BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC

In the matter of Russell City Energy Center	))))	Appeal No. 08-01

OPPOSITION TO REQUEST FOR SUMMARY DISMISSAL

Introduction

I reside in the city of Hayward where I am raising my 3 children. Furthermore, I am on the City of Hayward's Keep Hayward Clean and Green task force (Simpson Decl. ¶) and serve as a board member for the Hayward Area Planning Association. decl. Lewis My home has been designated to be the maximum Carbon Monoxide impact point for emissions from the Russell City Energy Center ("RCEC"). Because the Bay Area Air Quality Management District ("the District") failed to comply with the notice requirements of 40 C.F.R. Part 124 and the District's own rules governing notice, I was precluded from commenting on the draft PSD permit issued to RCEC. Without having been provided proper notice, I nevertheless was able to appeal the issuance of the final PDS permit in a timely manner. Therefore, this Board should not dismiss my appeal. Instead, the Board should rule that the District's deficient notice of both the draft and final PSD permits resulted in prejudicial and harmful error and the District should be required to reopen the comment period for the permit. While the District should be in charge of making the administrative record they did not include copies of any notices to the EAB reference was made 28 times in the response but no notices. Notices dated April 2, 2007, November 20, 2001 and November 30, 2007(Exhibit 1). In the event that the EAB does not immediately remand this upon review of the notices, we offer the following.

Standard of Review

The applicable standard of review by the Board in matters concerning procedural error by an agency is whether the responsible agency's action was arbitrary and capricious. My argument that the notice of the draft PSD permit was inadequate invokes this arbitrary and capricious standard of review. *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006); *see also* "[A] decision made without adequate notice and comment is arbitrary or an abuse of discretion." *Natural Res. Def. Council v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002) (*citing* 5 U.S.C. § 706(2)(A))(holding that EPA failed to provide adequate notice and opportunity for comment prior to issuing final NPDES permit). Significantly, the adequacy of the agency's notice and comment procedure is determined without deferring to an agency's own opinion of the opportunities it provided. *Kern County Farm Bureau*, 450 F.3d at 1076; *Natural Res. Def. Council*, 279 F.3d at 1186.

I. The District's Failure to Provide Notice of the Draft Permit Is a Violation of Federal Notice Requirements and Prejudicially Harmed Me Because It Prevented My Participation in the Permitting Process

a. The District failed to comply with the requirements of 40 C.F.R. 124.10.

I have placed myself in a position to be made aware of any notice issued relating to RCEC due to my extensive involvement in organizations that meet the standards outlined in 40 C.F.R. 124.10 as meriting notice. Had the District complied with the requirements of Part 124, I would have received notice. It is disingenuous of the District to violate public notice requirements and then argue my appeal is precluded as a result.

Pursuant to the Re-Delegation Agreement between the Environmental Protection Agency ("EPA") and the District, the District must comply with the notice requirements of both its own Regulation 2, Rule 2, as well the requirements of 40 CFR 124.[1] Section 124.10, which governs the public notice of permit actions and public comment period, requires that public notice be given when a draft permit has been prepared. Furthermore section 124.10 details how the notice

[1] Section III, ¶ 2 of the Re-Delegation Agreement states: "The District shall issue PSD permits under this Agreement in accordance with the PSD elements of the District's Regulation 2, Rule 2 . . . . .Elements of Regulation 2, Rule 2 relating to state law requirements inconsistent with . . . 40 CFR 52.21 and 124. . . shall not apply to PSD permits under this Agreement." The requirements for publication are not inconsistent and therefore Regulation 2, Rule 2 applies to the PSD permit.

is to be provided, to whom it will be provided and how the District will generate the list of people to inform. The section states in relevant part:

> "(c) Methods. Public notice of activities . . . shall be given by the following methods: (1) By mailing a copy of a notice to the following persons;
> (vii) For PSD permits only, affected State and local air pollution control agencies, the chief executives of the city and county where the major stationary source of major modification would be located, any comprehensive regional land use planning agency. . .
> .
> (ix) Persons on a mailing list developed by:
> (B) Soliciting persons for "area lists" from participants in past permit proceedings in that area; and (C) Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press . . ." (40 CFR 124.10).

I serve on the board of directors for the Hayward Area Planning Association ("HAPA") and have been appointed to act on its behalf in these proceedings. (Simpson Decl. ¶) It is a comprehensive regional land use planning agency serving the Hayward Area. (Simpson Decl. ¶) Consequently, HAPA should have received notice pursuant to 40 C.F.R. 124.10(vii). I have participated in CEC hearings through our HAPA attorney Jewell Hargleroad.

My environmental efforts have also earned me an appointment by the Mayor and City council of Hayward to the City of Hayward's Keep Hayward Clean and Green task force where I serve as the Chairman of the Sustainability Committee. We passed a resolution against the facility. Had the City of Hayward been informed of the District's actions the Committee would have likely commented during the public comment period. The District did not even provide notice of the draft permit to the Board of Supervisors of Alameda County, Decl. of Gail Steele in violation of 40 C.F.R. 124.10(c)(1)(vii). Furthermore, many people and groups participated in the 2002 permitting proceeding for RCEC before the District, including Communities for a Better Environment. The District, however, did not solicit persons for "area lists" from these past permit proceedings in the area. The District did not even notice interested parties from the original application like Communities for a Better Environment (decl. Shana Lazerow) and parties clearly interested in Hayward proceedings like Mike Toth as identified by Sandy Crockett

on May 8, 2007 (Exhibit 2). It is notable that Mr. Crockets actions demonstrated in the above exhibit are not an attempt at community outreach. They are more akin to counterintelligence.

