance ("PDOC") for Mirant Delta, LLC, Contra Costa Unit 8 power plant, Bay Area Air Quality Management District ("BAAQMD") Application# 1000 that was being processed by the California Energy Commission ("CEC") as part of its Application for Certification ("AFC") at that time under docket 00-AFC-1 to which CARE was an Intervenor.¹ It is clear to CARE however that the public notice didn't comport with the requirements of the Clean Air Act in the notice provisions of 40 C.F.R. § 124.10 and while BAAQMD did reply to CARE's comments the District failed to ever notify CARE of whether or not the final PSD permit was issued. Construction of either a new or significantly modified facility that requires a PSD permit may not begin until a final permit has been issued by the Regional Administrator (or delegated state agency) following EAB review, since "a PSD permit is

¹ See <http://www.energy.ca.gov/sitingcases/gateway/documents/index.html>

a pre-construction permit * * * [issued to] a new facility” (In re *Kawaihae Cogeneration Project*, 7 E.A.D. 107, 110 n.5 (EAB 1997)). CARE therefore supports the EAB's review of the permit.

This Motion also constitutes a Complaint to Office of the Administrator USEPA under 42 USC § 7604 for allowing PG&E to operate the facility without a final PSD Permit. This is the provision entitling CARE to commence a civil action against the BAAQMD and US EPA Region 9.² CARE intends to do so after the expiration of the 60

² 42 USC § 7604. Citizen suits

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607 (b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607 (b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation

(i) to the Administrator,

(ii) to the State in which the violation occurs, and

(iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412 (j)(3)(A) or (f)(4) of this title or an order issued by the Administrator pursuant to section 7413 (a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; service of complaint; consent judgment

(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In any action under this section, the Administrator, if not a party, may intervene as a matter of right at any time in the proceeding. A judgment in an action under this section to which the United States is not a party shall not, however, have any binding effect upon the United States.

(3) Whenever any action is brought under this section the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and on the Administrator. No consent judgment shall be entered in an action brought under this section in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator during which time the Government may submit its comments on the proposed consent judgment to the court and parties or may intervene as a matter of right.

(d) Award of costs; security

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nonrestriction of other rights

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,

against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 7418 of this title.

(f) "Emission standard or limitation under this chapter" defined

day waiting period.

When the current project owner, Pacific Gas and Electric Company ("PG&E") filed to amend its authority to construct and draft PSD permit in 2008, BAAQMD Application# 17182, CARE's treasurer Robert Sarvey filed timely comments on the amendment in July 2008 (attached) and therefore Mr. Sarvey has an individual interest in this matter.³ The amended ATC changed the permit conditions to allow increased

For purposes of this section, the term "emission standard or limitation under this chapter" means—

- (1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,
 - (2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or [1]
 - (3) any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment), [2] section 7419 of this title (relating to primary nonferrous smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, section 7545 (e) and (f) of this title (relating to fuels and fuel additives), section 7491 of this title (relating to visibility protection), any condition or requirement under subchapter VI of this chapter (relating to ozone protection), or any requirement under section 7411 or 7412 of this title (without regard to whether such requirement is expressed as an emission standard or otherwise); [3] or
 - (4) any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations [4] which is in effect under this chapter (including a requirement applicable by reason of section 7418 of this title) or under an applicable implementation plan.
- (g) Penalty fund

(1) Penalties received under subsection (a) of this section shall be deposited in a special fund in the United States Treasury for licensing and other services. Amounts in such fund are authorized to be appropriated and shall remain available until expended, for use by the Administrator to finance air compliance and enforcement activities. The Administrator shall annually report to the Congress about the sums deposited into the fund, the sources thereof, and the actual and proposed uses thereof.

(2) Notwithstanding paragraph (1) the court in any action under this subsection to apply civil penalties shall have discretion to order that such civil penalties, in lieu of being deposited in the fund referred to in paragraph (1), be used in beneficial mitigation projects which are consistent with this chapter and enhance the public health or the environment. The court shall obtain the view of the Administrator in exercising such discretion and selecting any such projects. The amount of any such payment in any such action shall not exceed \$100,000.

³The BAAQMD has stopped listing any CAA permits on their website from before 2009 so as preclude public access to Permit information so as to preclude meaningful and informed public participation and deny the public access to an open decision making process as is required by the CAA and the federal and state constitutions. The notice for the amended permit provides an

emissions of CO and purported to lower the level of other criteria pollutant emissions to their current BACT levels. The amendment was withdrawn by the Applicant, PG&E.

Respectfully submitted,



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Verification

I am an officer of the Intervening Corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except matters, which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 16, 2009, at San Francisco, California.



Lynne Brown Vice-President
CALifornians for Renewable Energy, Inc.
(CARE)

example of this unlawful BAAQMD policy since it does not work anymore and has not been replaced.

http://www.baaqmd.gov/pmt/public_notices/2008/17182/B8143_nsr_17182_pn_060408.pdf

Certificate of copy sent electronically and by US Mail

I hereby certify that I have this day served the foregoing document "*Motion to Intervene of Californians for Renewable Energy, Inc. (CARE) and Robert Sarvey*" under PSD Appeal No. 09-02. Each person designated on the official service list, has been provided a copy via US Mail and e-mail where available, to all persons on the attached service list on July 16, 2009 for the proceedings, PSD Appeal No. 09-02.



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