

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

In re Russell City Energy Center	)	PSD Appeal No. 10-05
	)	
Russell City Energy Company, LLC	)	CARE/Simpson Reply Brief
PSD Permit Application No. 15487	)	
	)	

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**I. INTRODUCTION AND SUMMARY OF ARGUMENTS**

In behalf of CALifornians for Renewable Energy, Inc. (CARE) we provide the following reply brief to the opening briefs of the Bay Area Air Quality Management District (BAAQMD) the State of California<sup>1</sup> and the Russell City Energy Center, LLC.<sup>2</sup> A pending *Motion to Enter Consent Decree* before the United States District Court Northern California District, in *United States v. PG&E*, case No. 3:09-cv-04503-SI <sup>3</sup> is relevant to our Russell City Petition to demonstrate there is a pattern of synergistic corruption wherein BAAQMD, acting in behest of US EPA, an agency of the United States, are involved with PG&E and GE Capital in a corrupt organization whose purpose is to allow PG&E to construct and operate it Gateway Generating Station without the required PSD permit creating a culture of synergistic corruption.

We allege that there is a pattern and practice of the United States participating in such synergistic corruption with the energy industry as demonstrated by the United States miss-handling of the Gulf Oil Spill, as reported by the May 14, 2010 New York Times article *U.S. Said to Allow Drilling Without Needed Permits*. “WASHINGTON — The federal Minerals Management Service gave permission to BP and dozens of other oil companies to drill in the Gulf of Mexico without first getting required permits from another agency that assesses threats to endangered species — and despite strong warnings from that agency about the impact the drilling was likely to have on the gulf... Those approvals, federal records show, include one for the well drilled by the Deepwater

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<sup>1</sup> Under the auspices of the California Energy Commission (CEC) and California Public Utilities Commission (CPUC).

<sup>2</sup> Russell City Energy Center, LLC is owned 65 percent by a Calpine Corporation affiliate and 35 percent by a GE Energy Financial Services affiliate. See <http://ceoworld.biz/ceo/2009/04/17/calpine-ge-receive-california-public-utilities-commission-approval-of-power-purchase-agreement-for-planned-bay-area-state-of-the-art-power-plant>

<sup>3</sup> See attached Exhibit 1 US EPA *Responses to Comments Regarding Consent Decree for Gateway Generating Station* and attached Exhibit 2 *United State’s Memorandum in Support of Motion to Enter Consent Decree – Civil Action No. 09-0453 SI*.

Horizon rig, which exploded on April 20, killing 11 workers and resulting in thousands of barrels of oil spilling into the gulf each day.” And this is by the same federal government workers who the San Francisco Chronicle in an article titled *Offshore drilling regulator to be broken up* reported on May 12, 2010 “Even before the gulf spill, the agency had been battered by the findings of a 2008 Interior Department *investigation that revealed employees* in its Denver office had *inappropriate sexual relationships with representatives of oil companies and had used drugs.*”

BAAQMD and Russell City would have your honor believe that it cooperated with Petitioners meaningful and informed public participation instead of “(a) that the Air District prevented and/or failed to support public participation throughout the permitting process; (b) that the Air District issued flawed fact sheets, notices, and other documents; (c) that the Air District’s response to CARE/Simpson’s document requests under the California Public Records Act was inadequate; and (d) that the Air District has failed to issue any permit ‘correctly’.” Petition at 15.

If it was any other agency but BAAQMD (aka US EPA, United States) with their current records of poor performance this might even be believable. Simply put our reply brief is that BAAQMD and Russell City are involved in synergistic corruption whose sole purpose is to protect Russell City, Pacific Gas and Electric Company (PG&E) and the huge hedge fund GE capital<sup>4</sup> from losses. Like “Enron [GE Capital] was able to claim fantastic profits, constantly driving up their share price. But their profits were hypothetical – not actual - based on projected future earnings. Meanwhile the company was accumulating huge debt levels.”

As reported March 18, 2009 by Business Insider article *Major Concerns About GE Capital Ahead Of Meeting*.<sup>5</sup> “Bloomberg has a good roundup of some of the company's trouble spots, which they'll be addressing tomorrow. \*GE Capital's financial assets total \$637 billion”. A "bottomless pit" of unsecured debt opened up worldwide when the Congress allowed unregulated banks to be created in 2000 in the Enron loophole. The "Enron loophole" exempted most over-the-counter energy trades and trading on electronic energy commodity markets from government regulation.<sup>6</sup> The "loophole" is so-called as it was drafted by Enron Corporation lobbyists working with U.S. Senator Phil Gramm (R-TX) to create a deregulated market for their experimental "Enron On-line" initiative.<sup>7</sup>The

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<sup>4</sup> GE Capital's financial assets total \$637 billion

<sup>5</sup> See <http://www.businessinsider.com/major-concerns-about-ge-capital-ahead-of-meeting-2009-3>

<sup>6</sup> Jickling, Mark (2008-07-07). "The Enron Loophole". Congressional Research Service. [http://assets.opencrs.com/rpts/RS22912\\_20080707.pdf](http://assets.opencrs.com/rpts/RS22912_20080707.pdf).

<sup>7</sup> Mother Jones, <http://www.motherjones.com/politics/2008/05/foreclosure-phil>

"loophole" was enacted in sections § 2(h)(3) and (g) of the Commodity Exchange Act, 7 U.S.C. as a result of the Commodity Futures Modernization Act of 2000, signed by U.S. president Bill Clinton on December 21, 2000. It allowed for the creation, for U.S. exchanges, of a new kind of derivative security, the single-stock future, which had been prohibited since 1982 under the Shad-Johnson Accord, a jurisdictional pact between John S. R. Shad, then chairman of the U.S. Securities and Exchange Commission, and Phil Johnson, then chairman of the Commodity Futures Trading Commission. On June 22, 2008, then U.S. Senator Barack Obama proposed the repeal of the "Enron loophole" as a means to curb speculation on skyrocketing oil prices.<sup>8</sup> In the first half of 2008 the notional amounts outstanding of over-the-counter (OTC) derivatives continued to expand. Notional amounts of all types of OTC contracts stood at \$683.7 trillion at the end of June 2008.<sup>9</sup>

## **II. THE CULTURE OF SYNERGISTIC CORRUPTION**

Russell City argues at page 27 to 28 of its Brief “[i]t is not always clear, however, what those issues are, and nowhere do CARE/ Simpson articulate specific objections to any condition of the final PSD permit so as to establish a basis for review. A number of their “issues” do not even relate to the RCEC Project, but to facilities and permit processes that are not at issue here; nor do they bear in any way on this proceeding, as with CARE/Simpson’s discussion of issues surrounding the permitting of the Gateway Generating Station. Id. at 15-16. As a result, CARE/Simpson fail in this section to “provide sufficient specificity such that the Board can ascertain what issue is being raised” and to “articulate some supportable reason as to why the permitting authority erred or why review is otherwise warranted.” *Knauf I*, 8 E.A.D. at 127. Thus, the Board should deny review on this basis alone.”