Decl. Toth

The District received 605 public comments regarding Calpine's project and The Eastshore Energy Center. They placed them all in the Eastshore file. They responded to them on 10/24/07 one week before the permitting action, about five months after the comments were made, referencing Russell City Energy Center 5 times in the letter. They gave no notice of the permitting action to occur in one week and offered no opportunities to be on a mailing list. Public comments, district response and emails (Exhibit 3) decl. Decl. Finn, Watters, Chavez, Silva, LePell, Pacheco, Forsyth, Kramer. All commenter's deserve notice of the permitting action. I would like the opportunity to provide a brief on the merits of this letter.

the District created no mailing list and did not notify the public of the opportunity to be put on such a list. The District's disregard for these statutory requirements resulted in harm to myself and the public because we were unaware of the draft permit and any comment period or of the ability to ask for a public hearing.

b. The District cannot satisfy the requirements of Part 124 by providing notice of the draft permit to the CEC and failing to provide evidence that CEC distributed the notice.

Rather than complying with section 124 as the District is required to, the District says that it gave sufficient notice to the public because it sent a notice to the CEC.[2] The District seems to contend that it delegated its authority, for purposes of service of notice at least, to the CEC.

No evidence that the CEC actually provided the Preliminary Determination of Compliance ("PDOC") or Final Determination of Compliance ("FDOC") to any of the interested parties was offered beyond the declaration of Weyman Lee: "The letter to the California Energy Commission also caused a copy of the PDOC/PSD Permit to be mailed to each of the interested parties on the Energy Commission's service list for the Project, *I am informed and believe*, as it is the practice of the staff . . . to mail copies of all written materials." (Lee Decl., ¶ 2) (emphasis

[2] The District was required to give notice to the CEC as an agency pursuant to 40 C.F.R. 124.10 (b)(ii). That section merely identifies agencies requiring notice, it does not indicate that the District's responsibility terminates there.

added). The CEC may not have served anyone. Therefore, the District cannot argue that its distribution to the CEC resulted in distribution to the public.

Furthermore, the notice and PDOC provided to the CEC on April 2, 2007 was not posted for viewing until May 3, 2007. (Exhibit 4) page 4 Arguably, even the CEC was unaware of the comment period because its comments on May 29 were "late comments" according to the District.

Significantly, the County of Alameda filed a petition to reopen the CEC proceedings (Exhibit 5) based largely on the failure of the CEC to provide notice to the County of its action. The District issued the permit prior to the CEC's decision not to reopen the proceedings. Consequently, the County appealed to the Supreme Court of California. Considering the level of controversy surrounding this facility the only explanation for the dearth of public comment on the draft permit is that the notice was defective.

II. The Untimely Notice the District Provided Was Substantially Deficient Because It Did Not Promote Participation.

Significantly, the District failed to include either notice in the 205 pages of its response and declarations. I have provided copies of both the draft and final notices (Exhibit 1).

The numerous deficiencies in these notices were not harmless error. The District is tasked with providing accurate information to the public so that it may participate in a meaningful manner. The regulations governing notice are meant to safeguard this process and ensure open government. The notices provided by the District thwarted this goal.

a. The true identity of the applicant was not revealed in the notice.

Federal regulation 40 C.F.R. 124.10(d)(1)(ii) provides that all public notices must contain the "[n]ame and address of the permittee or permit applicant, and if different, of the facility or activity regulated by the permit. . . ." Importantly, the notice does not identify the applicant as Calpine Corporation and fails to provide Calpine's address. The notice references the "Russell City Energy Center," and gives the address of the proposed facility. It is significant that the regulation explicitly requires that if the name of the facility would not reflect the true identity of who will be in charge of the facility, such identifying information must be provided. It was not

in this case. This omission is harmful because Calpine was in bankruptcy and has incurred multimillion dollar fines by the state Attorney General's office for manipulating the energy market. Other enforcement actions were also not disclosed. Furthermore, the District has compliance violations that are documented in its 2001 Calpine file (Exhibit 6). The District may argue that the applicant is Russell City Energy Center but they sent the permit to Calpine at Calpine's otherwise undisclosed address and the Check to the District for $249,300 was from Calpine (Exhibit 7). These deficiencies resulted in prejudice because there is not sufficient evidence that the public was aware of Calpine's involvement.[3]

b The location of the facility was not adequately identified in the notices.

In bold on the notices is Russell City Energy Center. The "final notice" does not contain an address for the facility. The name Russell City is patently deceptive. There is no city named Russell in the Bay Area. These deficiencies resulted in prejudice because there was not sufficient evidence that the public was aware of the location.

c. The notice of the draft permit was insufficient to inform the public of other procedures by which it could participate in the final permit decision.

