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Petition of CAlifornians for Renewable Energy, Inc. (CARE) to object to and protest Reopening of Title V Major Facility Review Permit for the Los Medanos Energy Center LLC, Pittsburg, California

CAlifornians for Renewable Energy, Inc. (CARE) respectfully objects to and protests the November 9th, 2004, the Reopening of Title V Major Facility Review Permit for the Los Medanos Energy Center LLC Los Medanos Energy Center District Facility No. B1866 by the Bay Area Air Quality Management District (BAAQMD or District) for failure to provide Petitioners relevant information on the facility's compliance to conditions for its original Title V Permit issued by BAAQMD on September 1st, 2001, for its failure to hold a requested public hearing on such, and for failing to allow a 30-day public comment period on its Settlement Agreement with Calpine by the District over 66 each Violations of its conditions of operation, herein referred to as NOVs.

CAlifornians for Renewable Energy, Inc. (CARE) is a non-profit public

benefit corporation organized under the laws of California in 1999 recognized as a tax-exempt under §501 (c)(3) of the US Tax Code for the purpose of educating the public about, and encouraging public agencies to consider, alternative forms of renewable energy as a means of avoiding (1) dependence on declining supplies of fossil fuels and (2) the harmful air emissions their use occasions. CARE is the only party to this proceeding actively representing the community interest's of residential customers who are members of CARE in the area of the Los Medanos Energy Center who reside in the affected community of Pittsburg, California, who have born the disparate environmental and socioeconomic burden of Calpine's 550 MW Los Medanos and 880 MW Delta Energy Center(s), two gas fired power plants.

The District failed to provide CARE information on over a dozen Notice(s) of Violation (NOVs)

The Los Medanos Energy Center Title V Permit, remanded back to BAAQMD by the US EPA Administrator in response to a successful Appeal by CARE of the original BAAQMD Title V Permit issued for the facility for among other things their failure to provide a statement of basis.

> The District is reopening it for the limited purposes of: (i) responding to certain issues raised by the United States Environmental Protection Agency in its May 24, 2004, Order Denying In Part And Granting In Part Petition For Objection To Permit ("Order"); (ii) adding three sources to the permit; (iii) removing obsolete conditions; (iv) responding to changes in federal turbine standards since the permit was originally issued; and (v) incorporating certain other minor corrections and changes. The District is not reopening the permit for other purposes. [District's response to comments at paragraph 2.]

The major flaw in the District's Title V Permit is that it fails to recognize that once the public decides to actively participate in a project's Title V Permit review process, the air district must be transparent as regards the Title V Permit applicant's prior performance to conditions required in its original permit. In BAAQMD's response to the comments of CARE, they admit to failing to provide

CARE information on over a dozen Notice(s) of Violation (NOVs) on the facility's performance to these conditions, and further denied our request for a Public Hearing lawfully requested on this permit in the absence of production of these public records.

The BAAQMD itself invited requests for a public hearing yet denied the public's request for a public hearing once NOVs became public

The BAAQMD itself invited public comments and requests for a public hearing as shown in the attached (B1866pn8-12-04.pdf) where it states,

> The District invites written comment on the issues identified in EPA's order, as well as any proposed changes. All comments must be received by September 20, 2004. The public may also request a public hearing for this reopening of the permit. [August 12th 2004 Notice at paragraph 4.]

In issuing it November 9, 2004 Permit without allowing for the lawfully requested Public Hearing, and without providing CARE the lawfully requested information on enforcement action taken on NOVs relevant to the Applicant's performance to its original Title V Permit conditions of operation, the District, exposes a failure in the Title V permitting process, by failing to provide CARE as a representative of the public an opportunity to meaningful and informed public participation in the Title V Permit. The NOV information was released by the District on November 19th, 2004 was voluminous and we have failed to review all the information provided. The information we now have in our possession demonstrates the Permit applicant's continuous and repeated violations on emission limitation imposed by the original Title V Permit for the facility