In response, as non-attorneys, we attempt to “provide sufficient specificity such that the Board can ascertain what issue is being raised” and to “articulate some supportable reason as to why the permitting authority erred or why review is otherwise warranted” we allege that because the issues surrounding the permitting of the Gateway Generating Station raise similar issues of fact and law to the case before the Board in Russell City and the issues we raise are directly relevant to what is going on in the Court with the Gateway Generating Station, and allege there is a common denominator, the hedge fund GE Capital<sup>10</sup>, and the culture of synergistic corruption with PG&E and

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<sup>8</sup> "Obama vows crackdown on energy speculators: McCain fires back after Democrat tries to tie rival to 'Enron loophole'" Associated Press 2008-06-22. <http://www.msnbc.msn.com/id/25318274/>

<sup>9</sup> See [http://www.bis.org/publ/otc\\_hy0811.pdf?noframes=1](http://www.bis.org/publ/otc_hy0811.pdf?noframes=1) at page 5.

<sup>10</sup>

Calpine they have created. In our brief we will discuss what synergistic corruption is and why it is corrosive to social capital. We will provide examples of synergistic corruption and discuss the implications of the Gateway Humboldt and Russell City projects as part of a pattern synergistic corruption between BAAQMD, USEPA, the State of California, Calpine, PG&E, and GE.

For example in Mr. Simpson's Petition for Review before the Ninth Circuit for the US Court of Appeals, Case No.: 10- 71396, regarding PG&E's Humboldt project the second cause of action is for Fraud and Misrepresentation.

In the Gateway proceeding ample evidence has been presented that PG&E conspired with the Bay Area Air Quality Management District to specifically preclude Mr. Sarvey and I from public participation in violation of our rights and to knowingly operate the facility without permits in violation of the Clean Air Act.

We have attached Exhibit 3 a copy of Mr. Simpson's Petition for Review herein and ask for it to be timely included in the record herein to demonstrate that there is a simlare pattern and practice "that PG&E conspired with the Bay Area Air Quality Management District to specifically preclude Mr. Sarvey and [Mr. Simpson] from public participation in violation of our rights and to knowingly operate the facility without permits in violation of the Clean Air Act"

### **III. WHAT IS SYNERGISTIC CORRUPTION?**

In the November 30, 2005 article by Dr. Robert Stevens titled "*What is Social Capital?*"<sup>11</sup> at 1 "According to the standard view, social capital is networks of relationships. Networks can be regarded as a form of capital since they are a resource that enables people to work together to achieve things that they could not easily achieve by themselves...Against the standard view, I will argue that networks do not always constitute a resource. In some cases they are a liability. Sometimes networks are socially corrosive. But social capital cannot by definition be a liability or socially corrosive...So I conclude that networks do not constitute social capital...I will argue that social capital is cooperation in pursuit of the common good."

Regarding synergistic corruption Mr. Stevens uses Enron as an example at page 3 to 4. "Bethany McLean and Peter Elkind in their book *The smartest guys in the room* document the story of the rise and fall of Enron, resulting in the largest bankruptcy case in US history. It was a story of "creative accounting". Enron was able to claim fantastic profits, constantly driving up their share price. But their profits were hypothetical – not actual - based on projected future earnings.

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<sup>11</sup> See <http://www.aare.edu.au/05pap/ste05642.pdf>

Meanwhile the company was accumulating huge debt levels. By the end, Enron had accumulated debts of US\$38 billion – only a third of which showed up on its balance sheet.

McLean and Elkind observe that the corrupt Enron executives could not have accomplished their deception without plenty of help.

They needed accountants to agree that prepaids were a trading liability... They needed lawyers to sign off on deal structures. They needed credit rating agencies to remain sanguine in the face of frightening levels of off-balance sheet debt. Most of all, they needed the banks and the investment banks to help them carry out their machinations. (McLean and Elkind 2003 page 161-162)

Almost everyone associated with the company failed to do right thing. Such conspiracy – synergistic corruption as it has been called – certainly involved networks of people with shared values pursuing their goals. Each stood to profit mightily. On Field’s account synergistic corruption is a form of social capital. It is not clear however, that synergistic corruption is straightforwardly an asset. Synergistic corruption undermines the ethical basis of business. I will argue later that promise making and keeping and honest dealing is a form of social capital that underpins an economy and a society of which it is a part. Synergistic corruption corrodes this form of social capital. It is more of a liability than an asset. Francis Fukuyama in “Social Capital and Civil Society” defines “social capital” as “an instantiated informal norm that promotes cooperation between two or more individuals” (Fukuyama 1999 page 1). Fukuyama argues that “Many groups achieve internal cohesion at the expense of outsiders, who can be treated with suspicion, hostility or outright hatred. Both the Ku Klux Klan and the Mafia achieve cooperative ends on the basis of shared norms, and therefore have social capital, but they also produce abundant negative externalities for the larger society in which they are embedded.” (Fukuyama 1999 page 2). Group cohesion secured at the expense of outsiders is obviously a liability for the larger society. As Fukuyama admits “It is very important when measuring social capital to consider its true utility net of its externalities.” (Fukuyama 1999 page 2). Too many negative externalities could presumably lead one to conclude that social cohesion secured at the expense of outsiders is not a form of capital at all.”

#### **IV. REPLY TO BAAQMD**

For purposes of brevity we identify the following issues raised by BAAQMD which we believe our Petition adequately address already but that we dispute BAAQMD’s arguments inapposite to our Petition.

1. The District Provided Ample Opportunities for Meaningful Public Participation 11

The District claims “the record shows that the District not only complied with all of the requirements of Part 124, it went over and above and what is required to ensure that the public was fully engaged in this proceeding. The Board should therefore dismiss these claims.” Based on the evidence in the record the District’s claim that it complied with all of the requirements of Part 124 is false since pursuant to the Notice requirements set forth in 40 CFR § 124.10 (d) *Contents (iv) Name, address and telephone number of a person from whom interested persons may obtain further information, including copies of the draft permit or draft general permit, as the case may be, statement of basis or fact sheet, and the application*”. [Emphasis added] As stated in our comments on February 4, 2009 to the District “[t]he Notice that was included for the PSD Permit at the District’s website failed to include a copy of the Application No. 15487 which was originally submitted to the District in 2001. We can only hope the Board agrees that with no discernable docket at the District there is no way that the public can identify the basis for permitting actions to effectively participate.”

We are of course stating that the Notice must include reference to the application not the application itself. The issue of public notice is rooted in our First Amendment right "to petition the Government for a redress of grievances" this right requires an open government and an opportunity for informed participation. Congress continues to strive for this goal. They have greatly identified a system for comparing air quality status and impacts through the National Ambient Air Quality Standards. (NAAQS). Decision makers use the standards to determine if and which permits should be issued. They also form the basis for informed public participation. The District has apparently concluded that the people of the Bay Area do not need this information as required in 42 U.S.C. 7427 as they have not disclosed it. There is no clue of this information in their public Notices for this or any facility, there are no "warning signs" or notice otherwise that the public should be concerned with Air quality except perhaps the fireplace/woodstove ordinance that actively prosecutes citizens who try to keep warm without paying the fossil fuel burning industry, which the district allows to pollute with impunity. Fireplace/woodstove emissions in the bay area appear dwarfed by the illegal emissions that the District allows the industry to pollute. The District included gross weights of pollutants in their public notices for this permit without a basis of their effect on air quality. An important policy decision that the Board should review is; Does a public notice for a PSD permit require notice of the projects effect on air quality? District rule 2-2-405 states; "The written notice shall contain the degree of PSD increment consumed." The "Corrected Notice of Public Hearing and Notice inviting Written Public Comment on Proposed Amended PSD Permit states; "The project will

utilize the Best Available Control Technology to minimize emissions of these air pollutants as required by 40 C.F.R. Section 52.21. The proposed project will not consume a significant degree of any PSD increment" The District acknowledged a series of defects in its public notice but claimed that they were later corrected in statements(s) of Basis. Can the defects in the public Notice for this PSD permit that led to an appearance of propriety where none existed be corrected without the issuance of a new public Notice? The Additional Statement of basis refers in footnote 141 on page 84 to a "Summary of Air Quality Impact Analysis for PM2.5 From the Russell City Energy Center, attached to Memorandum from Glen Long to Weyman Lee, July 27, 2009" The administrative record indicates the same document but it is Dated July 27, 2007. We do not know which is correct.