The District's notice of the draft permit is deficient under section 124.10. Subsection (d)(1)(v) of this section requires that the notice provide a "brief description of the comment procedures required by §§ 124.11 and 124.12 and the time and place of any hearing that will be held, including a statement of procedures to request a hearing . . . and any other procedures by which the public may participate in the final permit decision." Sections 124.11 and 124.12 detail that in order to request a hearing it must be in writing, barring that, the election to hold a hearing is at the discretion of the District. The notice provides no statement of procedures to request a hearing.

This resulted in harm because those of us who participated in the CEC proceedings were under the impression that they were joint proceedings with the District as part of the coordinated and streamlined permitting process. This extensive oral participation, however, did not register

[3] The District may argue that the applicant is Russell City Energy Center, but they sent the permit to Calpine at Calpine's otherwise undisclosed address, which is different from the project address (Exh. 4). The check for $249,300 to the District was from Calpine (Exh. 5).

as "a significant degree of public interest in" the permit, *See* 40 C.F.R. 124.12(a)(1), simply because we did not know to *write* to the District of our expectation of a public hearing. This blatant disregard of a mandate to provide information to the public is not harmless error.

The federal regulations further mandate that all public notice include the "[n]ame, address and telephone number of a person from whom interested persons may obtain further information. . . ." 40 C.F.R. 124.10(d)(1)(iv). A phone number to obtain further information was not disclosed. This requirement is meant to facilitate the dissemination of information to the community, however, the District's notice eliminates one of the ways a community member without access to the internet may have pursued information regarding the facility.

The notice also violated the District's Regulation 2-2-405 because it did not include the degree of PSD increment consumed. A PSD increment is the measurement of "maximum allowable increase[s] in the concentration of a particular contaminant."[4] This information is important in the notice of the draft permit because it details the degree of impact the facility will have. The CEC completed this analysis in Air Quality table 3, notable is the use of the old Federal pm2.5 standard. Use of the new standard would demonstrate existing non-attainment increased to a level of 121 percent of standard. The proposed Eastshore Energy Center CEC proceedings disclose the current standard and demonstrate a cumulative impact of 175% of standard. Disclosure of this information would be of paramount information to the public and affected agencies. Air Quality tables (exhibit 8)

The notice does not identify a "draft PSD permit"

Finally, the notice of the draft permit merely invited written public comment and did not detail the procedure for a public hearing. The notice failed to mention public hearings and it did not state that District Regulation 2-2-405 would explain to the public in detail the District's procedure for a public hearing. Consequently, the notice was deficient under District Regulation 2-2-405 and the effect of the numerous deficiencies was to prevent meaningful public participation.

[4] David Wooley and Elizabeth Morss, Clean Air Act Handbook, Section 1:119

d. Publication of the notices in the Oakland Tribune violated the District's regulations requiring notice.

The newspaper in which the notice was published – the Oakland Tribune – is not a newspaper of general circulation "within the District." The Oakland Tribune is a newspaper of general circulation "within the City of Oakland" and "within the County of Alameda," as the District acknowledges. It is not a newspaper of general circulation "within the District," which is comprised of seven counties and portions of two additional counties. Cal. Health & Safety Code § 40200.

The District regulations requiring notice in a newspaper of general circulation within the District must be interpreted to mean newspapers of general circulation covering the District. Otherwise, any notice regarding PSD permits, which by their very nature affect regional air quality within the District, would not reach the District residents who may be interested in commenting on the facility.

Tellingly, the notice in the Oakland Tribune was even insufficient to inform Hayward residents as it was not published in the Daily Review, the adjudicated newspaper of general circulation for the city of Hayward where the facility is proposed.

Because the District failed to comply with its own regulations regarding notice of the final permit, the 30-day appeal period has not begun to run.

III. The 30-Day Appeal Period Has Not Begun to Run and, Even if the Newspaper Notice Sufficed as Public Notice, My Appeal to the Board Was Timely Filed on January 3, 2008 Since the Newspaper Notice Ran on December 6, 2007.

The District's attempt to prevent this appeal on the grounds of timeliness must fail because the 30-day period has not begun to run. First, the 30-day period has not begun to run because the notice of the District's action on the final permit was defective. The notice of the final permit was defective because the list of those who are required to receive notice of the final permit is determined by those who comment on the draft permit. 40 C.F.R. § 124.15. As I argued earlier, because the District failed to provide notice of the draft permit – and since the commenters to the draft permit deserve notice of the final permit under 40 C.F.R. § 124.15 – the

District's failure to provide notice of the draft permit fundamentally affected the identity of the persons who should have received notice of the final permit. Thus, the District's notice of the final permit was defective and the appeal period has not yet run. Second, the District's newspaper notice was also defective within the meaning of the District's rule, and therefore the 30 days have not begun to run. Lastly, I filed my appeal within 30 days of December 6, 2007, when the District published the notice of the final permit in the Oakland Tribune. Therefore, if the 30 days did begin to run, I filed my appeal on time by filing before January 7, 2008.

a. The District's notice of the final permit did not comply with section 124.

