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

In re: Russell City Energy Center Russell City Energy Company, LLC Permit Application No. 15487	PSD Appeal[1] No.

[1] § 124.19 Appeal of RCRA, UIC, NPDES, and PSD Permits.

(a) Within 30 days after a RCRA, UIC, NPDES, or PSD final permit decision (or a decision under 270.29 of this chapter to deny a permit for the active life of a RCRA hazardous waste management facility or unit) has been issued under §124.15 of this part, any person who filed comments on that draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision. . . .. The petition shall include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations and when appropriate, a showing that the condition in question is based on:

(1) A finding of fact or conclusion of law which is clearly erroneous, or

(2) An exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review.

(b) The Environmental Appeals Board may also decide on its own initiative to review any condition of any RCRA, UIC, NPDES, or PSD permit decision issued under this part for which review is available under paragraph (a) of this section. The Environmental Appeals Board must act under this paragraph within 30 days of the service date of notice of the Regional Administrator's action.

(c) Within a reasonable time following the filing of the petition for review, the Environmental Appeals Board shall issue an order granting or denying the petition for review. To the extent review is denied, the conditions of the final permit decision become final agency action. Public notice of any grant of review by the Environmental Appeals Board under paragraph (a) or (b) of this section shall be given as provided in §124.10. Public notice shall set forth a briefing schedule for the appeal and shall state that any interested person may file an amicus brief. Notice of denial of review shall be sent only to the person(s) requesting review.

(d) The Regional Administrator, at any time prior to the rendering of a decision under paragraph (c) of this section to grant or deny review of a permit decision, may, upon notification to the Board and any interested parties, withdraw the permit and prepare a new draft permit under §124.6 addressing the portions so withdrawn. The new draft permit shall proceed through the same process of public comment and opportunity for a public hearing as would apply to any other draft permit subject to this part. Any portions of the permit which are not withdrawn and which are not stayed under §124.16(a) continue to apply.

(e) A petition to the Environmental Appeals Board under paragraph (a) of this section is, under 5 U.S.C. 704, a prerequisite to the seeking of judicial review of the final agency action.

(f)(1) For purposes of judicial review under the appropriate Act, final agency action occurs when a final RCRA, UIC, NPDES, or PSD permit decision is issued by EPA and agency review procedures under this section are exhausted. A final permit decision shall be issued by the Regional Administrator:

(i) When the Environmental Appeals Board issues notice to the parties that review has been denied;

(ii) When the Environmental Appeals Board issues a decision on the merits of the appeal and the decision does not include a remand of the proceedings; or

(iii) Upon the completion of remand proceedings if the proceedings are remanded, unless the Environmental Appeals Board's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.

(2) Notice of any final agency action regarding a PSD permit shall promptly be published in the Federal Register.

(g) Motions to reconsider a final order shall be filed within ten (10) days after service of the final order. Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Motions for reconsideration under this provision shall be directed to, and decided by, the Environmental Appeals Board. Motions for reconsideration directed to the administrator, rather than to the Environmental Appeals

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Board, will not be considered, except in cases that the Environmental Appeals Board has referred to the Administrator pursuant to §124.2 and in which the Administrator has issued the final order. A motion for reconsideration shall not stay the effective date of the final order unless specifically so ordered by the Environmental Appeals Board.

INTRODUCTION

On February 5, 2009 CARE, Bob Sarvey, and Rob Simpson filed comments[2] on the "amended" PSD permit for the Russell City Energy Center Application Number 15487. CAlifornians for Renewable Energy, Inc. ("CARE") objects to this permit. This also serves as a Complaint to Office of the Administrator of the U.S. Environmental Protection Agency (USEPA) and the California Air Resources Board (ARB) under 42 USC § 7604.[3] In the July 29, 2008 "Remand" of the United States Environmental Protection Agency (USEPA) Environmental Appeals Board ("EAB" or "Board") admonished the Bay Area Air Quality Management District ("BAAQMD" or "District") to "scrupulously adhere to all relevant requirements in section [40 C.F.R. § 124.10(d)] concerning the initial notice of draft PSD permits (including development of mailing lists), as well as the proper content of such notice" but the District failed to properly carry out this order.[4]

The District, like Pacific Gas and Electric (PG&E)[5] claim that when the EAB reviewed the original PSD permit appeal by Mr. Simpson "[t]he EAB, found no substantive defects in the PSD permit and its decision denied review of each of the substantive claims raised in the appeal." The remand order from the EAB decision does not deny review of the substantive PSD issues raised by Mr. Simpson but states that permit must be re-noticed and that the appeal board refrains from opining on the substantive PSD issues raised by Mr. Simpson "at this time."

> "The District's notice deficiencies require remand of the Permit to the District to ensure that the District fully complies with the public notice and comment provisions at section 124.10. Because the **District's renoticing of the draft permit will allow Mr. Simpson and other members of the public the opportunity to submit comments on PSD-related issues during the comment**

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[2] See http://www.baaqmd.gov/~/media/Files/Engineering/Public%20Notices/2009/15487/letters/02-05-09_simpson_rob_care.ashx the comments prepared by Michael E. Boyd, Bob Sarvey, and Rob Simpson for CARE. The comments on environmental justice are sponsored by Lynne Brown.

[3] This Complaint also includes an attached ratepayers citizens *Complaint Petition* filed before the California Public Utilities Commission (CPUC) in the *Application of Pacific Gas and Electric Company for Expedited Approval of the Amended Power Purchase Agreement for the Russell City Energy Company Project (U39E)* under Docket A.08-09-007 at: http://docs.cpuc.ca.gov/efile/CM/96544.pdf

[4] In re: Russell City Energy Center Permit No. 15487 USEPA EAB PSD Appeal No. 08-01

[5] See September 10, 2008 testimony at page 1-5 http://docs.cpuc.ca.gov/published/proceedings/A0809007.htm

period, the Board refrains at this time from opining on such issues raised by Mr. Simpson in his appeal."
Remand Order at page 3[6]

There are in fact several PSD related issues that the EAB appeals Board will have to review when the EAB is petitioned after the BAAQMD issues the draft permit. We have reviewed comments on the draft PSD permit from several major environmental organizations including the Sierra Club, Earth Justice, and Golden Gate University - Environmental Law and Justice Clinic for Citizens Against Pollution which we incorporate by this reference as if fully set forth by CARE and Rob Simpson. Despite claims otherwise the remand order from the EAB on the original Russell City PSD permit dismisses all substantive comments other than public notice requirements, this is simply not true. Major issues remain with this permit.