The District failed to recognize that the "Order" was in response to a Title V Complaint filed against the District's action by CARE

The May 24, 2004, EPA Administrator's Order Granting In Part Petition For Objection To Permit (Order) required that the BAAQMD do a statement of

basis, which it has never done for the Los Medanos facility, to explain its permitting decision, but it clarifies certain important concepts in ways favorable to the public. One of the reasons we petitioned on some of these issues was to get EPA to do exactly what it ended up doing in this decision, which is to affirm that, first, state variance provisions do not affect federal enforcement and, second, emergency breakdown provisions in the permit do not change liability (only enforcement discretion). We also obtained some important procedural victories. Consistent with the Georgia case, EPA Region 9 (without citing to the case) says that it will run the 60-day petition period after sequentially running the 30-day public comment period and the 45-day EPA review period, instead of running the periods simultaneously, as the local rules allow.

> The commenter did allude to its claim that it cannot comment on the permit reopening until it receives all of the enforcement-confidential documents that are the subject of its Public Records Act request. But even assuming that this contention were true, it would not provide a reason to hold a public hearing. Even if the District were required to await the completion of the enforcement process and the release of additional documents in order to reopen the permit, as the commenter contends, doing so would not necessarily require a public hearing. .... there is a significant countervailing public interest that counsels against holding a public hearing where it is not warranted. The District has been required to reopen the permit in response to EPA's Order, and the District does not believe it appropriate to delay unnecessarily in responding to that Order. Holding a public hearing would cause a significant delay in doing so. Where the circumstances do not warrant holding a public hearing, this would undermine the public interest in having the District respond promptly to EPA's order. [District's response to comments at page 4 paragraph 7 and 8.]

In a November 15, 2004 e-mail from District counsel stated in regards to the May 24, 2004, EPA Administrator's Order on the Title V Permit for the Los Medanos Energy Center that "the reopening of the permit was in response to EPA's order, not in response to CARE's proposal" but what the District failed to recognize in the e-mail and its response to public comments on the Reopened Title V Permit was that the "Order" was in response to a Title V Complaint filed

against the facility's original Title V Permit issued by the District by CARE and Our Children's Earth (OCE). It is an abuse of discretion for the District to use this as an argument to conclude wrongly, "the circumstances do not warrant holding a public hearing, this would undermine the public interest in having the District respond promptly to EPA's order". In fact by denying the requested hearing the District is the one that is attempting to "undermine the public interest" including Petitioners procedural due process rights.

The District has acted prejudicially regarding CARE's & Pittsburg Unified School District's Title VI Civil Rights complaint as meritless

CARE has brought a civil rights complaint under Title VI the Civil Rights Act of 1964, 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a–1975d, 2000a–2000h-6, and Executive Order 12898, against the approval of the Los Medanos Energy Center and Delta Energy Center(s) in Pittsburg California, by the California Energy Commission (CEC), California Air Resources Board (CARB), and the Bay Area Air Quality Management District (BAAQMD), with USEPA on April 17, 2000 (File No: 2R-00-R9). We were told that the USEPA Office of Civil Rights had accepted CARE's complaint for investigation only regarding CARB and BAAQMD and not CEC, as they are/were recipients of EPA funding. Since this time we have become aware that the CEC is not exempt from investigation, but instead the investigating agency is decided by Sebastian Aloot, Staff Attorney, Coordination and Review Section Civil Rights Division of the US Department of Justice (202) 305-9349. CARE participated with the fore-mentioned parties in an Alternative Dispute Settlement process funded by the US EPA through monthly meetings from June through December 2002.

In a November 15, 2004 e-mail from District counsel District's response to CARE's April 17, 2000 Title VI Complaint with US EPA Office of Civil Rights (2R-00-R9) in regards to what he characterized as,

> "CARE's 3/21/04 proposal to "settle" its Title VI complaint against the District. To set the record straight, the reopening of the permit was in response to EPA's order, not in response to CARE's

> proposal. The District did receive and consider CARE's proposal, but does not believe it to be an appropriate method of resolving a Title VI complaint. The District continues to believe that it has fully complied with Title VI and all other applicable legal requirements, and that CARE's complaint is meritless and will be rejected by EPA." [November 15th 2004 e-mail from District counsel at paragraph 1.]