2. The District Made All Of The Supporting Administrative Record Documentation On Which The Permit Analysis Was Based Available For Public Review 12

The record speaks for itself here. The District did not; "Provided Ample Opportunities for Meaningful Public Participation" Response page 11 emphasis omitted or make " All Of The Supporting Administrative Record Documentation On Which The Permit Analysis Was Based Available For Public Review" Response page 12 emphasis omitted . There was certainly a different response to attorney's seeking information and Simpson.

3. The District Also Duly Responded To Petitioner Rob Simpson's Public Records Act Requests; But Public Records Act Compliance Is Not A Proper Issue For A PSD Permit Review In Any Event 14

Recognizing that the California Public Records Act (CPRA)<sup>12</sup> is outside the scope of the Board's exercise of authority, the record herein however demonstrates that the District knowingly violated the CPRA central provisions that an "agency has 10 days to decide if copies will be provided. In "unusual" cases (request is "voluminous," seeks records held off-site, or requires consultation with other agencies), the agency may upon written notice to the requestors give itself an additional 14 days to respond. (§6253(c)) These time periods may not be used solely to delay access to the records. (§ 6253(d))"<sup>13</sup>

The District contends that; "Public Records Act Compliance Is Not A Proper Issue For A PSD Permit Review" response page 14 emphasis omitted. The District required a public records

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<sup>12</sup> See [http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title40/40cfr124\\_main\\_02.tpl](http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title40/40cfr124_main_02.tpl)

<sup>13</sup> See <http://www.thefirstamendment.org/capra.html>

request from Simpson for any chance to access to the administrative record for this permit and now claims that by Simpson complying with this requirement the District has managed to eliminate scrutiny.

We argue that the record also demonstrates the District's failure to comply with this state law's timeline to provide Mr. Simpson access to records was intentional so as to preclude Petitioners such as CARE, Rob Simpson, and Bob Sarvey from access to documentation, such as the Application No. 15487, on which the District's purported Permit analysis was based. This is why Petitioners provided the Board a copy of the picture of the closet and the box containing the purported record as an exhibit which is what was provided in person by the District to Rob Simpson after his repeated requests by e-mail for access to this documentation so as to further demonstrate that the District never had any intention to provide Petitioners the supporting documents they sought.

We believe this demonstrates a pattern and practice of synergistic corruption between the District, Russell City Energy Center, Calpine and GE Energy Financial Services, a corrupt organization whose sole purpose was to support the development of the Russell City Energy Center and so as to protect GE's hedge fund's unsecured assets. These actions should be reviewed civilly and criminally pursuant the Racketeer Influenced and Corrupt Organizations Act (RICO)<sup>14</sup> by a court of law since the Board, to our knowledge, lacks criminal enforcement authority to do so.

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<sup>14</sup> Section 1962(c)'s utility stems from its breadth. Section 1962(a) and (b) claims are relatively narrow. To have standing under sections 1962(a) and (b), the plaintiff must allege more than injury flowing from the racketeering activity. Under section 1962(a), a civil plaintiff has standing only if he has been injured by reason of the defendants' investment of the proceeds of racketeering activity. Under section 1962(b), a civil plaintiff has standing only if he has been injured by reason of the defendants' acquisition or maintenance of an interest in or control over an enterprise through a pattern of racketeering activity. These distinctions will be discussed in greater detail in the section of this memorandum that is particularly concerned with the section 1962(a) and 1962(b) claims.

RICO's interstate commerce requirement racketeering shared common goals (increasing and protecting the financial position of the enterprise) and common victims (those who threatened its goals), and drew their participants from the same pool of associates (those who were members and associates of the enterprise)).

A state agency's interpretation of a federal statute is not entitled to deference. See *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997) (review is de novo); cf. *JG v. Douglas County Sch. Dist.*, 552 F.3d 786, 798 n.8 (9th Cir. 2008) (explaining that although a state agency's interpretation of federal law is not entitled to deference, "the Secretary's approval of that agency's interpretation is due some deference because it shows a federal agency's interpretation of the federal statute that it is charged to administer.")

1. The plaintiff has suffered an actual or threatened injury;
2. The conduct of the defendant is a cause of the plaintiff's injury; and

Continued on the next page



4. The District Made The Permit Application Available For Public Review 19

The record herein provided supports the opposite finding of fact. The District did not make "The Permit Application Available For Public Review" Response page 19 emphasis omitted.

5. The District Properly Clarified The Permitting History For This Project In Its Additional Statement of Basis and Responses to Public Comments. 20

The record speaks for itself. "With respect to including the application on the index of record documents that the District made available during the second public comment period, Petitioners are simply wrong on this issue. A review of the index shows that the application is the very first document listed, in a section entitled "Permit Application And Related Materials". See *Young Decl.*, Exh. 4 at 2." Response page 20 emphasis added. The statement appears to indicate a document titled; Application for Permit Modification for the Russell City Energy Center (with transmittal letter)\* 11/20/2006 not a "permit application".

6. 40 C.F.R. Section 51.166 Does Not Govern PSD Permitting Under 40 C.F.R. Section 52.21; And In Any Event The District Issued The Permit Within One Year Of The Application. 21

This is a disputed matter of fact and law for the Board to decide. This is a disputed matter of fact and law for the Board to decide. The record speaks for itself. The District's contention that the it should be excused from timeliness pursuant 42USC 7475 (c) et al, in making a final decision on the permit within one year of the application is without merit. See Response page 21-23. Their argument that the remand somehow extended this time period because it did not state otherwise seeks to place the burden on the Board of restating the entire Clean Air Act in remand to remind the District of its duties. See Responses to Public Comments at 196-98. which includes; "The EAB did not instruct the Air District to reject the application because more than one year had past since the application was submitted." The District did not even comply with what the remand ordered it to do and it is particularly egregious for the District to excuse itself from its mandate under the Clean Air Act because it was not specifically ordered to comply. "The District does not read the Remand Order to have ruled on any substantive claims" Response page 23. CARE/Simpson contends that this properly places these "substantive claims" before the Board at this time.

7. Petitioners Are Wrong That The District Has Contended That The Remand Order Resolved Substantive Issues 23

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3. If the plaintiff wins the lawsuit, his injury will be corrected or compensated for

The record speaks for itself. The District's contention that the it should be excused from timeliness in making a final decision on the permit within one year of the application is without merit. See Response page 21-23. Their argument that the remand somehow extended this time period because it did not state otherwise seeks to place the burden on the Board of restating the entire Clean Air Act in remand to remind the District of its duties. See Responses to Public Comments at 196-98. which includes; "The EAB did not instruct the Air District to reject the application because more than one year had past since the application was submitted." The District did not even comply with what the remand ordered it to do and it is particularly egregious for the District to excuse itself from its mandate under the Clean Air Act because it was not specifically ordered to comply. "The District does not read the Remand Order to have ruled on any substantive claims" Response page 23. CARE/Simpson contends that this properly places these "substantive claims" before the Board at this time.