Under 40 C.F.R. 124.19(a), the 30-day period within which a person may request review of a PSD permit "begins with the service of notice of the Regional Administrator's action unless a later date is specified in that notice." Since the District issued the PSD permit under its delegated authority, the "Regional Administrator" means the chief administrative officer of the delegate agency. 40 C.F.R. 124.41. Notice of the final permit decision must be provided to "the applicant and each person who has submitted written comments or requested notice of the final permit decision." *Id.* § 124.15(a).

Because the District failed to notice the draft permit properly (see my earlier argument), members of the public, including me, were unable to submit comments to the draft. Thus, any attempt on the District's part to give notice of the final permit failed to comply with section 124.

Furthermore, 40 C.F.R. 124.15(a) requires the District to provide a reference to the procedures for appealing the final decision. The purported notice does not contain any such information (defeating the purpose of providing the notice arguably). In addition, my personal attempts to acquire such information from the District were unsuccessful. Counsel for the District assumed an adversarial position and informed me that he could not tell me what the procedures to appeal were, nor did he provide proper citation to the relevant federal regulations in complete contravention of 40 C.F.R. 124.15(a). (Simpson Decl. ¶) The district received over 600 public comments regarding Eastshore and Calpine's project that they only filed in the Eastshore Energy proceeding. They responded to the comments nearly 5 months later on October 24 1 week before the Final permit was issued without noticing them of the action.

Because the District failed to give notice in the manner section 124 requires, the 30-day period has not begun to run.

b. Because I filed my appeal on January 2, 2008, before 30 days from December 6, 2007, when the District published its newspaper notice, my appeal is timely.

As the District acknowledges, the notice in the Oakland Tribune was not published until December 6, 2007. (Resp't Brf. p.7) (In addition, consistent with that date of newspaper publication, the District's website (Exhibit 9) indicates that notice of the permit was provided on December 6, 2007.) Thus, even if the notice in the Tribune sufficed as notice under section 124, any appeal filed before January 7 (January 5 and 6 being weekend days) should be considered timely. Since my appeal was filed on January 2, 2008, my appeal is timely.

c. The District's argument that the 30-day period began to run on November 1 or November 29 does not have any merit.

The District argues that November 1, 2007 is the commencement of the time for my appeal because the District mailed the notice to the applicant on that day. Mailing the notice to the applicant does not constitute public notice under Regulation 2, Rule 2. If the Board were to accept the District's argument, the 30-day period would run regardless of whether anyone other than the applicant received notice. The purpose of the public notice requirement, however, is to let persons other than the applicant know about the permit to enable public participation.

The Board should similarly dismiss any arguments that the 30-day appeal period ran they claim that I received a fax from the District on November 29, 2007. I received no such fax. (See Simpson Decl.)

The District has no one but itself to blame for December 6th being the commencement of the appeal period because it tried to prevent anyone but the applicant from being able to appeal 30 days from the November 1, 2007 service of notice. An appeal period must be a uniform period of time and the District cannot manipulate this uniformity to time people out of their right to appeal.

Newspaper publication does not satisfy the requirements of 40cfr124.10 as it does not serve the USFWS for concurrence with the Endangered Species Act, The San Francisco Bay Conservation and Development Commission For Concurrence with the Coastal Zone Management Act or The Chief executives of the City or County or any state or Federal land managers as would be consistent with the Clean Air Act. email correspondence with Coastal zone manager Tim Eichenberg Chief counsel San Francisco Bay Conservation And Development Commission BCDC (Exhibit 10) confirming lack of notice.

Permitting history

The District states; "The Permitting History of the Russell City Energy Center The District and CEC followed these procedures in this case. The facility was initially licensed in 2002, but before construction the site was relocated and so the facility had to be re-licensed and re-permitted."

The facility was never licensed or permitted by the EPA in 2002. No conforming public notice was made at that time by the district, and no PSD permit was issued at that time. This is confirmed in the re-delegation agreement. (Exhibit 11)The permit was not issued due to the necessity of a USFWS formal biological opinion which never occurred. This opinion was necessary pursuant to the Endangered Species Act and acknowledgment that the project could have a significant negative impact on adjacent endangered species and habitats.

While the relocation is the only stated reason for the re-license and re-permit, the CEC record indicates extensive information of even greater significance than the relocation including equipment changes, the emission profile, operating procedure, removal of mitigations, etc. The plant went from a Base-load facility to one that is licensed to start and stop on a daily basis. The new site is closer to a protected habitat and has a greater impact upon endangered species mapped (exhibit 12)

Contemporaneous Emission Reduction Credits .

The notice states that "The emission increases of nitrogen oxides and precursor organic compounds associated with this project will comply with the emission offset requirements of District Regulation 2-2-302." It provides no detail of the credits. They were not contemporaneous as defined by the district. "2-2-242 Contemporaneous: The five year period of time immediately prior to the date of application for an authority to construct or permit to operate." Page 18 and 19 of the Amended FDOC disclose credits from 1984, 1985, 1987, 1996, 1999, and the closest to contemporaneous being from the year 2000. This information could certainly have raised concern in the community and affected agencies. The EPA has expressed concerns with older Emission credits as have many other who subscribe to logic as they provide no present relief. The following excerpt is from the CEC proceedings Staff received an oral comment from Mr. Mike Sweeney, the Mayor of the City of Hayward, regarding the project. Mr.