DISTRICT IS CIRCUMVENTING PUBLIC PARTICIPATION

The District continues to fail to implement 40 CFR 52.21, 40 CFR 124 and the Clean Air Act in its consideration of PSD permit for the Russell City Energy Center (RCEC). The District is circumventing public participation by failing to provide access to the administrative record. Petitioner(s)[7] have requested access to the record Since September 11 2008 without satisfaction. After no less than 10 requests in writing in person and by telephone the District has provided limited response providing no basis for the permitting. It has been impossible for the public to participate with no discernible docket for the facility as would be provided if the EPA issued the permit. When the EPA issues PSD permits there is an accessible docket and supporting documentation available on the EPA website. The Notice that was included for the PSD Permit at the District's website[8] failed to include a copy of the Application No. 15487.[9] On August 3, 2009 the District placed an Index of Public Permitting Record Documents on its website in

[6] For a electronic copy of the *Remand Order*;
See:http://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Filings%20By%20Appeal%20Number/EA6F1B6AC88CC6F085257495006586FB/$File/Remand...50.pdf
[7] Petitioner(s) are CARE, Rob Simpson, and Robert Sarvey.
[8] See http://www.baaqmd.gov/pmt/public_notices/2008/15487/index.htm
[9] A copy of the initial authority to construct (ATC) is also not provided on the District's website. On February 4, 2009 Rob Simpson request to see a copy of the Application No. 15487 at the District's Offices in San Francisco but none was provided.

which Application No. 15487 was not listed.[10] With no discernable docket at the District there is no way that the public can identify the basis for permitting actions to effectively participate.

The documents issued by the District are fatally flawed. The District has recently issued no less than 4 “fact sheets” for RCEC each in conflict with the others and none satisfying the requirements of 40 CFR 124.8.[11] The public can not rely on any of the “Fact Sheets” issued by the District. The District has also issued 3 different “Public Notices” and 3 different Statements of Basis, 3 of the 4 “Fact Sheets” the 3 different Public Notices and the 3 different Statements of Basis all make false claims of propriety by claiming that this is an amendment of a PSD permit when no such permit has ever been issued. “The Air District is proposing to incorporate the changes that have been made to the proposed project into the Federal PSD Permit that was initially issued in 2002, including the new project site.” Fact sheet 1 and 2. "The initial project, proposed by an affiliate of Calpine Corporation, received all necessary air quality permits and was licensed by the California Energy Commission (CEC) in 2002." Fact sheet #3

The "amended" Permit fails to comply with 40 CFR 51.166 (2) "Within one year after receipt of a complete application, the reviewing authority shall ... (vii) Make a final determination whether construction should be approved, approved with conditions, or disapproved".

In the December 10, 2008 *Corrected Notice of Public Hearing and Notice Inviting Written Public Comment on Proposed Amended PSD Permit* the District states " [t]he 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 Notice goes on to state:

> The proposed amended PSD Permit is a federal permit issued by the District on behalf of the United States Environmental Protection Agency (“EPA”). The District issues PSD permits under a Delegation Agreement with EPA. The District also participates in the California Energy Commission’s licensing process under state law and issues a District Authority to Construct incorporating the Energy Commission’s requirements. The District issued an Authority to Construct for the Russell City Energy Center jointly in the same document with the federal PSD Permit on November 1, 2007. District claims only the federal PSD Permit has been remanded, and only the federal PSD permit is being re-noticed. The

[10] See http://www.baaqmd.gov/~/media/Files/Engineering/Public%20Notices/2009/15487/B3161_nsr_15487_index_080309.ashx

[11] 40 CFR 124.8 (3) For a PSD permit, the degree of increment consumption expected to result from operation of the facility or activity. (4) A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions.

> Authority to Construct is not being reopened and this notice applies only to the proposed amended PSD permit.

This is in error because the USEPA EAB revoked the PSD Permit on remand as was demonstrated in the second EAB Appeal[12] where the EAB found there was no federal PSD Permit to Appeal. So there is no PSD permit to amend and therefore the so-called "amended Permit" is a faux substitute for the "draft permit, providing public notice fully consistent with the requirements of 40 C.F.R. § 124.10.32" as directed by the EAB.

BACT IS PART OF THE CAA AND THE PDOC INCLUDES THE DISTRICT'S BACT ANALYSIS THEREFORE CLEARLY THE PDOC AND DRAFT PSD PERMIT ARE INTERDEPENDENT

Congress enacted the PSD provisions of the Clean Air Act (CAA) in 1977 for the purpose of, among other things, "insu[ring] that economic growth will occur in a manner consistent with the preservation of existing clean air resources."[13] The statute requires preconstruction approval in the form of a PSD permit before anyone may build a new major stationary source or make a major modification to an existing source[14] if the source is located in either an "attainment" or "unclassifiable" area with respect to federal air quality standards called "national ambient air quality standards" (NAAQS).[15] EPA designates an area as "attainment" with respect to a given NAAQS if the concentration of the relevant pollutant in the ambient air within the area meets the limits prescribed in the applicable NAAQS. CAA § 107(d)(1)(A), 42 U.S.C. § 7407(d)(1)(A). A "nonattainment" area is one with ambient concentrations of a criteria

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[12] See In re: Russell City Energy Center Permit USEPA EAB Appeal No. 08-07

[13] CAA § 160(3), 42 U.S.C. § 7470(3).

[14] The PSD provisions 2 that are the subject of the instant appeal are part of the CAA's New Source Review (NSR) program, which requires that persons planning a new major emitting facility or a new major modification to a major emitting facility obtain an air pollution permit before commencing construction. In addition to the PSD provisions, explained infra, the NSR program includes separate "nonattainment" provisions for facilities located in areas that are classified as being in nonattainment with the EPA's national Ambient Air Quality Standards. See infra; CAA §§ 171-193, 42 U.S.C. §§ 7501-7515. These nonattainment provisions are not relevant to the instant case.

[15] See CAA §§ 107, 160-169B, 42 U.S.C. §§ 7407, 7470-7492. NAAQS are "maximum concentration ceilings" for pollutants, "measured in terms of the total concentration of a pollutant in the atmosphere." See U.S. EPA Office of Air Quality Standards, New Source Review Workshop Manual at C.3 (Draft Oct. 1990). The EPA has established NAAQS on a pollutant-by-pollutant basis at levels the EPA has determined are requisite to protect public health and welfare. See CAA § 109, 42 U.S.C. § 7409. NAAQS are in effect for the following six air contaminants (known as "criteria pollutants"): sulfur oxides (measured as sulfur dioxide ("SO_2")), particulate matter ("PM"), carbon monoxide ("CO"), ozone (measured as volatile organic compounds ("VOCs")), nitrogen dioxide ("NO2") (measured as NOx), and lead. 40 C.F.R. § 50.4-.12. See CAA §§ 107, 161, 165, 42 U.S.C. §§ 7407, 7471, 7475.

pollutant that do not meet the requirements of the applicable NAAQS. *Id.* Areas "that cannot be classified on the basis of available information as meeting or not meeting the [NAAQS]" are designated as "unclassifiable" areas. *Id.* The PSD Regulations provide, among other things, that the proposed facility be required to meet a "best available control technology" ("BACT")[16] emissions limit for each pollutant subject to regulation under the Clean Air Act that the source would have the potential to emit in significant amounts.[17]

The District processes PSD permit applications and issues permits under the federal PSD program, pursuant to a delegation agreement with the USEPA. The District's regulations, among other things, prescribe the federal and State of California standards that new and modified sources of air pollution in the District must meet in order to obtain an "authority to construct" from the District.[18]