8. Claims Regarding The Determination Of Compliance The District Issued In Accordance With State Law Are Not Properly Raised In An Appeal Under 40 C.F.R. 124.19; And They Have No Merit In Any Event. 24

This is a disputed matter of fact and law within the Board's jurisdiction to decide. As Petitioners state in our February 2009 comments "Since BACT is part of the CAA and the PDOC includes the District's BACT analysis therefore clearly the PDOC<sup>15</sup> and draft PSD Permit are interdependent on the findings from the federal BACT analysis conducted by the District purportedly in 2002 and again in 2007. The PSD permitting procedures at the heart of this dispute were triggered by RCEC's application to the CEC, on November 17, 2006, to amend the CEC's original 2002 certification of RCEC's proposal to build a 600-MW natural gas-fired, combined cycle power plant

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<sup>15</sup> The District's process for permitting power plants is integrated with the CEC's certification process to support the latter's conformity findings, as reflected in the District's regulations specific to power plant permitting. See DR, Power Plants Regulation 2 Rule 3 §§ 2-3-100 to 2-3-405, available at <http://www.baaqmd.gov/dst/regulations/rg0202.pdf>. These regulations state that "[w]ithin 180 days of [the District's] accepting an [application for certification] as complete [for purposes of compliance review], the [District Air Pollution Control Officer] shall conduct a ... review [of the application] and make a "preliminary decision" as to "whether the proposed power plant meets the requirements of District regulations." Id. § 2-3-403. If the preliminary decision is affirmative, the District's regulations provide that the District issue a preliminary determination of compliance (PDOC) with District regulations, including "specific BACT requirements and a description of mitigation measures to be required." Id. The District's regulations further require that "[w]ithin 240 days of the [District's] acceptance of an [application for certification] as complete," the District must issue a final Determination of Compliance ("FDOC") or otherwise inform the CEC that the FDOC cannot be issued. Id. § 2-3-405.9

in Hayward, California.<sup>16</sup> According to the District Air Quality Engineer who oversaw the RCEC's PSD permitting, the District, after conducting an air quality analysis, issued its PDOC/draft PSD permit, notice of which it published in the Oakland Tribune on April 12, 2007. Declaration of Wyman Lee, P.E. ("Lee Decl.") ¶ 2. RCEC originally filed for certification by the CEC in early or mid-2001, and was initially certified by the CEC on Sept. 11, 2002, pursuant to the *Warren-Alquist Act*, see supra. During the initial CEC certification process, which also incorporated the District permitting, the District issued a PDOC/Draft PSD Permit to RCEC in November 2001. However, the District did not proceed to issue a final PSD permit because RCEC withdrew plans to construct the project in the spring of 2003. See Letter from Gerardo C. Rios, Chief, Permits Office, U.S. EPA Region 9, to Ryan Olah, Chief Endangered Species Division, U.S. Fish and Wildlife Service (Jun. 11, 2007). The amended CEC certification and PSD permitting were required purportedly because RCEC afterwards proposed relocating the project 1,500 feet to the north of its original location<sup>17</sup>. “

“[T]he District pointed out, the fact that the federal PSD Permit was remanded by the EAB could not have invalidated the state-law licensing for the same reasons that the California Supreme Court's upholding of the CEC's licensing decisions could not have validated the Federal PSD permit.” The District misstates the hierarchy of jurisdiction a federal decision could certainly "have invalidated the state-law licensing”.

9. Greenhouse Gases Are Not Regulated Under The Clean Air Act At This Time; And Even If They Were, The District Properly Considered Greenhouse Gas Issues and Imposed Greenhouse Gas Permit limits. 25

This is a disputed matter of fact and law within the Board's jurisdiction to decide. The District wants it both ways, for the project to be exempted from greenhouse gas compliance requirements under the law while at the same time seeking to establish a district-wide BACT limit for CO2. This is improper.

10. The District Properly Considered Comments Regarding Biosequestration of CO2. 27

This is a disputed matter of fact and law within the Board's jurisdiction to decide to the degree the Board exercises its jurisdiction to review BACT for CO2. CARE/Simpson disagree with the District's responses to CO2 issues and Bio-sequestration in their entirety. The District continues

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<sup>16</sup> See Declaration of J. Mike Monasmith ("Monasmith Decl.") 2, Att. A.

<sup>17</sup> See Final PSD Permit, Application No. 15487 ("Final Permit") at 3.

to misstate the record and comments received; "The Petition also claims that bio-sequestration could be used to abate other pollutants such as particulate matter, and could increase the efficiency of the facility. These alleged benefits were never mentioned in any comments regarding bio-sequestration, which addressed bio-sequestration in the context of greenhouse gas control only. But in any event, the technology has not been developed to control anything at this point." Response at page 28. Subterranean sequestration may be a viable alternative as well as bio-sequestration of pollutants in algae producing ponds.<sup>18</sup> The District did not adequately consider the utilization of what it calls wastewater which could be recycled for a higher use as it is presently done in the fresh water marshes created with the so called wastewater<sup>19</sup> and the effects of vaporization. Unenforceable emission limits, artificially created to be below significance levels, with no basis of viability and no expectation of monitoring, compliance or enforcement, also subject to further amendment after construction, do nothing to serve the public or protect the integrity of the air quality as required under the Clean Air Act.

11. The District Properly Considered Comments Requesting That The District Require The Applicant To Build A Non-Fossil-Fuel Fired Facility. 28

This is a disputed matter of fact and law.

12. The District Did Not Err In Not Requiring Calpine to Build A Less-Efficient Simple-Cycle Facility 29

This is a disputed matter of fact and law.

13. The District Adequately Considered The Potential Impacts From Using Recycled Wastewater 30

This is a disputed matter of fact. "The District also considered the potential implications of using recycled water with respect to Legionnaire's disease, and found that there would not be any significant impacts in this area either." see *id.* at 186-87 the facility will be required ... to treat the cooling tower water with chlorine or other biocide to prevent the growth of the Legionella bacterium and other micro-organisms." Response at page 31. CARE/Simpson have seen no study of the effects of vaporizing the "chlorine or other biocide" and contend that it is required to assess the air quality impacts of the facility.

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<sup>18</sup> See page 7 of 12 From: Rob Simpson Sent: Wednesday, September 16, 2009 11:43 PM Attached Exhibit 2 also quoted in petition page 17 emphasis added.

<sup>19</sup> See <http://www.epa.gov/wetlands/pdf/ConstructedWetlands-Complete.pdf>

#### 14. The District Clearly Identified the Project Location 32

This is a disputed matter of fact and law. The District claim; "that the District clearly published the facility's street address and the intersection at which it will be located." is without merit. The project is not planned to be located at the intersection described. The District Notices misstated the location of the facility, they identified the address of an access road which is about 1/4 mile from the actual project location. While in some instances such a discrepancy may not matter, in this instance it changes the location from the edge of the San Francisco Bay, adjacent federally protected endangered species and their habitats to an industrial area, Failure to provide this information to the public and affected agencies is false and misleading description of the project location. It potentially prejudiced consideration of the projects effects. The CEC Application for Certification (which may be the same document that is identified as the "application for permit modification" in the index) states; "City of Hayward Parcel—The power block will be located mostly on the portion of the City of Hayward parcel that is currently used for sewage sludge drying." 3-77<sup>20</sup> The Address of the "City of Hayward parcel" is 3700 Enterprise Drive.