Sweeney, at the December 15, 2006 Informational Hearing, expressed concerns over the impacts of the project's emissions and net air quality benefits of the emission mitigations on the local air quality.

Substantial Changes between the PDOC and the FDOC

The District claims that there were no substantial changes between the PDOC and the FDOC and minimizes the effects of the change in the credits. The final permit provided substantial changes to the draft permit including ERC exchanges between an already certified project the East Altamont Energy Center and Calpine's Hayward plan without noticing by the district of the ERC swap between the two projects. The location of the ERC's in the East Altamont Energy Center was a disputed topic since the project sat on the border of the San Joaquin valley district and the District. Both the mitigation agreement between Calpine and the San Joaquin Valley Air Pollution Control District and the CEC's CEQA type evaluation revolved around the location and the timing of the ERC's offered for the East Altamont Center.

Another major change in the FDOC which should have triggered public notice is the substitution of POC Emission Reduction credits for NOx Emission Reduction Credits. The overreliance on POC credits fails to mitigate the Nitrogen deposition on sensitive habitats and also increases the formation of secondary particulate due to the reactivity of NOx emissions with particulate precursors in the atmosphere.

	PDOC	FDOC
NOx	57%	26%
POC	43%	74%

( )

The district changed the ERC package for the East Altamont Energy Center in the FDOC without notification of the parties to the EAEC project and the San Joaquin Valley Pollution Control District who also had a separate mitigation agreement which required governing board approval with Calpine based on the ERC package in the EAEC Final Determination of Compliance.

"The District and CEC followed these procedures in this case."

I offer the handwritten notes of Weyman lee summarizing in writing my comments. (Exhibit 13) One of which 11/1 states "Notification Adequate?" referencing my concerns about receiving legal notification. My BACT concerns are also summarized. Perhaps in response to my concerns 11/3/07 notes summarize Mr. Lee's conversation with Twan Ngo CEC **"in hindsight, should have made provision in condition for alternative plan."** This refers to the CEC recommended and approved plan. AQ-SC10 AIR QUALITY CEC Twan Ngo 4.1-22 (Exhibit 14). The CEC gave the applicant the choice of using the cleaner technology or not. The Air district did not give them the choice to use the cleaner technology. Mr. Lee spoke with me for hours in the month of November never informing me of the permit until I asked the right question on 11/29. My Constructive notice of appeal was on November 1, 2007 It should be noted that Mr. Lee's notes 11/3/07 # 2 also substantiate my concerns about the ineffectiveness of the fireplace retrofit program

The district acknowledges that the CEC did hold extensive hearings and received a number of letters from the public on Air Quality issues. Prior to review of the CEC proceedings the Air district and the public did not have the information available to properly consider the Air Districts actions. It is capricious and an abuse of discretion to make Final determinations of compliance prior to completion of the CEC hearings in this "coordinated permit review process". This has led to incorrect conclusions on the part of the district.

Response to Declaration of Mike Monasmith

I have participated in CEC hearings through our HAPA attorney Jewell Hargleroad. I believe that Mr. Monasmith would be aware of this since he knows who I am through our conversations, personal introductions and seeing me sitting next to our attorney interacting as a client would at the front table in hearings (Eastshore). Mr. Monasmith's Emails (exhibit 15) provide a review of his communications with me and demonstrate evidence of my participation. I have never received responses to my inquiries with Mr. Monasmith. The CEC has not sent copies of all written materials that are filed in the docket. They have only sent materials that are accompanied by a service list. Monasmith contends that they received "several comment letters....addressing

air quality. The last 2 pages of Monasmith's Exhibit A disclose many opposition letters without a docket date. The entire docket was not provided. The docket log, from the original proceedings and service list (exhibit 16) provide extensive evidence of additional public air quality concerns and inadequacy of the service list for satisfaction of 124.10 Please take administrative notice of the entire proceeding. I request subpoena of all items identified in Exhibit A Monasmith Decl. prior to a decision on this matter.

PSD REQUIREMENTS

The district alleged that "that no PSD requirements are cited in the Petition, only District regulations and provisions of state law" Reading the petition can reveal numerous references to PSD requirements including code and section references. Also The Failure to consider CO2 emissions is not just a violation of state law SB 32 and AB 1368 it is a violation of Federal ruling Massachusetts vs. EPA 2007 and is currently in review by the EAB. Deseret Power Electric Cooperative (Bonanza) In the Event that the Sierra Club does not prevail in the above action, California's unique Carbon Dioxide concerns are best expressed by the Attorney General of California in State of California vs. EPA 2007 I ask that administrative notice be taken of these cases. The San Francisco Bay Area is a non-attainment area for Ozone and for PM2.5. The following excerpt is from the FDOC

The EPA models SCREEN3 and ISCST3 were used in the air quality impacts analysis. A land use analysis showed that the rural dispersion coefficients were required for the analysis. The models were run using five years of meteorological data (1990 through 1994) collected approximately 6.6 km southeast of the project at the BAAQMD's Union City meteorological monitoring station. Because the exhaust stacks are less than Good Engineering Practice (GEP) stack height, ambient impacts due to building downwash were evaluated. Using 1990-1994 San Leandro ozone monitoring data, page 60 amended FDOC

In addition to <u>using air data from 14-18 years ago</u> the test method is also outdated pursuant to the following information from the EPA

promulgation package which establishes as the preferred air dispersion model in the Agency's "Guideline on Air Quality Models" ( ) in place of the ISC3 air dispersion model was signed by the Administrator of the US EPA on October 21. The package was then submitted to the Federal Register office and was published November 9, 2005.