In addition to the substantive provisions for EPA-issued PSD permits, found primarily at 40 C.F.R. § 52.21, PSD permits are subject to the procedural requirements of Part 124 of Title 40 of the Code of Federal Regulations (Procedures for Decisionmaking), which apply to most EPA-issued permits.[19] These *requirements also apply to permits issued by state or local governments* pursuant to a delegation of federal authority, as is the case here. Among other things, Part 124 prescribes procedures for permit applications, preparing draft permits, and issuing final permits, as well as filing petitions for review of final permit decisions. *Id.* Also, of particular relevance to this proceeding, part 124 contains provisions for public notice of and public participation in EPA permitting actions. See 40 C.F.R. § 124.10 (Public notice of permit actions and public comment

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[16] BACT is defined by the CAA, in relevant part, as follows:
The term "best available control technology" means an emissions limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of such pollutant.
CAA § 169(3), 42 U.S.C. § 7479(3); see also 40 C.F.R. § 52.21(b)(12).
[17] CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4); see also 40 C.F.R. § 52.21(b)(5).
[18] See Bay Area Air Quality Management District Regulation ("DR") New Source Review Regulation 2 Rule 2, 2-2-100 to 2-2-608 (Amended June 15, 2005), available at http://www.baaqmd.gov/dst/regulations/rg0202.pdf.
[19] See 40 C.F.R. pt. 124.5

period); *id.* § 124.11 (Public comments and requests for public hearings); *id.* § 124.12 (Public hearings).[20]

The District's Regulation 2 Rule 3 - 403 state "[w]ithin 180 days of accepting an [CEC Application for Certification] AFC as complete, the APCO shall conduct a Determination of Compliance [DOC] review and make a preliminary decision [PDOC] as to whether the proposed power plant meets the requirements of District regulations. If so, the APCO shall make a preliminary determination of conditions to be included in the Certificate, including specific BACT requirements and a description of mitigation measures to be required." Regarding the public notice requirement District's Regulation 2 Rule 3 - 404 goes on to state " [t]he preliminary decision [PDOC] made pursuant to Section 2-3-403 shall be subject to the public notice, public comment and public inspection requirements contained in Section 2-2-406 and 407 of Rule 2." Regulation 2 Rule 2 - 406 states " [t]he APCO shall make available for public inspection, at District headquarters, the information submitted by the applicant, and if applicable the APCO's analysis, and the preliminary decision to grant or deny the authority to construct including any proposed conditions... Furthermore, all such information shall be transmitted, upon the date of publication, to the ARB and the regional office of the EPA if the application is subject to the requirements of Section 2-2-405. Regulation 2 Rule 2 - 407 states " [i]f the application is for a new major facility or a major modification of an existing major facility, or requires a PSD analysis, or is subject to the MACT requirement, the APCO shall within 180 days following the acceptance of the application as complete, or a longer time period agreed upon, take final action on the application after considering all public comments. Written notice of the final decision shall be provided to the applicant, the ARB and the EPA..."

Since BACT is part of the CAA and the PDOC includes the District's BACT analysis therefore clearly the PDOC[21] and draft PSD Permit are interdependent on the findings from the

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[20] The requirement for EPA to provide a public comment period when issuing a draft permit is the primary vehicle for public participation under Part 124. Section 124.10 states that “[p]ublic notice of the preparation of a draft permit ... shall allow at least 30 days for public comment.” 40 C.F.R. § 124.10(b). Part 124 further provides that “any interested person may submit written comments on the draft permit ... and may request a public hearing, if no public hearing has already been scheduled.” Id. § 124.11.

In addition, EPA is required to hold a public hearing “whenever [it] ... finds, on the basis of requests, a significant degree of public interest in a draft permit(s).” Id. § 124.12(a)(1). EPA also has the discretion to hold a hearing whenever “a hearing might clarify one or more issues involved in the permit decision.” Id. § 124.12(a)(2).

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 in Hayward, California.[22] 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[23].

DISTRICT FAILS TO CONSIDER GREENHOUSE GAS EMISSIONS AS REGULATED POLLUTANTS

CARE also disagrees with the subject permit because it does not consider greenhouse gas emissions as regulated pollutants. Carbon Dioxide, CO_2, ammonia, NH_3, and Nitrous Oxide, N_2O, are components of the emissions expected from the Russell City Energy Center and yet

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[21] 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

[22] See Declaration of J. Mike Monasmith ("Monasmith Decl.") 2, Att. A.

they are not included as regulated emissions. The United States Environmental Protection Agency (USEPA) website[24] recognizes the climate change impacts of these emissions and yet these impacts were not included as pollutants.

Comment III.A.1. – Applicability of Federal PSD Program to Greenhouse Gas Emissions:
A number of comments claimed that CO2 (as well as other greenhouse gases) are pollutants "subject to regulation" under the CAA, and are therefore subject to PSD review.
Response: In the Statement of Basis and Additional Statement of Basis, the Air District summarized the current state of recent regulatory developments regarding whether greenhouse gases are subject to regulation under the federal PSD program. As the Air District noted in those documents, EPA's Environmental Appeals Board found in November of 2008 in the *Deseret Power* case that EPA as an agency has the discretion to determine whether greenhouse gases should be subject to PSD regulation or not, but had not at that time adopted any definitive policy position on the issue.[25] The EAB also suggested that it may be more appropriate for EPA to address this issue through a nationwide rulemaking, rather than through individual case-by-case PSD permitting decisions. The issue was thus in a highly unresolved state when the Air District issued its initial proposal on December 8, 2008. Then, on December 18, 2008, EPA issued a policy memorandum in response to the EAB's *Deseret Power* opinion. The impact of EPA's December 18 memorandum is that EPA is not requiring greenhouse gases to be regulated under the Federal PSD permitting program, at least as of this time.[26] This continues to be the case currently. EPA has recently determined that greenhouse gases endanger public health and welfare, which will pave the way for EPA to adopt regulations limiting greenhouse gases from motor vehicles and other sources.[27] EPA has also proposed new regulations for greenhouse gas emissions from cars and trucks which, if finalized, would make greenhouse gases subject to PSD regulation.[28] But these regulations are still only at the proposal

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23 See Final PSD Permit, Application No. 15487 ("Final Permit") at 3.
24 http://epa.gov/climatechange/index.html
25 *See In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03, slip op. at 63-65 (EAB Nov. 13, 2008).
26 See Memorandum, Stephen L. Johnson, Administrator, EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program, December 18, 2008 (hereinafter, "PSD Interpretive Memo"); notice provided at 73 Fed. Reg. 80300 (Dec. 31, 2008). EPA has proposed to reconsider the position set forth in the PSD Interpretive Memo, but it is proposing to affirm its interpretation with respect to whether greenhouse gases are subject to regulation under the PSD program. See Prevention of Significant Deterioration (PSD):Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program, Proposed Rule, 74 Fed. Reg. 51,535, 51,545-46 (Oct. 7, 2009).
27 See Final Rule, Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act (Dec. 7, 2009). [http://www.epa.gov/climatechange/endangerment.html]
28 See Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards (GHG Light Duty Vehicle Rule), 74 Fed. Reg. 49,454 (Sept. 28, 2009), issued jointly by EPA and the National Highway Transportation Safety Administration

> stage, and EPA continues to treat greenhouse gases as not yet subject to the PSD program until such time as specific regulations for greenhouse gases from specific sources are adopted and take effect. The Air District is therefore finalizing the permit on the basis that greenhouse gases are not subject to PSD at this time, since EPA's new regulations have not yet been finalized. However, as explained in the Statement of Basis and Additional Statement of Basis, the applicant has voluntarily requested the District to undertake a greenhouse gas BACT analysis and impose enforceable greenhouse gas BACT limits as if greenhouse gases were currently subject to PSD requirements. The Air District has done so, and is imposing greenhouse gas limits in the final permit based on the applicant's voluntary agreement to be subject to these requirements. The Air District therefore disagrees with these comments that greenhouse gases are subject to PSD requirements, but concludes that the issue is moot because the facility would satisfy all PSD requirements for greenhouse gases even if they were legally applicable at this time.