#### 15. The District Did Not Mislead the Public In Explaining The Distinctions Between The State and Federal Permitting Process. 32

This is a disputed matter of fact and law.

#### 16. The District Was Not Required to Indentify The Specific Turbines That Will Be Used at the Facility. 33

This is a disputed matter of fact and law. The District should identify if the turbines are used if they have been utilized to earn emission credits, where they were retired, and the expected emissions from the used turbines. The Districts assertion that "Petitioners are concerned that overhauled or remanufactured turbines may have "pollution characteristics" that may be different than the original manufacturer's specifications, Petition at 23, but if that is the case – and the "pollution characteristics" result in emissions that will not comply with the permit limits – then the facility will not be able to use that equipment." The Response at page 34 does not form an enforceable condition. If the District is proposing to add a condition that when the used turbines exceed permit limits they will immediately cause the permittee to "not be able to use that equipment" that would be a step in the right direction but the reality is that once the turbines are installed the

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<sup>20</sup> See [http://www.energy.ca.gov/sitingcases/russellcity\\_amendment/documents/owner/2006-11-17\\_RCEC\\_AMENDMENT.PDF](http://www.energy.ca.gov/sitingcases/russellcity_amendment/documents/owner/2006-11-17_RCEC_AMENDMENT.PDF) page 203of 258

district does not enforce permit limits. See Robert Sarvey Response. Making up limits without an expectation that they will be enforced or are possibly merely to obtain a permit that would subsequently be changed or ignored is intentionally deceptive to the public and illegal.

17. The District Committed No Errors With Respect to Considering the Impacts of Nearby Roadways. 34

This is a disputed matter of fact and law. The District claims that it "committed no errors with respect to considering the impacts of nearby roadways" Response at page 34 emphasis omitted. It further claims that "Highway 92, .. is located approximately 1 km south of the facility" While this distance is factually correct from the correct location of the facility it is closer to 1.4 Km from the intersection that the District claims the facility will be located at or near. The School District has briefed this issue better than Simpson could. CARE/Simpson agree with their position.

18. The District Properly Relied On Data from Nearby Monitoring Stations 35

This is a disputed matter of fact and law. The District defends its choice to use a distant monitoring station, in a different setting, instead of the closer station in a more representative location "the Fremont-Chapel Way monitoring station is located approximately 18 km southeast of the project". Response at page 37. The Oakland station is 12.5 Km from the planned facility. It is more representative of the local conditions and should be used. The reason for using Fremont monitoring instead of local monitoring or representative monitoring appears simple enough; with factual information on the area air quality status the facility could not be permitted. Footnote Number 263 on the Districts response to comments includes a link to The District's air monitoring plan.<sup>21</sup> A review of Fremont, Hayward and Oakland in the plan demonstrates why Fremont is not the appropriate monitor site. Fremont; "There has never been an exceedance of the national 24-hour PM10 standard recorded at Fremont, and the highest concentration recorded in the last nine years was less than half of the standard. The Air District discontinued PM10 monitoring at the site on June 30, 2008 because no exceedances of the national PM10 standard are expected to occur based on monitoring history" page 31 Hayward; "Studies had shown that on high ozone days, a cloud of ozone and precursors moves southward from Oakland " page 36 emphasis added Oakland "The Air District opened a new air monitoring station in Oakland in November 2007...Oakland is an important area for air pollution monitoring because it is the largest city in Alameda County, with a 2007 population

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<sup>21</sup> See [http://www.baaqmd.gov/~media/Files/Technical%20Services/2009\\_Network\\_Plan.ashx](http://www.baaqmd.gov/~media/Files/Technical%20Services/2009_Network_Plan.ashx)

estimate of 420,183. It has large emission sources within its boundaries, such as a major maritime port, an international airport, extensive areas of industry, and a number of major freeways. These sources have the potential to emit significant amounts of particulates and organic toxic compounds."<sup>22</sup>

19. The District Clearly and Extensively Responded to All Comments It Received. 38

This is a disputed matter of fact and law. See 1 to 3 for the response to the District above. The District not only failed to respond to comments, it now denies comments were made, misstates comments, and misleads when responding. "One concern challenges the District's air quality modeling for allegedly not taking into account the effects of water vapor that will evaporate from the facility's Zero Liquid Discharge system. But this concern was never raised in comments in either of the comment periods, and so the commenter would not be able to raise it in a Petition for Review." page 39 Again the District misstates the record my comments pages 5-6 of 12 state; I have found no evidence on this record to indicate any environmental benefit from discharging wastewater into the air instead of into the bay. Discontinuance of water deliveries to the bay may cause an undisclosed negative effect that should be studied and disclosed. Emissions of 4 million gallons of effluent into the air could have public health risks that have not adequately been studied." 4 million gallons represents the daily emission. In our comments pages 17, 31-33 and Simpson comments 9-10 of 13 we attempted to determine the viability of utilizing modern turbine technology instead of what is proposed, specifically Flex Plant 10 and 30. The District dismissed our comments with little consideration. The attached communication between the District and Helen Kang demonstrates that the District did not have the information regarding the Flex system prior to permitting. It is now apparent that the District did not adequately consider these options. Exhibit 4 e-mails from Helen Kang and two attachments Exhibits 5 and 6. These show the District has demonstrated that they have not adequately responded to comments.

20. The District Properly Notified The Public Of This Permitting Action, And Did Not Err In Failing Send Notice To Barbara George. 39

This is a disputed matter of fact and law. Barbara George of Women's Environmental Matters is a prominent local female environmental activist who participated with air quality, due process and environmental justice concerns on this record and in other proceedings before the

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<sup>22</sup> *Id.* at page 48

District. A simple search of her name on the District website reveals several entries of participation in other proceedings. The middle aged white men who appear to dominate the District ranks should not discriminate against her. Her organization appears specifically formed to overcome this type discrimination and the harm that it has caused. Her website states; Hardly any women were involved in planning, building or operating industrial energy systems such as coal & uranium mines, oil & gas rigs, refineries, giant dams, power plants & transmission lines. Even today, few women are able to break into that club, or have even been tempted to try. On the other hand, women all over the world have long been dealing with the mess the industrial energy system leaves behind — cleaning up soot in our houses & clothes, nursing family members sickened by pollution & industrial accidents, & coping with personal & societal changes in moving from farms & villages to urban settings.”<sup>23</sup>