This rule becomes effective December 9, 2005. Beginning one year after this date, the new model - - should be used for appropriate application as replacement for ISC3. During this one-year

period, protocols for modeling analyses based on ISC3 which are submitted in a timely manner may be approved at the discretion of the appropriate Reviewing Authority. Applicants are therefore encouraged to consult with the Reviewing Authority as soon as possible to assure acceptance during this period.

The shoreline fumigation impact was not correctly modeled. The site is neither rural nor inland. Please note the following excerpt:

SCREEN3 Model User's Guide

2.4.7 Fumigation Option
Once the distance-dependent calculations are completed, SCREEN will give the user the option of estimating maximum concentrations and distance to the maximum associated with inversion break-up fumigation, and shoreline fumigation. The option for fumigation calculations is applicable only for rural inland sites with stack heights greater than or equal to 10 meters (within 3,000m onshore from a large body of water.) The fumigation algorithm also ignores any potential effects of elevated terrain.

The New Source Review provisions of 40CFR51.165
BACT

The equipment licensed by the district is outdated and no longer manufactured. Calpine may install used equipment from another facility earning Emission Reduction Credits of over $40,000,000. I provided the following letter for the air district's Board of Directors (Exhibit 17) but the staff did not provide it to them. A simple comparison of the emission potential for the Calpine facility and another similar sized California facility reveals a stark difference. El Segundo application compared to Calpine's demonstrates NO2 emissions reduced from 134.6 tons to 91 tons, CO emissions reduced from 389.3 tons to 194.1 tons, Pm reduced from 86.8 tons to 51.8 tons The El Segundo facility (exhibit 18) was referenced in the CEC air quality testimony of Twan Ngo 4.1-9

The letter, referenced by the district, from the CEC to the Air district, dated May 29, 2007 (Exhibit 19) and the CEC staffs assessment explain the disparity. The following air district rules and associated federal statutes are violated by approval of this facility.

2-2-101 Description: This Rule shall apply to all new and modified sources which are subject to the requirements of Regulation 2-1-301. The purpose of this Rule is to provide for the review of new and modified sources and provide mechanisms, including the use of Best Available Control Technology (BACT), Best Available Control Technology for Toxics (TBACT), and emission offsets, by which authorities to construct such

sources may be granted. This rule implements the no net increase requirements of Section 40919 (a)(2) of the Health and Safety Code as demonstrated by the requirements of Section 2-2-316. The New Source Review provisions of 40 CFR 51.165 and the Prevention of Significant Deterioration provisions of 40 CFR 51.166 are hereby incorporated by reference.

2-2-218 Federally Enforceable: All limitations and conditions that are enforceable by the Administrator of the U. S. EPA, including requirements developed pursuant to 40CFR Parts 60 (NSPS), 61 (NESHAPS), 63 (HAP), 70 (State Operating Permit Programs) and 72 (Permits Regulation, Acid Rain), requirements contained in the State Implementation Plan (SIP) that are applicable to the District, any District permit requirements established pursuant to 40 CFR 52.21 (PSD) or District regulations approved pursuant to 40 CFR Part 51, Subpart I (NSR), and any operating permits issued under an EPA-approved program that is a part of the SIP and expressly requires adherence to any permit issued under such program

2-2-314 Federal New Source Review Applicability: The requirements of 40 CFR 51.165 are incorporated, by reference, as part of this rule.

ENDANGERED SPECIES AND PROTECTED HABITATS

The letter from The EPA to USFWS and response from USFWS (Exhibit 20) requesting an informal consultation contains errors of fact and incomplete analysis. The letter states "The nearest tidal marshes are approximately 1400 feet to the south and separated from the project by distribution warehouses In its new location, Russell city would avoid impacts to seasonal wetlands and protected species mentioned above" The project in its new location is surrounded an at least 180 degrees with protected habitats and endangered species (Exhibit 12) There is a tidal channel within 50 feet of the project. There are no Warehouses between the project and most of the biological impact areas. It should be noted that a 30 foot high warehouse offers little respite from 145 foot tall smoke stacks. Sensitive habitats are located less than 500 feet due west of the project.

The request for informal consultation agreement discloses that a formal consultation was in process in 2002 and Calpine withdrew its plan in spring of 2003 halting the consultation. Jim Browning from the USFWS confirmed on the telephone with me that he did not consult the original file prior to agreement with the EPA request. His letter also does not say that he reviewed the prior evidence. I request subpoena authority to review the USFWS file regarding this project prior to a decision by the EAB.

The Original Application For Certification AFC biological and land use sections (Exhibit 21) provide a reasonable assessment of the conditions at that time.