This project has been located so as to disparately place environmental burdens upon low-income, minority residents, and this project significantly increases emissions of greenhouse gases responsible for global warming. The United States Supreme Court has affirmed that "[t]he harms associated with climate change are serious and well recognized," *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438, 1455 (April 2, 2007). In the Federal Register Notice of EPA's endangerement findings it states "Note that it is EPA's current position that these Final Findings do not make well-mixed greenhouse gases ''subject to regulation'' for purposes of the CAA's Prevention of Significant Deterioration (PSD) and title V programs. *See*, e.g., memorandum entitled 'EPA's Interpretation of Regulations that Determine Pollutants Covered By Federal Prevention of Significant Deterioration (PSD) Permit Program' (Dec. 18, 2008). While EPA is reconsidering this memorandum and is seeking public comment on the issues raised in it generally, including whether a final endangerment finding should trigger PSD, the effectiveness of the positions provided in the memorandum was not stayed pending that reconsideration. Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program, 74 FR 515135, 51543–44 (Oct. 7, 2009). In addition, EPA has proposed new temporary thresholds for greenhouse gas emissions that define when PSD and title V permits are required for new or existing facilities. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule (74 FR 55292, October 27, 2009). The proposed thresholds would ''tailor'' the permit programs to limit

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(NHTSA); see also Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas Tailoring Rule,74 Fed. Reg. 55,292 (Oct. 27, 2009).[

which facilities would be required to obtain PSD and title V permits. As noted in the preamble for the tailoring rule proposal, EPA also intends to evaluate ways to streamline the process for identifying GHG emissions control requirements and issuing permits. See the Response to Comments Document, Volume 11, and the Tailoring Rule, for more information."[29]

In *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438, 1455 (April 2, 2007), the Supreme Court ruled that the Clean Air Act (CAA or Act) authorizes regulation of greenhouse gases (GHGs) because they meet the definition of air pollutant under the Act. Pursuant to§ 124.19 Appeal of [] PSD Permits. (a) Within 30 days after a [] PSD final permit decision []… has been issued under §124.15 of this part, any person who filed comments on that draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision. . . .. The petition shall include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations and when appropriate, a showing that the condition in question is based on: (1) A finding of fact or conclusion of law which is clearly erroneous, in this case the finding in error is "The Air District therefore disagrees with these comments that greenhouse gases are subject to PSD requirements" or that BAAQMD's finding that "the issue is moot because the facility would satisfy all PSD requirements for greenhouse gases even if they were legally applicable at this time" is (2) an exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review and further more the Environmental Appeals Board may also decide on its own initiative to review any condition of any PSD permit decision issued.

SPECIFIC "AMENDED" PSD PERMIT ISSUES FOR REMAND

Mr. Simpson filed the Appeal regarding this same facility that resulted in the remand EAD 08-01. In its response to his appeal the District stated "The District received only one comment during the comment period, from the Project Applicant."[30]

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[29] http://www.epa.gov/climatechange/endangerment/downloads/Federal_Register-EPA-HQ-OAR-2009-0171-Dec.15-09.pdf

[30] See http://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Filings%20By%20Appeal%20Number/4EC369FF484811EB852573D8005DB90C/$File/Response...100000.pdf page 6

The first item of note that validates the wisdom of the Judges Edward E. Reich, Charles J. Sheehan, and Anna L. Wolgast in their remand which states; “(7) Contrary to the District’s statements, the District’s notice omissions do not constitute ‘harmless error’. Such omissions affected more persons than Mr. Simpson.” EAD 08-01 page 3 "In order to correct serious and fundamental deficiencies in the of the draft permit and to remedy the resulting harm to the PSD program’s public participation process, the Board finds it necessary to remand the Permit to the District to ensure that the District fully complies with the public notice and comment provisions of section 124.10." EAD 08-01 page 39. The Board deserves credit for defending the publics right to participate in the PSD program.

Subsequent iterations of the permit received extensive comments from agencies, organizations and individuals. This demonstrates the validity of the Board's concerns in remand and that there is great interest in PSD permitting, if potential parties become aware of proceedings.

We give little credit for the increased participation to the District. Their process has continued to attempt to prevent informed participation. The outreach was conducted without accurate information or support from the District. Credit for participation goes to dedicated individuals and their groups like the Environmental Law and Justice Clinic at Golden Gate University School of Law, CAlifornians for Renewable Energy (CARE), Citizens Against Pollution, Hayward Area Planning Association, Chabot-Las Positas Community College District and Congressman Pete Stark whose first comment letter includes; “The proposed PSD permit fails to meet Federal requirements regarding the use of best available control technology (‘BACT’). Although including limits on greenhouse gas emissions in the proposed permit is commendable, it must be done right. Unfortunately, the proposed permit is based on a defective BACT analysis. It fails to prevent air quality impacts that will contribute to violations of the national ambient air quality standards (‘NAAQS’) in the Hayward area should the Russell City plant be built. Finally, the draft permit does not adequately take into account the potential negative impact on critical habitats and wildlife along the adjacent Hayward Shoreline. For these reasons I urge you to not approve the proposed permit.”

As citizens whose hours of participation in this proceeding no longer measures in the hundreds, we find the District’s methods in their purported Responses to Public Comments as indicative of their actions to date. It is indiscernible to determine which comments they are

responding to, their responses are often misleading or without basis and they chastise those who would dare seek informed participation.

Public records requests to the District have often been ignored, misguided or delayed up to a year in response. We can not expect that others would have had a more informative experience. Others may have merely given up prior to receipt of requested records. The District has issued no less than 4 different "fact Sheets" The Address and identified location of the facility changes from Notice to Notice, and none of the Notices includes identification of the emission impacts or the PSD increment consumed.[31]

The District attempts to weave a story of an innocent agency besieged by public records requests of insurmountable volume as to render it incapable of timely response. The District posted no docket for this proceeding during the proceeding so that the public could decide which documents to review. The district chides Mr. Simpson for non specificity in requesting documents Page 211-215. With no docket posted there is no way for the public to know what to ask for. When Region 9 issues a PSD permit there is a running docket posted on the website, just as the Board does. This not only informs the public of the basis of decisions so that they may participate in real time, it prevents the reconstruction of a record after the fact as in the Districts (Index) of Public Permitting Record documents listed on the District's website August 3, 2009 certainly is.