The California Energy Commission (CEC) Decision for the Russell City Energy Center, Application for Certification 01-AFC-7 identified on page 18 of the INDEX OF PUBLIC PERMITTING RECORD DOCUMENTS includes a number of comments attributed to Ms. George including; "On the morning of the evidentiary hearing, Barbara George, on behalf of Woman’s Energy Matters (WEM), petitioned to intervene in the case" page 6 "Barbara George of Women’s Energy Matters stated her worries about cumulative impacts of local emissions from highways combining with those of the project as well as the risk of the project emitting pollutants in the plume from the cooling towers. Staff witness Behmer explained that the Staff analysis includes existing emissions, including those from local highways, as part of the baseline or background environmental Conditions. Staff then adds project-related emissions to that amount to determine total impacts. He also included vapor-born particulates from cooling towers in his analysis. (RT 183-189.)" page 92 Barbara George suggested that the water proposed for cooling use at the power plant could be used in ways other than power plant cooling and recommended that the project use dry cooling technology instead. (RT 293.)”<sup>24</sup> Her comments of nearly a decade ago are particularly germane as we are dealing with the same deficiencies with the same planned plant today. In another proceeding before the District her comments are also germane to this proceeding in demonstrating an ongoing ignorance by the district of public comments. "Lack of “Alleged Complaints;” Responsibility of Regulators and Regulated Corps. “The undersigned testified at your public meeting in Bayview

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<sup>23</sup> See <http://www.womensenergymatters.org/background.htm>

<sup>24</sup> See See page 159 [http://www.energy.ca.gov/sitingcases/russellcity/documents/2002-09-12\\_COMMISSION\\_DECIS.PDF](http://www.energy.ca.gov/sitingcases/russellcity/documents/2002-09-12_COMMISSION_DECIS.PDF)



Hunters Point May 4, 2004 and also attended the information meeting in April. Your staff's statement that "there were no alleged complaints" is an impressive denial of reality. There were complaints right there at that meeting, and several attendees said they had called PG&E or the Air Board to complain. Your staff stated that you don't count complaints to PG&E because they can't be trusted to report them to you. That is alarming, since they are required to report facts from their monitors. Are you implying those can't be trusted too? Are you saying that your regulation can't be trusted to keep track of them? We certainly hope not. For all the reasons above, Women's Energy Matters urges you to deny the permit for Hunters Point Power Plant. Sincerely, Barbara George Women's Energy Matters"<sup>25</sup>The District appears to be relying on the same circular logic that the Board rejected in the prior remand for this permit where they claimed that Simpson should have raised his issues of, failure to provide public notice of the comment opportunity, during the comment opportunity. The District is misguided to rely; "*In re J&L Specialty Products Corp.*, 5 E.A.D. 31 (EAB 1994)" in its dismissal of Ms. George and Women's Energy Matters as "harmless" and excusing itself for noncompliance with section 124.10. on pages 39-43 of its response to petition for review 10-05 It should be looking to Russell City Energy Center remand 08-01 "On remand, the District must scrupulously adhere to all relevant requirements in section 124.10 concerning the initial notice of draft PSD permits" Response at page 39. The District's claim that complaints about the California Power Plant Licensing Process being irrelevant are particularly dubious in light of the prior remand and the failure to include Ms. George and others in notice of this permit. The same failures of this permit are being repeated throughout the state with negative consequences for the environment and people who wish to meaningfully participate in permitting. The Board should allow further briefing on this issue.

21. The Petition's Complaints About the California Power Plant Licensing Process In General Are Irrelevant To This Specific Permit 43

This is a disputed matter of fact and law.

22. Petitioners' Concerns About Endangered Species Act Consultation Are Not Properly Raised In An Appeal Under 40 C.F.R. Section 124.19; And They Have No Merit In Any Event. 44

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<sup>25</sup> The comments are referenced on the District website but the actual text Simpson received from Ms. George on May 30, 2010.

[http://www.baaqmd.gov/~media/Files/Engineering/Title%20V%20Permits/A0024/A0024\\_2004-09\\_renewal\\_15a.ashx](http://www.baaqmd.gov/~media/Files/Engineering/Title%20V%20Permits/A0024/A0024_2004-09_renewal_15a.ashx)

This is a disputed matter of fact and law. Concerns about the failure of obtaining a formal Biological Opinion from the US Fish and Wildlife Service (USFWS) in this context pertain to the District's failure to provide adequate, factual information to USFWS to make an informed decision. The project location is less than 50 feet from the waters of the U.S. ?? and is adjacent to Federally protected Endangered Species and their habitats

23. The District Properly Evaluated Environmental Justice Considerations. 44

The District states "[t]he Petition does not address the District's analysis of environmental justice concerns, and it does not claim (explicitly at least) that the District erred in concluding that there would be no significant impacts on any environmental justice communities from this facility." Response at page 45. First to clarify, each comment and statement that we make throughout this proceeding should be considered a claim that the District erred, unless explicitly stated otherwise. Each claim that the District and Calpine have made that is contrary to our petition and pleadings we categorically deny. Pleading length restrictions prevent us from further response to many issues. We will be happy to continue to respond should the Board choose to allow further briefing.<sup>26</sup>

A. **Violation of due process of law and 42 U.S.C. § 1983**<sup>27</sup>

It has been shown that there are links between socio-economic factors (ex: education, income, occupation) and people's health. This may be due to the fact that, in general, people with lower incomes tend to live in more environmentally polluted areas, have reduced access to health care, and in some cases, suffer a language barrier that puts them at a disadvantage for receiving services. In Alameda County, working class communities of color, in particular, bear a disproportionate share of health risk due to environmental factors. Increased health risks may include elevated instances of cancer, asthma, heart attacks and other serious health problems related to higher exposures to toxic air contaminants.

This is a disputed matter within the Board's jurisdiction to investigate for violation of 42 U.S.C. § 1983, commonly referred to as "section 1983" which provides:

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<sup>26</sup> The comments on the CEC PMPD from Chabot College in the Eastshore Energy Proceeding is germane to these proceedings and better explains the failures of the Districts System for ignoring Environmental justice communities. The District used the same process in the same neighborhood. [http://www.energy.ca.gov/sitingcases/eastshore/documents/intervenors/2008-07-15\\_CHABOT-LAS\\_POSITAS\\_COMMUNITY\\_COLLEGE\\_DISTRICT\\_INTERVENORS\\_COMMENTS\\_ON\\_PMPD\\_TN-47054.PDF](http://www.energy.ca.gov/sitingcases/eastshore/documents/intervenors/2008-07-15_CHABOT-LAS_POSITAS_COMMUNITY_COLLEGE_DISTRICT_INTERVENORS_COMMENTS_ON_PMPD_TN-47054.PDF)

<sup>27</sup> For additional clarity it is attached as Exhibit 6 is a Declaration in response by Earnest Pacheco.

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (emphasis added). Clearly the record herein, voluminous as it may be, demonstrates the District's actions in concert with Russell City Energy Center LLC "causes to be subjected, any citizen... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" in violation of the federal statute in this case in violation of due process and 42 U.S.C. § 1983.