Considerations of noise impacts were studied in the original 2002 CEC staff assessment Excerpts are as follows:

"Numerous waterfowl and shorebird species inhabit the proposed project region, and some studies indicate ducks, geese, long distance migrants and colonial nesting birds are particularly susceptible to noise disturbances (Burger 1981; Markham and Brechtel 1979). RECON (1989) concluded that noise levels above 60 dBA affected the territorial behavior of a state and federally listed bird species not known from the RCEC project region. A report on noise criteria for the protection of endangered perching birds concluded that the 60 dBA criterion derived from the RECON (1989) study, while not suitable for all species and situations, did come from the available scientific data and was a reasonable departure point (TNCC 1997). The 60 dBA criterion has been used by the USFWS as a reference point for evaluating noise impacts to wildlife (Buford 2001)....

Staff is concerned that construction impacts, particularly noise, could directly impact sensitive species breeding areas and wildlife using the surrounding areas. The USFWS has also raised this concern. Applicant estimates noise levels from pile-driving and steam blow activities will range from 106 decibels (dBA) @ 50 feet to 65 dBA @ 1.02 miles (Calpine/Bechtel 2001). Sensitive nesting species within a one-mile radius of the proposed project site could be exposed to noise levels above 60 dBA. A general rule for estimating noise levels at increasing distances is to decrease the noise level by 6 dBA as the distance is doubled (Birdsell 2001). Applying this to the pile-driving and steam blow activities provides estimated noise levels of 100 dBA @ 100 feet, 76 dBA @ 1,600 feet (> ¼ mile) and 70 dBA @ 3,200 feet (> ½ mile) respectively.

Staff was particularly concerned with potentially adverse operational noise impacts to the upland area adjacent to the southwest border of the proposed project site. Because this upland area is considered salt-marsh harvest mouse refugia, staff was concerned that noise from proposed project operation would increase background noise levels, making it more difficult for the salt-marsh harvest mouse, and other wildlife, to detect predators.

Noise disturbances from construction activities during the mating and nesting season may have an adverse effect on formation of pair bonds and/or reproductive success of sensitive species in the project area; furthermore, construction related disturbances could discourage habitat use by wildlife. Information obtained from the EBRPD documents the presence of several breeding/nesting species under federal/state protection within a one-mile radius of the project footprint (Taylor 2001). These include: federally and state endangered -salt marsh harvest mouse, federally threatened, state species of concern-Western snowy plover, federally and state endangered-California clapper rail, state species of concern, black skimmer and the state and federally endangered-California least tern. Joe Didonato, Wildlife Program Manager for the East Bay Regional Parks District, indicated the presence of snowy egret (*Egretta thula*) and black-crowned night heron (*Nycticorax nycticorax*) rookeries within one-quarter mile of the proposed project site (Didonato2001). These rookeries are listed as sensitive by CDFG...."

The 2007 CEC staff report noise and vibration section (Exhibit 22) which addresses the noise impact for people but ignores the impact on endangered species and migratory birds. It measures the noise impact on the San Francisco Bay trail on the Cogswell marsh bridge at the opposite end of the protected habitat and demonstrates a noise impact of 44 db which is slightly less than the existing noise level from the sound of the water of 44.5 db. The noise contour map in the above exhibit demonstrates 65db next to the habitat but the map cuts off just before the habitat. Ostensibly the habitat impact will be from 65 to 44 db going towards the bridge (exhibit 12). This is presently an extremely quiet area away from the noise of the waves and restricted from human access for preservation. This noise is a direct negative impact to endangered species.

IMPACTS OF NITROGEN DEPOSITION ON CALIFORNIA ECOSYSTEMS AND BIODIVERSITY (Exhibit 23)

The impacts described in the above referenced report demonstrate a potentially significant impact to the environment including the vernal pools described in the following CEC staff assessment excerpt;

Wetlands and Habitat Compensation

Although Energy Commission staff agrees with the project owner's conclusion that the project site would not cause a direct loss of wetlands (RCEC 2006), thereby eliminating

the requirement for a Wetlands Mitigation Plan originally required in Biological Resources Condition of Certification **BIO-15**, there is a vernal pool on the Eastshore Substation site that must be protected when the new transmission line is brought into the substation. Because the project owner has conducted recent field surveys, identified this sensitive resource, and the transmission line alignment generally avoids the vernal pool (RCEC 2007), Energy Commission staff believes it can be protected by implementation of relatively simple impact avoidance measures that would be described in the project BRMIMP.

The following regulations may also be violated;

Clean Water Act of 1977
Title 33, United States Code, sections 1251-1376, and Code of Federal Regulations, part 30, section 330.5(a)(26).
• Endangered Species Act of 1973
Title 16, United States Code, section 1531 et seq., and Title 50, Code of Federal Regulations, part 17.1 et seq., designate and provide for protection of threatened and endangered plant and animal species, and their critical habitat.
• Migratory Bird Treaty Act
Title 16, United States Code, sections 703-712, prohibit the take of migratory birds.
Coastal Zone Management act

The effects of Global warming and sea level rise associated with projects like this are projected to inundate the entire area by the end of this century.

PUBLIC BENEFIT OR CONVENIENCE?

These requirements were removed from the CEC licensing process when the California energy market was deregulated. This has led to a proliferation of licenses and an overbuilt market. These plants are not a response to market demand or a replacement of older technologies. They will serve to undermine the renewable energy market in the San Francisco area. When Customers make the choice of renewable energy, as many in the Bay area are doing, Pacific Gas and Electric PGE still receives a surcharge based upon its capacity to produce. The requirement for these findings was not removed from the districts responsibility.