The District would have you believe that a roughly 100 day period from September 11, 2008 to December 18, 2008 was required to provide documents created between July 29, 2008 to September 11, 2008 a 44 day time period. (Response to comments p211-13_. The Index demonstrates no voluminous activities during the time period. It is also notable that response was not until 10 days after the public comment period began and the Documents were not provided to Mr. Simpson at that time, it took nearly another month to pry the documents from the District. The bulk of what was sent to Mr. Simpson were copies of the Appeal 08-1 that he wrote and volumes of digital data with no clue as to what it was, or where it came from. Finally on February 4th Mr. Simpson gained access to one box of records at the District. He was escorted through the Districts ostentatious, downtown San Francisco, 7 story Headquarters to what can only be described as a windowless storage closet, a place so dismal and cramped that it stood in

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[31] BAAQMD District rule 2-2-405 Publication and Public Comment: If the application is for a new major facility or .. or requires a PSD analysis... a prominent notice stating the preliminary decision of the APCO, ... *The written notice shall contain the degree of PSD increment consumed*. (emphasis added)

stark contrast to the rest of the building. There was a chair but no room to sit. He photographed the room and box on his phone. (Exhibit 1) and was informed that District staff was unavailable to make many copies. There was no apparent order or any Index to the heap of papers in the box. The District stated

> Mr. Simpson, who submitted the Public Records Act Requests, therefore had full access to all of the *relevant* documentation during both comment periods [32] [p. 212]

The District misstates the facts as is demonstrated in the string of emails (Exhibit 2) not shown are at least a dozen calls and multiple fruitless visits to the District, which takes at least a half a day each time to complete. Most of the District Document reviewed by Mr. Simpson was forwarded to him by attorneys who had gained access to the records. Apparently the District was more cooperative when attorneys sought records.

This is the same Air District who quietly issued the 2007 permit while the County of Alameda and others were in an appeal to the California Supreme Court for the Commissions failure to provide Notice of its actions, which included the Authority to Construct.

This is the same District that claimed to the Board in Appeal 08-01 that it had issued a PSD permit for the facility in 2002. They have since recanted on this claim. This District has apparently never issued any PSD permit correctly. The permitting scheme that was invalidated in the remand was their typical *modus operandi*. The Remand touched the tip of the iceberg for an agency culture and regulatory framework in California that serves to circumvent public participation and the Clean Air Act, while permitting polluters.

Despite the opportunity to learn from the insight of the Board, the District has chosen, instead of bringing their permitting actions into the light, to push their actions further underground and simply forgo PSD permitting altogether and allow operation of the Gateway Generating Station without any permits and actively attempt to prevent public participation specifically by Mr. Simpson and Mr. Sarvey in violation of civil or political rights. The District conspired with Pacific Gas and Electric to violate the Clean Air Act (PG&E) (SEE DISTRICT PGE COMMUNICATION) (comments to DOJ AND BAAQMD)) A similar and concurrent cat and mouse game quest for records ensued throughout Mr. Simpson's appeal of that project in appeal PSD 09-02 in which the EAB ultimately dismissed the Petition after the District

acknowledged "that construction of the Gateway facility occurred without a valid PSD permit as required by the PSD provisions of the Clean Air Act " and Region 9 began enforcement action. The matter is presently pending in *United States v. Pacific Gas & Electric Company*, Civil Action No. 09-4503 (N.D. Cal.) and D.J. Ref. No. 90-5-2-1-09753

THE EAB SHOULD REMAND THE PERMIT BECAUSE THE DISTRICT DID NOT ADEQUATELY RESPOND TO COMMENTS.

We tried to lay out comments in a manner that was straight forward and simple for the District to understand and respond to, had they so chosen Our comments are attached and identified as (Exhibit 3). Having received no such response, we could guess at how each District "Response" might relate to each of our comments to determine if the District had in some way attempted to respond to some comment that may somehow have related to our own comments. The speculative exercise could result in an ambiguous complaint of great length. The District did not adequately respond to any of our comments. Because the District restated the comments and did not identify which comments they were restating or responding to they did not adequately respond to any of our comments. We and other members of the public are prejudiced by the District's failure to respond to our comments in a manner that is clear and forthright. We will try and identify some of the responses that may appear to be to our comments but it can in no way be a complete list without some correlation between the comment and the response.

> The Response states;"To construct a solar thermal plant to replace some of the peak capacity from duct burning would need 275 acres of land, which would not be feasible given the space-constrained project site on the edge of the San Francisco Bay."15-16 When convenient for their argument the District identifies the true location of the planned facility, When issuing public Notices it did not.

The Response states;"Simple-cycle facilities are therefore generally inferior to combined-cycle facilities, except for applications where the generating capacity must come online in a very short time frame, which is not the case with the uses for which this facility has been proposed and designed. The Air District therefore disagrees that it should require the applicant to redesign the facility as a simple-cycle peaking facility." The function for which the facility is proposed and designed for does not meet the Commission's goal; 13

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[32] Notably, during the first comment period the Air District repeatedly reminded Mr. Simpson of the documents it had made available for public review during the comment period and invited him to review

The function conflicts with the current demand as stated b the Commission

"an essential piece of the state's renewable strategy is to construct new, very efficient, gas-fired power plants that will be essential to support a more renewable-based system. These gas-fired power plants will typically have fast-start capability, are highly efficient, and can quickly "ramp" up and down to support fluctuating generation from wind and solar facilities (page 3) Exhibit 4 CEC letter)

> "The Air District is therefore finalizing the permit on the basis that greenhouse gases are not subject to PSD at this time" 19 Greenhouse gases are subject to PSD therefore this basis is an erroneous "finding of fact or conclusion of law".

The Response states; The Air District also considered the comments' reference to bio-sequestration of carbon in algae producing ponds. Research has begun on an emerging technology that would use "algae bioreactors" to sequester carbon dioxide emissions. An algae bioreactor would house huge quantities of algae that would use CO2 captured from a power plant for photosynthesis. Although the technology is potentially promising, it is also in its infancy and is not feasible at this time as an add-on control technology.56 Moreover, the comment on this point did not provide any information on how the facility could feasibly implement bio-sequestration, it simply referenced the technology and suggested that the Air District study it. The Air District has done so in response to this comment, but disagrees that bio-sequestration is currently feasible control technology that could be required here as part of a greenhouse gas BACT technology review.57

> For these reasons, the Air District disagrees that subterranean sequestration or bio-sequestration are appropriate BACT control technologies. These are active areas of research and development, however, and the development of carbon capture and sequestration technologies, both geological and biological, will continue to be monitored. 24