There are significant health impacts linked to power plant emissions. The US EPA has found that air pollutants emitted from industrial sources, such as power plants, increase the likelihood of adverse cardiovascular and respiratory impacts, as well as cause and worsen chronic health conditions, such as asthma.<sup>28</sup> These pollutants have also been linked to more serious health effects, such as cancer, permanent respiratory damage, and birth defects. Asthma is a respiratory disease that constricts the lungs and causes extreme breathing difficulties. In most cases, prescription inhalers are necessary to help clear the airways in the event of an asthma attack. Lack of medical intervention for asthma attacks can lead to hospitalization, emergency room visits, and even death. Respiratory diseases, such as asthma, can be triggered by, and may even be caused by, exposure to groundlevel ozone (smog), and particulate matter. Emissions from the proposed project will increase local levels of particulate matter and volatile organic compounds, which may lead to an increase in childhood asthma in those communities. Like asthma, chronic obstructive pulmonary disease (COPD) is a common respiratory disease aggravated by high levels of smog pollution and poor air quality. COPD encompasses a group of respiratory diseases that includes chronic obstructive bronchitis and emphysema. People suffering from COPD typically experience varying levels of airflow obstruction

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<sup>28</sup> See, e.g., U.S. Environmental Protection Agency, *Cleaning Up Common Pollutants*, available at <http://www.epa.gov/air/caa/peg/cleanup.html>; California Air Resources Board, *Asthma and Air Pollution*, available at <http://www.arb.ca.gov/research/asthma/asthma.htm>

and breathing difficulties. According to the US EPA:<sup>29</sup> COPD is the fourth leading cause of death in the U.S., the leading cause of hospitalization in adults, particularly in older adults, and is a major cause of morbidity, mortality, and disability.<sup>30</sup> Air pollution may be an important contributor to COPD. Although there are many factors that contribute to cancer (genetics, diet, lifestyle, environment, etc), certain carcinogenic pollutants are known to contribute to, and perhaps even cause certain types of cancers. Several of the compounds emitted by power plants are known carcinogens, or have been linked to increased cancer levels in certain areas.<sup>31</sup> Air pollution may be an important contributor to COPD.<sup>32</sup> Lung cancer has been linked to breathing polluted air, in addition to other factors. In fact, it has been shown that air pollution, mainly from vehicles, industries, and power plants, raises the chances of lung cancer and heart disease in people exposed to it long term.<sup>33</sup> Exposure to smog can not only aggravate existing conditions (such as asthma), but it also may increase susceptibility to respiratory illnesses, such as pneumonia and bronchitis. Numerous scientific studies have linked ground level ozone to a variety of serious respiratory and pulmonary problems, including: Airway irritation, coughing, and pain when taking a deep breath; Wheezing and breathing difficulties during exercise or outdoor activities; and Inflammation of the lungs, which is much like a sunburn on the skin.<sup>34</sup>

Repeated exposure to certain pollutants, such as ozone, can cause permanent lung damage in some cases. Like cancer, cardiovascular disease is caused by many factors, most of which are influenced by the patient (diet, exercise, lifestyle, smoking, high stress occupation, etc), but Some Are Less Easily Controlled, Such As Environmental Pollution.

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<sup>29</sup> See EPA report of the environment- human disease and condition:<http://cfpub.epa.gov/eroe/index.cfm?fuseaction=list.listBySubTopic&lv=list.listByChapter&ch=49&s=381>

<sup>30</sup> American Lung Association. 2008. Chronic obstructive pulmonary disease (COPD) fact sheet. Accessed February 2009. <http://www.lungusa.org/site/pp.asp?c=9oICLOOxGrF&b=1541153>

<sup>31</sup> *Id.* According to the US EPA: COPD is the fourth leading cause of death in the U.S., the leading cause of hospitalization in adults, particularly in older adults, and is a major cause of morbidity, mortality, and disability.

<sup>32</sup> EPA report of the environment- human disease and condition:  
<http://cfpub.epa.gov/eroe/index.cfm?fuseaction=list.listBySubTopic&lv=list.listByChapter&ch=49&s=381>

<sup>33</sup> Lung Cancer, Cardiopulmonary Mortality, and Long-term Exposure to Fine Particulate Air Pollution, *Journal of the American Medical Association* (Vol. 287, No. 9: 1132-1141)

<sup>34</sup> *Ibid.*

**B. Nitrogen Oxides (NOx)**

**Description:** The most harmful NOx is nitrogen dioxide (NO<sub>2</sub>). NOx react with ammonia, moisture, and other compounds to form small particles that penetrate deeply into the lungs. NOx is a primary ingredient in the creation of ozone (smog). NOx are listed as a “criteria pollutant” by the US EPA.<sup>35</sup> **Health Effects:** Lung irritation, aggravates asthma or chronic bronchitis, bronchitis and emphysema-like conditions, increases susceptibility to respiratory infections.

**C. Ground Level Ozone (smog)**

**Description:** Gas made up of three oxygen atoms (O<sub>3</sub>). Ozone is not emitted directly from power plants, but rather is formed by other emitted pollutants (NOx and VOCs) in the presence of sunlight. Ozone is the primary component in smog. More visible in summer when hot weather makes ozone levels worse. According to US EPA, ozone can be dangerous even at low levels. Ozone is listed as a “criteria pollutant” by the US EPA.<sup>36</sup> **Health Effects:** Coughing, chest pain, shortness of breath, eye, nose, and throat irritation; aggravates asthma, bronchitis, emphysema, and heart disease.

**D. Carbon Monoxide (CO)**

**Description;** Colorless, odorless gas. Created when carbon dioxide (CO<sub>2</sub>) is not burned completely. The highest levels of CO in the outside air typically occur during the colder months of the year when inversion conditions are more frequent, and air pollution becomes trapped near the ground beneath a layer of warm air. Carbon Monoxide is listed as a “criteria pollutant” by the US EPA.<sup>37</sup> **Health Effects:** At high levels, causes death. At low levels, fetal exposure results in underweight birth. Low birth-weight is linked to lifelong health effects like obesity and diabetes.

**E. Particulate Matter (PM)**

**Description:** Made up of a number of components, including acids, organic chemicals, metals, and soil or dust particles. Can be formed in the atmosphere from sulfur dioxides (SO<sub>2</sub>) and nitrogen oxides (NOx). Particles can get deep into lungs, and even the bloodstream. Particulate matter is listed as a “criteria pollutant” by the US EPA.<sup>38</sup> **Health Effects:** Premature death, chronic

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<sup>35</sup> For more information on the health effects of Nitrogen Oxides (NOx), see <http://www.epa.gov/air/nitrogenoxides/health.html>

<sup>36</sup> For more information on the dangers and health effects of ozone, see “Smog - Who Does it Hurt?”, downloadable at <http://www.epa.gov/air/ozonepollution/health.html>

<sup>37</sup> For more information on the health effects of Carbon Monoxide (CO), see <http://www.epa.gov/air/urbanair/co/hlth1.html>

<sup>38</sup> For more information on health effects from particulate matter pollution, see <http://www.epa.gov/air/particlepollution/health.html>

irritation that can trigger asthma attacks. Known to aggravate other lung diseases, cause lung cancer, interfere with blood gas exchange, and increase risk of death from heart disease.

**F. Carbon Dioxide (CO<sub>2</sub>)**

**Description:** Important greenhouse gas. Widely known as a pollutant responsible for global warming. New research suggests that CO<sub>2</sub> forms “domes” over areas of mass pollution. These concentrated pockets elevate local levels of CO<sub>2</sub>, creating warming conditions that increase ozone formation.<sup>39</sup> CO<sub>2</sub> domes thus worsen the effects of localized air pollution (pollution from ozone or particulates). **Health Effects:** Most of the effects from CO<sub>2</sub> pollution are global, but localized CO<sub>2</sub> domes worsen air quality in urban areas, causing respiratory problems, increasing rates of cancer, asthma, respiratory disease, hospitalizations, ER visit, and premature death in those areas.

**V. REPLY TO RUSSELL CITY LLC**

For purposes of brevity we identify the following issues raised by Russell City which we believe our Petition adequately address already but that we dispute Russell City’s arguments inapposite to our Petition.