As regards to District counsel's prejudicial statement "that CARE's complaint is meritless and will be rejected by EPA" if as stated our Complaint was/is "meritless" why then did US EPA commission a mediator to attempt to resolve this complaint informally through an Alternative Dispute Resolution (ADR) process at a cost of in excess of $100,000 in taxpayer funds? CARE has been open to Settle this matter informally, and the offer for a request for Supplemental Environmental Program (SEP) pursuant to the Policy posted on the BAAQMD website the so-called "settlement" was just such a show of Good Faith on CARE's part.

The Civil Rights Complaint was against the CEC for failing to incorporate Title VI into its demographic analysis, which failed to identify that the community of Pittsburg California was 63% people of color, predominantly African American, and that then proposed projects Los Medanos and Delta Energy Centers Disparately impacted the low-income children of color of the Pittsburg Unified School District. The complaint included a resolution from the Pittsburg Unified School District to this effect making it a co-complainant with CARE. The Complaint was to the BAAQMD for acting as an Agent for the CEC while simultaneously acting as the Air Permitting authority for the CEC, without performing an independent evaluation of the projects compliance with the requirements of the federal Clean Air Act (CAA) and the California Environmental Quality Act (CEQA) first.

We object and protest the District's November 15th, 2004 e-mail, which we contend, provides further evidence of the District's intent to discriminate against CARE's members and the constituents of the Pittsburg Unified School District

who are predominantly low-income children of color. For this reason we are also sending this Petition to the USEPA Office of Civil Rights, and the Coordination and Review Section Civil Rights Division of the US Department of Justice.

The District failed to provide a 30-day public comment period on its Settlement Agreement as was done in the Settlement Agreement Regarding EPA's Approval of the BAAQMD's Title V Program

Left unresolved from CARE Title VI Complaint ADR process was the mitigation to be offered up for the Pittsburg community to mitigate the two Calpine plants' impacts on air emissions locally. This is intended to be an additional Title V and Title VI Civil Rights Complaint against the BAAQMD's permitting Calpine's continued operation of its facilities with 66 each NOVs now finally purportedly resolved on November 9th, 2004 (untimely for the purposes of public comment on the Permit) listed resolved through a Settlement Agreement on the outstanding violations with Calpine.

> Finally, the fact that the District had not finally resolved the outstanding violations – and therefore could not publicly release sensitive enforcement-confidential documents – by the close of the public comment period did not render it "impossible to comment" on the permit reopening, as the commenter contends. The commenter requested detailed enforcement-sensitive information in a public records request, and the District replied that it could not provide such documents until the violations were finally settled.[1] [District's response to comments at page 2 paragraph 6.]

CARE respectfully objects to BAAQMD's failure to provide an opportunity for public comment on the Settlement Agreement and requests a 30-day public comment period be Noticed in the Federal Register on this Settlement Agreement as was done in the Settlement Agreement Regarding EPA's Approval of the Bay Area Air Quality Management District's Title V Program. On January 7, 2003, the U.S. Department of Justice (on behalf of EPA) signed a settlement with Communities for a Better Environment and Our Children's Earth (OCE)

[1] Now that the violations are finally resolved, the District is providing the documents the commenter requested.

Foundation to resolve the groups' challenge to EPA's approval of the CAA Title V operating permits program for Bay Area Air Quality Management District. A copy of the Settlement is available at the Region 9 web site:

- Settlement Agreement (16 K PDF ☐)
- Federal Register Notice announceing a 30-day public comment period on the settlement agreement (January 14, 2003)

Why is this Settlement Agreement on this Title V Permit between Calpine and BAAQMD, any different from one between the EPA and OCE, especially in light of the fact the EPA recently delegated its Title V Permit authority back to BAAQMD? To do otherwise than to allow public comment deprives us of our procedural due process rights as well as statutory and constitutional rights.