If the following District statement is in response to Simpson's comment; "Carbon Sequestration is a feasible control technology that has not been adequately studied for this project. Subterranean sequestration may be a viable alternative as well as bio-sequestration of pollutants in algae producing ponds. There are extensive ponds adjacent to the site that could accommodate this. After sequestration the water/ algae could be utilized for reforestation or irrigation to create a buffer between the the developed and natural areas of the shoreline or in

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them in order to understand the basis for the proposed permit.

other locations further sequestering Carbon… Please study this plan" The District misstates the comment. The Site is adjacent to extensive ponds that were created, yet no longer used, for salt production. The site creates a unique opportunity to initiate bio sequestration of Carbon Dioxide. The process also creates a huge opportunity to sequester other pollutants also, just as Carbon Dioxide would be caught up in an aqueous solution so would particulate matter and other pollutants, it could also increase efficiency by aiding in cooling for the facility. The link provided by the district in footnote 56 pertains to a different technology of converting algae to fuel which may be be a "technology.. in its infancy" Simpson made no such comment. Photosynthesis is not a technology that is in its infancy. Wet scrubbers that can help facilitate this action are also not a new technology.[33]

The Response stated; "Energy Commission specifically evaluated potential non-fossil-fuel-fired alternatives, such as solar, wind, and biomass, in its licensing proceeding for the Russell City Energy Center. The Energy Commission ultimately rejected those alternatives as not feasible because "they do not fulfill a basic objective of the plant: to provide power from a baseload facility to meet the growing demands for reliable power in the San Francisco Bay Area."[34]

The problem with relying on data from 2002 or even 2007 in making decisions for future energy needs is that they fail to consider the rapidly changing technology available and the fact that other sources have been developed to satisfy any need, albeit in violation of the Clean Air Act, like the Gateway Generating Station and demand is no longer "growing" as we are overbuilt with fossil fuel generation at this time so the "basic objective of the plant" is moot.

The Response states; "the Energy Commission explicitly found that the ability to use recycled wastewater was an objective of the project when it initially approved the facility.180 The use of a wet cooling system taking advantage of the City's wastewater is thus clearly an integral design element of the project." The District response misstates the facts. The Facility, planned at the turn of the century, was a once through cooling type design to discharge wastewater that was

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[33] http://cfpub.epa.gov/ncer_abstracts/index.cfm/fuseaction/display.abstractDetail/abstract/8823/report/0

[34] 2002 Energy Commission Decision, *supra* note 17, at p. 19. The Energy Commission made a further finding in its 2007 Amendment decision that no renewable alternatives would be able to meet the project's objectives. *See* 2007 Energy Commission Decision, *supra* note 16, at p. 21, finding 3. In making this finding, the Commission relied in part upon the detailed analyses that were undertaken in connection with the original licensing proceeding in 2002. *See id*., pp. 20-21

used for cooling to the bay. The Zero liquid Discharge or All Vapor Emission system was not a part of the original plan and the impacts have not been adequately studied.

The Response states; "The facility's "Zero Liquid Discharge" plant will minimize potential harm to water quality in the vicinity of the Water Pollution Control Facility's outfall, where wastewater that has undergone secondary treatment would otherwise be discharged into the bay.": This statement ignores the fact that advanced fresh water marshes have been developed next to the Wastewater plant utilizing wastewater, which has created nesting sites for Least Terns and other endangered species. East Bay Regional employee Park Mark Taylor identified Least tern nests in the fresh water marsh. Use of wastewater for other effects could threaten this ecosystem.

> Nothing in these comments suggested that there was anything defective in how the Air District has undertaken the integrated permitting process here, and so the District finds nothing in the comments to provide cause to change any permit conditions or decline to issue the
> permit. 199

both notices to see what had changed.

> 377 The District also received several comments regarding the use of the "Russell City" name for the facility. Some commenters objected to the use of this name because the city in which the facility is officially located is the City of Hayward, CA. Other comments praised the use of the "Russell City" name in recognition of the unincorporated community that historically existed in the area that was known by that name. The facility's name is not relevant to any PSD permitting issues, and the Air District disagrees that there is any way that any members of the public could be misled by the use of this name given all of the information the Air District provided regardingthe location of the facility. 203

The name certainly is relevant if it misleading, as it is here.

> For potential further appeals, should have been more explicitly described in the permitting documents. The comments questioned whether the Statement of Basis should have described other avenues for appealing permits for this facility, besides appeal of the CEC license to the California Supreme Court, appeal of the District Authority to Construct through the state appeals system, and appeal of the federal PSD Permit through the Federal appeals system. The comments questioned whether the Statement of Basis should have noted that Alameda County was one of the parties that appealed CEC denial to Supreme Court; and that the Supreme Court dismissal was "without review". The comments similarly questioned whether additional details regarding the EAB remand should have been provided

Response: The Air District notes that these comments merely asked questions about what information the Air District should have provided in its permitting documents, and did not identify any area where the Air District did not provide sufficient information or identify any additional information the Air District should have provided. These questions therefore do not contain any substantive comment that the Air District is required to respond to. To the extent that the questions can be construed as comments suggesting that the Air District in fact was deficient in the information it provided regarding appeals procedures, the Air District disagrees that it was required to provide any further information under the applicable Federal PSD requirements. The Federal PSD requirements in 40 C.F.R. section 52.21 and 40 C.F.R. Part 124 do not require that the Air District specify the appeals procedures for any permits or approvals at the draft permit stage. (*See* 40 C.F.R. §§ 124.7-124.10.) The Air District provided the information in its Statement of Basis and related documents over and above the minimum required by the Federal PSD requirements in an attempt to inform the public as much as reasonably possible regarding how the overlapping state and federal licensing/permitting process works for power plants in California. The Air District considers the information it provided –specifying how the CEC license, the Federal PSD permit, and the District Authority to Construct, respectively, are issued and how the can be appealed – to have done a very good job in achieving this goal, and disagrees that there was any more information that it should reasonably have provided (let alone was *required* to have provided under the Federal PSD permitting requirements). The comments on this issue do not identify (expressly or even impliedly) any reason where the permitting process for this PSD permit was defective. 204

If the District is responding to comments; first a comment that intends a response is inherently a question so discounting each comment that is framed as a question is disingenuous at best. Second the District misstates the basis and questions in Comments 3- 26 on pages 22-24 of CARE and Rob Simpson comments on the "amended" PSD permit for the Russell City Energy Center dated February 5, 2009 seek to understand the cooling potential on public participation by the District misstating the status of the permitting appeal actions and opportunities. They are not so much questions of what statutory disclosure requirements were required but of the truth in District claims and effect of misleading the public.