1. CARE/Simpson’s Allegations That the Air District Circumvented Public Participation Have No Merit 10

This is a disputed matter of fact and law. See 1 for the response to the District above.

Petitioners allege that 1 demonstrates a pattern of synergistic corruption by Russell City in concert with BAAQMD.

2. The Air District Complied with All Regulatory Requirements Governing Public Inspection of Administrative Materials 10

This is a disputed matter of fact and law.

3. The Air District Was Not Required To Maintain an Electronic Docket or Database of Permit-Related Documents 12

This is a disputed matter of fact and law.

4. The Air District’s Documents Were Not “Fatally Flawed” 14

This is a disputed matter of fact and law.

5. The Air District’s Fact Sheets Complied with Applicable Regulations 14

This is a disputed matter of fact and law.

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<sup>39</sup> For more information on CO<sub>2</sub> domes, see Mark Jacobson’s research “Enhancement of local air pollution by urban CO<sub>2</sub> domes”  
<http://pubs.acs.org/doi/abs/10.1021/es903018m?cookieSet=1&journalCode=esthag>

6. The Air District Timely Clarified that the Permit Was a Draft PSD Permit, Not an Amendment to an Existing PSD Permit 16

This is a disputed matter of fact and the record speaks for itself.

7. CARE/Simpson's Allegations About the Interdependence of the Determination of Compliance and Draft PSD Permit Do Not Raise Any Issue for Board Review 17

This is a disputed matter of fact and law. See 8 for the response to the District above.

Petitioners allege that Russell's number 7 demonstrates a pattern of synergistic corruption by Russell City in concert with BAAQMD.

8. CARE/Simpson's Arguments About Greenhouse Gas Emissions Are Incorrect and Unfounded 21

This is a disputed matter of fact and law.

9. RCEC's PSD Permit Imposes Limits on GHG Emissions, Despite the Fact that GHGs Are Not Yet Subject to Regulation 21

This is a disputed matter of fact and law.

10. The Air District Adequately Considered the Project's Impacts on Low Income and Minority Households and Specifically Considered the Impacts of the Projects GHG Emissions on Air Quality and Public Health 24

This is a disputed matter of fact and law.

11. The Petition Fails To Specify Any "Specific 'Amended' Permit Issues" Warranting Review 27

This is a disputed matter of fact and law.

12. The Air District Did Not Prevent or Fail to Support Informed Public Participation in the Permitting Process 28

This is a disputed matter of fact and law.

13. CARE/Simpson Demonstrate No Clear Error or Other Basis for Review in the Air District's Publication of Public Notices and Related Documents 31

This is a disputed matter of fact and law.

14. The Air District Did Not Mislead the Public Concerning the Location of the Project 31

This is a disputed matter of fact. The record speaks for itself.

15. The Air District's Notices Were Not Otherwise Deficient 33

This is a disputed matter of fact. The record speaks for itself.

16. This Board Lacks Jurisdiction To Review the Air District's Response to Public Records Act Requests; Regardless, the Air District's Response Was Adequate 35

This is a disputed matter of law for the Board to decide.

17. A Number of CARE/Simpson's Issues Are Beyond the Scope of Review of this Permit 37

This is a disputed matter of law for the Board to decide.

18. CARE/Simpson’s Assertion that the Air District Did Not Respond Adequately to Any of Their Comments Has No Merit 38

This is a disputed matter of fact. The record speaks for itself. CARE/Simpson requested discovery so as to give the District and Russell City an opportunity to provide specific reference to the record to substantiate their claim that the District responded adequately to Petitioners’ comments. In the absence of such additional evidence the record speaks for itself that the District failed to provide any specific answers to our comments that provided any reference to whose comments were being responded to and in any case the District failed to respond to all Petitioners’ questions made during the public comment period.

19. The Air District’s Responses to Public Comments Clearly Satisfied Its Obligations Under the Federal PSD Rules 38

This is a disputed matter of fact and law.

20. CARE/Simpson Fail To Show that Any of the Air District’s Responses to Public Comments Was Clearly Erroneous or Otherwise Warrants Review 40

This is a disputed matter of fact and law.

21. The Air District Did Not Fail to Identify the Location of the Facility 40

This is a disputed matter of fact.

22. The Board Does Not Have Jurisdiction To Review the CEC’s Decision to License a Combined-Cycle Facility 41

This is a disputed matter of law subject to the Board’s review.

23. The Air District Did Not Err in Finding that GHGs Are Not Subject to PSD 43

This is a disputed matter of law subject to the Board’s review.

24. Petitioner Fails To Show that the Air District’s Conclusion that Carbon Sequestration Is Not a Feasible Technology Is Clearly Erroneous 43

This is a disputed matter of fact subject to the Board’s review.

25. The Data Underlying the Determination that There Were No Feasible Alternatives to the Project Was Not Out of Date 46

This is a disputed matter of law subject to the Board’s review.

26. The Air District Adequately Studied All Potential Impacts of the Project’s Zero Liquid Discharge System 49

This is a disputed matter of fact subject to the Board’s review.

27. The Name “Russell City Energy Center” Is Not Misleading 53

This is a disputed matter of fact subject to the Board’s review.

28. The Air District Did Not Misrepresent the Character of the EAB Remand Order; Public Participation in the Permitting Process Was Not Chilled 53

This is a disputed matter of fact subject to the Board’s review.



29. The Air District's Response to CARE/Simpson's Request for Information Regarding the Project's Equipment Was Proper 55

This is a disputed matter of fact and law.

30. The Air District Properly Excluded Some Roadways from its Impact Analysis 58

This is a disputed matter of fact.

31. The Air District Adequately Responded to Comments 61

This is a disputed matter of fact and law. See response to District at 1 to 3.

32. The Air District Provided Proper Notice of all Permitting Proceedings 62

This is a disputed matter of fact and law. See response to District at 1 to 3.

33. CARE/Simpson Fail to Establish that the Air District Circumvented Any Applicable Regulation or Rule in Permitting this Facility 63

This is a disputed matter of fact and law.

34. Unresolved Issues from Prior Appeals Cannot Be Incorporated by Reference 64

This is a disputed matter of law properly before the Board's review.

35. The Allegations Raised Concerning the Adequacy of the U.S. Fish & Wildlife Report Fall Outside of the Board's Jurisdiction and Are Without Merit 64

This is a disputed matter of fact and law.

36. The Air District Fully and Adequately Considered the Project's Potential Health Impacts 67

This is a disputed matter of fact and law.

37. The Air District Adequately Considered the Project's Impacts on Low Income and Minority Households 68

This is a disputed matter within the Board's jurisdiction to investigate.

## VI. CONCLUSIONS

For all the reasons outlined above the Board should remand the permit back to the BAAQMD.

Respectfully submitted,



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s/ Rob Simpson  
27126 Grandview  
Hayward, CA 94542

June 1<sup>st</sup>, 2010

**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 this 1<sup>st</sup> day of June 2010, at San Francisco, California.



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

**Certificate of Service**

I hereby certify that I have this 1<sup>st</sup> day of June 2010 served the foregoing document “*Californians for Renewable Energy (CARE) reply brief*” under US EPA EAB PSD Appeal No. 10-05, transmitting the copies via e-mail to all parties who have provided an e-mail address. First class mail will be used if electronic service cannot be effectuated.

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