The District's failure to provide relevant performance compliance records violated the California Public Records Act

While recognizing that state variance provisions do not affect federal enforcement, due process requires that BAAQMD be required to provide Petitioners any relevant information on the facility in accordance with the California Public Records Act. As non-attorney we contacted the only expert attorney we know on the California Public Records Act, Mr. Terry Francke, of California Aware who provided me Pro Bono, consultation on this matter. He advised us that the BAAQMD "waived its claim of exemption" for the NOVs from the CPRA once the BAAQMD communicated with the Violator on the nature of the Violation subject to the law enforcement investigation and action. He explained, "Do you know the reason these exemptions exist? It is so the cops do not provide the criminal advanced notice of their violation of the law which enables them to destroy the evidence before the cops catch them." The transcript from the California Energy Commission's (CEC's) 8-20-2003 Business Meeting at which time the District's counsel Mr. Bunger first publicly stated the nature of the violations (or lack thereof).

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23 MR. BUNGER: Yes, I am the district
24 counsel for the District, and it is my offices'
25 responsibility to deal with notices of violation,
1 and I have just a brief comment, which is that
2 there is a distinction between a facility being
3 out of physical compliance, which is what the
4 Applicant's appear to be referring to, and whether
5 or not they've paid civil penalties on the NOV's.
6 It is correct that on a number of these
7 NOV's the civil penalties have not yet been paid,
8 but it is not correct that they are out of
9 compliance. They have been in physical compliance
10 for many, many months now.
11 And so, from the District perspective,
12 as Mr. Hill put forward, there is not an ongoing
13 compliance problem that we're aware of at any of
14 the Calpine facilities within the District.

Since this information was publicly disclosed by the District as part of this public CEC meeting, at which the Violator was present, the District clearly waived its right to claim an exemption from the California Public Records Act, at that time, 8-20-2003 and furthermore such exemption would not have applied during the Title V comment period on the Los Medanos Permit issued Nov. 9th 2004.

Mr. Francke further informed us that as a result of the passage of Proposition 59 on November 2nd 2004 that "perspective" legal action can be taken against the District now that the information is being released post election. We contend this means that we shouldn't waive any of our rights for judicial and administrative review of the District's actions to date on this matter, and this is to clarify that we do not waive any of rights in this regard as demonstrated by this Petition.

Mr. Francke also advised us to send the BAAQMD a letter formally requesting your recognition of failure to comply with the requirements of the CPRA, and a promise that in the future when a Notice of Violation is filed on a Violator that the public be immediately notified of an opportunity to receive a copy

of the Notice and any subsequent enforcement action that may follow. To do otherwise provides the Violator an opportunity to know what is being violated, and what enforcement action will occur while in this case the public (AKA the victim) is denied access to this information, which in our understanding of the law is a clear violation of our due process and equal protection rights. We will endeavor to complete this letter by December 3rd 2004.

Conclusions

Wherefore we respectfully request that EPA Region 9 accept these objections and protests to the November 9th, 2004, Reopening of the Title V Major Facility Review Permit for the Los Medanos Energy Center LLC Los Medanos Energy Center District Facility No. B1866 by the Bay Area Air Quality Management District (BAAQMD or District) for failure to provide Petitioners relevant information on the facility's compliance to conditions for its original Title V Permit issued by BAAQMD on September 1st, 2001, for its failure to hold a requested public hearing on such, and for failing to allow a 30-day public comment period on its Settlement Agreement with Calpine by the District over 66 each Violations of its conditions of operation, herein referred to as NOVs. We respectfully request the EPA to Order the District to hold a public hearing on the November 9th, 2004 Reopen Title V Permit in Pittsburg California, and a 30-day public comment period on its Settlement Agreement with Calpine for NOVs.

James B MacDonald

James MacDonald – Secretary, CARE
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Robert Sarvey – Treasurer, CARE
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