ENVIRONMENTAL INJUSTICE

The first sentence of the districts "Background" reads "The Russell City Energy Center is a 600 MW natural-gas fired power plant in the city of Hayward." This is not true. There are no power plants in Hayward at this time. There are plans for 2 power plants. While I believe that the EAB understands this is not an existing facility as stated, the "Notice of Final Action makes the same sort of mis-statement which misleads the public. Many of us do not even know the definition of MW. It is unjust to make abbreviations in a notice without definition. Most people in the affected

area have a limited command of the English Language if they speak it at all. The notice should have also been in Spanish if it were to reach the majority.

Testimony of Sandra Witt DrPH Director of Planning, policy and Health Equity for the Alameda County Public Health Department (Exhibit 24) originally used in the Eastshore Energy Center proceedings. Socioeconomics maps and isopleths graphs for both projects is also included demonstrating their relationship It is important to take administrative notice of the Eastshore Energy Center because they are concurrent plans affecting the same community and referenced on the same letter to the community from the Air District (Exhibit 3)
The Eastshore Energy Center docket 06-afc-6 proceedings also offer extensive evidence of public and government interest when actions are discovered.

NPDES

California Regional Water Quality Control Board letter Dated December 20, 2006 (Exhibit 25) addresses the projects failure to failure to comply with NPDES. Flood plain map and FEMA flood Zone map(s) (Exhibit 25) also demonstrates potential violations of the following:

Executive Order 11988, Floodplain Management
The purpose of this Executive Order, signed May 24, 1977, is to prevent Federal agencies from contributing to the adverse impacts associated with occupancy and modification of floodplains. In the course of fulfilling their respective authorities, Federal agencies shall take action to reduce the risk of flood loss, to minimize the impact of floods on human safety, health and welfare, and to restore and preserve the natural and beneficial values served

The districts authority to issue a PSD permit.

The re- delegation agreement page 4 # 7 references (Russell City #13161) a project located at 3590 Enterprise avenue (2001 notice) district application 2896 (2001 PDOC)
The permit Dated November 1, 2007 application 15487 is for plant 18136 at Depot Rd and Cabot Blvd. The permit does not contain an address but it is known on the notice dated April 2, 2007 as 3806 Depot Road. Map of both locations (exhibit 25)

Incredible disparity occurs between the 2002 SUMMARY OF AIR QUALITY IMPACTS ANLALYSIS and the 2007 version (Exhibit 26) Shoreline fumigation impact increased from 34.6 to 62.4, maximum commissioning impact for carbon monoxide increased from 69.8 to 1977 Class 1 24- hour air quality impacts analysis for the Point Reyes National Seashore increased

from .16 to .21 In a decade of great advances in pollution control this facility was redesigned to increase emissions. This facility only resembles the original in Name and ownership. Pursuant to page 6 number 4 of the re-delegation agreement, the agreement should be revoked.

Exhibit list

Notices dated April 2, 2007, November 20, 2001 and November 30, 2007(Exhibit 1).

by Sandy Crockett on May 8, 2007. (Exhibit 2).

Public comments, district response and emails (Exhibit 3)

posted for viewing CEC May 3, 2007. (Exhibit 4)

the County of Alameda filed a petition to reopen the CEC proceedings (Exhibit 5)

District has compliance violations that are documented in its 2001 Calpine file (Exhibit 6)

Permit and Check to the District for $249,300 was from Calpine (Exhibit 7).

Air Quality tables (exhibit 8)

publication, the District's website (Exhibit 9)

Tim Eichenberg Chief counsel San Francisco Bay Conservation And Development Commission BCDC (Exhibit 10)

re-delegation agreement. (Exhibit 11)

endangered species maped (exhibit 12)

Weyman lee summarizing in writing my comments. (Exhibit 13)

AIR QUALITY CEC Twan Ngo 4.1-22 (Exhibit 14).

Mr. Monasmith's Emails (exhibit 15)

The docket log, from the original proceedings and service list (exhibit 16)

letter for the air district's Board of Directors (Exhibit 17)

The El Segundo facility (exhibit 18)

the CEC to the Air district, dated May 29, 2007 (Exhibit 19)

The letter from The EPA to USFWS and response from USFWS (Exhibit 20)

Exhibit list

AFC biological and land use sections (Exhibit 21)

The 2007 CEC staff report noise and vibration section (Exhibit 22)

IMPACTS OF NITROGEN DEPOSITION ON CALIFORNIA ECOSYSTEMS AND BIODIVERSITY (Exhibit 23)

Testimony of Sandra Witt DrPH Director of Planning, policy and Health Equity for the Alameda County Public Health Department (Exhibit 24)

California Regional Water Quality Control Board letter Dated December 20, 2006 (Exhibit 25)

2002 SUMMARY OF AIR QUALITY IMPACTS ANLALYSIS and the 2007 version (Exhibit 26)

Declarations
Steele
Simpson
Lewis
Toth
Lazerow
Forsyth
Pacheco
LePell
Silva
Chavez
Watters
Finn
Krammer