The District stated; "A number of parties then sought review of these permitting actions. On the state-law side, a group of interested organizations attempted to seek reconsideration of the Energy Commission's decision to license the project, but the Energy Commission declined to hear their request. The group then appealed the denial to the California Supreme Court, but the Supreme Court dismissed their petition. One person also appealed the Air District's issuance of the Authority to Construct to the District's Hearing Board, but his appeal was denied and he did not seek further review. All appeal avenues have therefore been exhausted, and the state-law

Energy Commission license and District Authority to Construct are not subject to further review…With respect to the Federal PSD Permit, one person appealed the permit to the Environmental Appeals Board raising issues concerning the public notice and comment process (among other, substantive issues). The Environmental Appeals Board ruled that the Air District had not mailed notice of the proposed amended Federal PSD Permit to several parties that were entitled to it, and so it remanded the permit to the District to re-notice the proposed permit and provide the public with a further opportunity to comment. (*See* Remand Order, *In re Russell City Energy Center*, PSD Appeal No. 08-01 (EAB Jul. 29, 2008) ("Remand Order").3) The Air District is re-noticing the proposed amended Federal PSD Permit at this time in response to the Remand Order." [Page 6-7] The District misstates the scope of the EAB considerations on this Matter and appeal venues which could serve to mislead the public and hamper participation

> The Air District is not reopening the state-law permitting process that was completed under the Warren-Alquist Act (culminating with the Energy Commission's license for the project and the District's incorporation of the Energy Commission's licensing conditions into the Authority to Construct permit). Those permitting actions under state law are final and all avenues for appeal have been exhausted. The Environmental Appeals Board's remand of the Federal PSD Permit to be re-noticed does not implicate these state-law permits. They are separate legal entities and the Environmental Appeals Board has not questioned their continued validity. 2 The Air District's ministerial Authority to Construct permit is appealable only on the narrow issue of whether the Air District correctly incorporated the Energy Commission's conditions of certification in the Authority To Construct. That is, an error in transcribing a permit condition from the Energy Commission's license into the Authority to Construct is appealable, but an appeal cannot seek to revisit substantive issues of what permit conditions are appropriate and required, which are addressed during the CEC licensing process and on any appeals therefrom.
> The Environmental Appeals Board ruled that the Air District had not mailed notice of the proposed amended Federal PSD Permit to several parties that were entitled to it, and so it remanded the permit to the District to re-notice the proposed permit and provide the public with a further opportunity to comment. *SOB at 7*

19. Is this what the EAB remand stated?

20. Could further disclosure of details of the Remand affect public interest or informed participation?

The District misstated and belittled the gravity of the EAB decision, limiting informed participation possibly resulting in decreased or misguided public participation.

The Response states; "Commenters asked for detailed information about the combustion turbines that the manufacturer intends to use at the facility, such as turbine serial numbers, dates of manufacture, cost, *etc*.

> **Response:** Specific details such as these are not relevant to determining the Best Available Control Technology and applicable permit limits for this equipment or for analyzing the potential air quality impacts of the facility, and so the Air District has not sought such information from the applicant. For example, if the Air District determines that a certain type of turbine is BACT and imposes a BACT permit limit based on the achievable emissions performance for such a turbine, it makes no difference which particular turbine is used (*e.g.*, which particular serial number) as long as the facility complies with the applicable permit conditions. The Air District disagrees that such specific information is relevant to the Federal PSD Permitting analysis. To the extent that information about particular types of turbines is relevant (*e.g.*, costs, ancillary environmental or energy impacts, relative efficiency, achievable emissions performance standards, *etc*.) the Air District has sought that information and provided it in the relevant areas of its permitting analysis.
>
> The Air District included this further discussion of the issue in the Additional Basis, and received comments during the second comment period that specific equipment details such as turbine serial numbers, dates of manufacture, cost, *etc.*, are important because the commenters believe that the turbines may be used or remanufactured turbines. The comments asserted that if they are overhauled turbines, their pollution characteristics may differ from the original manufacturer's specifications. The Air District has no information on which to evaluate these claims that the turbines that Calpine intends to use at the facility may be used or remanufactured, and the comments have not provided any information to support this contention beyond mere speculation. But regardless, it does not matter whether the turbines are new or used as long as they can meet the BACT emissions limits, which are based on the best performance of current, state-of-the-art equipment. The Air District disagrees that there is anything about such specific, detailed turbine information that is relevant to the PSD permit analysis, or that the Air District needs to obtain and publish such information as part of the permit process.

If this is a response to our comment; the District stated "the District also received some comments asking for detailed information about the combustion turbines the applicant intends to use at the facility, such as turbine serial numbers, dates of manufacture, cost, *etc*. But specific details such as these are not relevant to determining the Best Available Control Technology" ASOB 13 We still contend that these are likely used or re-manufactured turbines from a turbine repair company that Calpine bought in Las Vegas (where they claim that the turbines are stored). This is important because as they District stated; "The original equipment manufacturer's degradation curves only account for anticipated degradation within the first 48,000 hours of the

gas turbine's useful life; they do not reflect any potential increase in this rate which might be expected after the first major overhaul and/or as the equipment approaches the end of its useful life. Further, because the projected 5.2% degradation rate represents the *average*, and not the maximum or guaranteed, rate of degradation for the gas turbines, the Air District has determined that, for purposes of deriving an enforceable BACT limitation on the proposed facility's heat rate, gas turbine degradation may reasonably be estimated at 6% of the facility's heat rate." ASOB 31

> For the gas turbines, the Air District is basing its analysis on a 48,000-operating-hour degradation curve provided by Siemens, which reflects anticipated recoverable and non-recoverable degradation in heat rate between major maintenance overhauls of approximately 5.2% According to combustion turbine manufacturers, anticipated degradation in heat rate of the gas turbines alone can be expected to increase non-linearly over time." ASOB 32
>
> (ii) "a reasonable performance degradation margin of 6% to reflect reduced efficiency from normal wear and tear on the equipment between major maintenance overhauls" ASOB 28
>
> An enforceable BACT limitation must be set at a level that the facility can achieve for the life of the facility, including as its equipment ages and incurs anticipated degradation. ASOB 28
>
> The turbines' Design Base Heat Rate is 6,852 Btu/kWhr (HHV), based on operation of both combustion turbines with no duct firing, corrected to ISO conditions.[48] (For comparison with a pounds-per-megawatt-hour efficiency rating, this is between 792.9 and 815.5 lbs/MWhr, depending upon which CO2 emissions factor is applied.49) This represents what the plant (at the design stage) is expected to achieve when it is new and clean; it does not represent what it will achieve over time as the equipment incurs degradation between major maintenance overhauls." ASOB 29

So, if the turbines are used or overhauled, their pollution characteristics may be different than the original manufacturer specifications.

We believe that we have identified with sufficient specificity the basis of my comment and the District misstated the comment. A Calpine representative informed me that they would be utilizing equipment that had been removed from another facility.

The modeling for the air quality impacts do not include impacts of nearby roadways. The Monitoring station is not from the same impact area as demonstrated by the Districts own report (Exhibit xx). The District itself, in its Community Air Risk Evaluation (CARE)

Program, identified "Western Alameda County," showing the area also on its map, as one of 6 geographic areas "where higher levels of exposure to air pollution has elevated residents' health risks.

The District did not adequately respond to any comments. We do not have the capability to scan all interested parties comments to compare them to the Districts responses but we do note that Ermest Pacheco and Laura Baker, M.A, Ecology and Systematic Biology Conservation Committee Chair East Bay Chapter of the California Native Plant Society find the responses inadequate.(ERNIE EXHIBIT 5)

Barbara George Executive Director Women's Energy Matters participated in this proceeding since 2001-2002 and apparently never received Notice of this action. (Exhibit 6 Declaration of Barbara George)

§ 124.192) An important policy consideration which the Environmental Appeals Board should, in its discretion, review.

Does California Power Plant Licensing pursuant the Warren Alquist Act serve to circumvent the Clean Air Act and the PSD program? The Board offered guidance in the remand that could have benefited the California Energy Commission and California Air District's. Yet, they continue to act as if they are without the Boards enlightenment. In fact The Commission complains of the Boards Authority in a letter from its Executive Director Melissa Jones to the EPA Administrator (*Exhibit 7)

> Delay is further exacerbated by the fact that EAB is overburdened and not subject to time requirements for its decisions. Therefore, there is no way for a state licensing agency or project proponent to have any idea how long it will take to resolve PSD permit issues. Even under the current workload, appeals typically take more than a year (and often much more than a year) to resolve – adding at least an additional year to the permit process even if the appeal is denied.4 It is difficult to imagine how the EAB could cope with the crush of appeals that would almost certainly result from the proposed decision. The negative impact on power plant projects delayed by EAB review is almost inestimable. Financing for such projects (often on the order of hundreds of millions of dollars) is complex, reliant on contracts with utilities for the power to be provided, and subject to time-based milestone agreements. Open-ended delay at the EAB can prevent satisfaction of such milestones, making such contracts voidable. Thus, EAB review—even under its current, limited caseload—has the potential to kill projects even if the objections raised are specious or nonsubstantive....As stated above, the tailoring proposal is well-justified, but is unfortunately inadequate to avoid the quagmire it describes. Even with EPA's proposal, administrative agencies will be greatly overburdened, PSD permitting will be subject to indefinite delay, and all projects

that eventually receive permits will be subject to the burdensome review of the EAB. EPA can and must provide a better solution."

A cursory look at EAB appeals dockets proves the above contentions to be baseless. The Board appears to expeditiously conduct its business. (Exhibit xx CAP letter) The Commission should learn from EAB guidance and reduce appeals through compliance with the Clean Air Act in its licensing of power plants.

After the remand it became apparent that the disconnect between public participation and permitting was present at each planned power plant reviewed. The Warren Alquist Act integrates itself between the Air Districts and their compliance with the Clean Air Act. Facilities are built, never having given public notice of the project affects on air quality. The Commission continues to derail public participation, ignoring comments, conducting Air Quality hearings with Air districts, while keeping no record of comments and precluding review of Air District Decisions using the preclusive nature of the Warren Alquist Act, just as the District is attempting to do with the State law portions of the this permit. We request the opportunity to brief these issues before the Board.

We filed comments and appeals on a number of facilities; Humboldt Bay Repower project PSD 08-08, Gateway Generating Station PSD 09-02 and Russell City Energy Center 08-01 and 08-07.

In the Humboldt Bay Repower Project Appeal, The permit issued on April 14 2008 was identified on its cover as; TITLE V FEDERAL OPERATING PERMIT NCUAQMD PERMIT TO OPERATE AND FINAL DETERMINATION OF COMPLIANCE ATC PERMIT NO: 443-1. Therefore file a concurrent appeal to the EPA Administrator was filed. The Board Dismissed my appeal, as the North Coast Air Quality Management District (North District) claimed that It was not a Federal PSD permit issued but a state permit issued pursuant their State Implementation Plan (SIP). In September of 2009, 2 years after the appeals were filed, the North District issued a Notice of an amendment to the permit to clarify that the permit was actually not a Federal Title V permit either (mooting the Appeal to the Administrator) and to increase commissioning impacts for the facility, that is now almost fully constructed. The EPA Administrator never heard the appeal or even posted it, despite repeated requests. On March 4, 2010 the North Coast Air Quality Management District Hearing Board heard an appeal of the PSD permit for the facility filed by Mr. Simpson and Robert Sarvey. The Air Pollution Control Officer (APCO) would not accept the Petition until payment of $500 despite a petition for a fee

waiver. The Appeal was then combined with that of Robert Sarvey. At the Hearing the APCO presented the Board with a written recommendation to charge the appellants another $7,501.09 prior to hearing the appeal, the Board declined. Two out of three Hearing Board members agreed with the appeal. Ironically it was apparently originally a 5 person Hearing Board and 2 had recused themselves, ostensibly for ties to the developer Pacific Gas and Electric. Hearing board rules still required a quorum of 3 members to decide and so the appeal was denied.

The results of the Gateway appeal are evident in other parts of this petition except for the fact that on September 1, 2009, despite the Notice of Violation NOV and pending enforcement action, the Commission approved modifications to facility that fall far short of PSD requirements. [35]

The Russell City Energy Center Appeal resulted in the Remand and appeal 08-07 was untimely, as no permit had yet been issued. In this appeal we incorporate the unresolved issues from both prior appeals regarding this facility.

The U.S. Fish and wildlife report is incorrect and inadequate. The District did not provide accurate information the the USFWS to make its determination. It did not disclose the redirection of water resources, the true location of the facility or the affect of rerouting aircraft to the Wildlife preserve.

The Alameda County Health Department is on record documenting the health effects in the area east of the RCEC.

There are also important environmental justice issues of impacts on low income and minority households as demonstrated in the Chabot College Brief[36] filed with the Commission for another nearby planned facility.

[35] http://www.energy.ca.gov/sitingcases/gateway/compliance/2009-09-01_Order_Amending_the_CEC_Decision_TN-53025.pdf

[36] Chabot-Las Positas Community College District Post-hearing Brief http://www.energy.ca.gov/sitingcases/eastshore/documents/intervenors/2008-02-11_CHABOT_LAS_POSITAS_POST-HEARING_BREIF_TN-45307.PDF

CONCLUSIONS

The remand order from the EAB decision does not deny review of the substantive PSD issues raised by Mr. Simpson but states that permit must be re-noticed and that the appeal board refrains from opining on the substantive PSD issues raised by Mr. Simpson. The District is circumventing public participation by failing to provide access to the administrative record.

Since BACT is part of the CAA and the PDOC includes the District's BACT analysis therefore clearly the PDOC 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. Therefore the District should re-notice the PDOC along with a "new" draft PSD permit consistent with the requirements of the CAA and the District's Regulations.

Because of the District's failure to carry out the USEPA EAB Remand Order to "scrupulously adhere to all relevant requirements in section [40 C.F.R. § 124.10(d)] concerning the initial notice of draft PSD permits (including development of mailing lists), as well as the proper content of such notice" therefore this also serves as a Complaint to Office of the Administrator of the U.S. Environmental Protection Agency (USEPA) and the California Air Resources Board (ARB) under 42 USC § 7604.

The EAB should remand any permit issued by the District as the District has demonstrated neither competence nor willingness to comport with the Clean Air Act in the issuance of PSD permits.

The EAB should remand the permit because the District did not adequately respond to comments.

Respectfully submitted,

Michael E. Boyd

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cc.
Martin Homec

VERIFICATION

I am an officer of the Complaining 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 22nd day of March, 2010, at San Francisco, California.

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