

# ***Californians for Renewable Energy, Inc. (CARE)***

Michael E. Boyd, President of the Board of Directors  
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Sunnyvale, CA 94089  
(408) 325-4690

## **STATE OF CALIFORNIA**

Energy Resources Conservation  
and Development Commission

In the Matter of: ) Docket No. 99-AFC-3  
)  
Application for Certification for the ) **Motion to Stay Bifurcation of**  
Metcalf Energy Center [Calpine ) **the FDOC/PSD Permits**  
Corporation and Bechtel Enterprises, Inc.] )  
\_\_\_\_\_ )

CARE moves that the California Energy Commission (CEC) stay the Bay Area Air Quality Management District's (BAAQMD's) bifurcation of the FDOC/PSD permit's release. The CEC Metcalf Committee discussed the bifurcation of the FDOC and PSD permit as proposed by the applicant at its July 19, 2000 status conference. Jeff Harris, stated in this regard,

"19 we have actually proposed essentially a  
20 two -- a two-step approach where the FDOC would be  
21 issued before the biological opinion. As Mr.  
22 Richins said, the Bay Area district was  
23 considering that. It would be issued with  
24 basically a notice saying that it doesn't operate  
25 as the PSD permit, pending the consultation,  
1 because the consultation is limited to the Section  
2 7 PSD federal permit.  
3 Subsequent to that, then there would be  
4 a biological opinion completed, and the  
5 consultation completed. At that point, the Bay  
6 Area district could then issue the PSD portion of  
7 their permit, and that would start the -- the  
8 timeframe for the appeal to the Environmental Appeals Board"

Subsequent to the status conference, CARE sent e-mail to Matt Haber at EPA Region IX as follows.

"Dear Matt,

I don't know if your involved in the BAAQMD's FDOC on the Metcalf Energy Center (MEC)? I noticed you where involved in the Three Mountain Power Project, where EPA revoked another air district's FDOC on this project because the Section 7 consultation wasn't complete and approved by EPA yet. Why isn't this the case with the MEC? The BAAQMD is talking about releasing the FDOC before the PSD permit is issued. Isn't the air district's FDOC supposed to be based on the evidence of the record? How can they issue an FDOC without identification of specific impacts on threatened and endangered species and the mitigation and monitoring program?

What about the BAAQMD's finding that SCR meets BACT? I thought SCONOX was the current BACT for EPA?

I'm forwarding this e-mail I sent to Cecilia Brown on the Red Legged Frog from CARE's biologist Dr. Shawn Smallwood.

Matt please give the San Jose community the same treatment the Three Mountain community received. Don't let the BAAQMD be treated any different then the air district was treated for Three Mountain. If they issue the MEC FDOC prematurely please revoke it. Our community deserves nothing less.

Mike Boyd President (408) 325-4690  
CALifornians for Renewable Energy, Inc. (CARE)"

Mr. Haber of EPA passed this e-mail to Duong Nyugen who called on July 26, 2000 to discuss this matter. Mr. Nyugen was informed of CARE's position that bifurcation of the FDOC and PSD Permit would place an undue burden on the public's rights to participate. Further, CARE identified that any FDOC issued prior to the PSD federal air permit would include a incomplete administrative record on the Endangered Species Act (ESA) section 7 consultation with the US Fish and Wildlife Service, the impacts on threatened and endangered species, and any proposed mitigation and monitoring plan. CARE contends that the release of the FDOC without this required information makes this document fatally flawed and inadequate in regards to the evidence of the record.

Following this conversation on July 28, 2000 EPA region IX notified BAAQMD of its concerns in a letter to Steve Smith from Gerardo Rios in reference to the bifurcation of the FDOC and the PSD permit for the Metcalf Energy Center (see attachment 1). In this strongly worded letter it was stated in this regard.

"We would like to note that bifurcating the FDOC may not be the best means for addressing EPA's ESA requirements. The bifurcation process is a strained procedure, particular where permit terms and conditions for nonattainment NSR overlap with PSD conditions in one document that is labeled 'FDOC.' In addition, in some instances, EPA may determine that revisions to the PSD conditions are required as a result of ESA consultation, and the PSD revisions may necessitate changes to no-PSD portions of the FDOC. For these reasons, we would prefer that the FDOC not issue until ESA process is concluded and EPA has determined that it has satisfied its ESA obligations"

CARE contacted Steve Hill at BAAQMD subsequent to his receipt of this letter to determine the air districts response. Steve Hill informed CARE that the District intends to continues to pursue a bifurcated FDOC/PSD permit process irrespective of the letter from EPA region IX advising otherwise.

CARE reiterates that the release of the FDOC without this required information makes this document fatally flawed and inadequate in regards to the evidence of the record. Without this information's inclusion in the FDOC the public is deprived of its ability to meaningfully participate in the Metcalf Energy Center environmentally review.

For these reasons intervenor CARE moves that the California Energy Commission (CEC) stay the Bay Area Air Quality Management District's (BAAQMD's) bifurcation of the FDOC/PSD permit's release.

*Michael E. Boyd*

8-11-00

Michael Boyd – President, CARE (408) 325-4690

Attachment 1

07/28/00 FRI 14:15 FAX 415 744 1076

US EPA AIR DIV

001



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, CA 94105

July 28, 2000

99-AFC-3

CALIF ENERGY COMMISSION

JUL 31 2000

RECEIVED IN DOCKETS

Steve Hill  
Permits Manager  
Bay Area AQMD  
939 Ellis Street  
San Francisco, CA 94109

Re: Metcalf Energy Center, Bifurcation of Final Determination of  
Compliance/Prevention of Significant Deterioration Permits

OPTIONAL FORM 96 (7-90)	FAX TRANSMITTAL	# of pages	
		To	Paul Pinkling
		From	Dzung Nguyen
		Dept./Agency	
		Fax #	916-654-3882
		Phone #	415-744-1096
		GENERAL SERVICES ADMINISTRATION 5099-101 NSN 7540-01-317-7398	

Dear Mr. Hill:

The purpose of this letter is to communicate our concerns regarding the Bay Area AQMD's consideration of a procedure to "bifurcate" the issuance of the final Determination of Compliance (FDOC) and the final Prevention of Significant Deterioration (PSD) permit for the Metcalf Energy Center project. We understand that Bay Area is contemplating releasing the "bifurcated" FDOC as soon as the end of July, but that the District will wait for the Endangered Species Act (ESA) Section 7 consultation process with the U.S. Fish and Wildlife Service (FWS) to be completed and for EPA to determine that it has satisfied its ESA Section 7 requirements before issuing the PSD permit. While we agree that it is appropriate and prudent to issue the PSD permit only after the consultation process has ended and EPA has determined that issuance of the permit will be consistent with the requirements of the ESA, the issuance of the FDOC on a separate track, prior to EPA determining that it has satisfied the ESA requirements, creates several awkward obstacles, procedurally and/or legally, to overcome. Our comments on this issue, should the District decide to proceed with the bifurcation of the permits, are detailed below.

First, it is possible that the consultation process will result in a more stringent PSD permit, e.g., a lower NOx limit, than the FDOC. There could also be overlap between state and federal requirements with respect to certain terms/conditions, e.g. Best Available Control Technology (BACT) and Lowest Achievable Emission Rate (LAER) for NOx. Therefore, we believe the District must identify which conditions in the FDOC are nonattainment (NSR) conditions and which are PSD conditions. This is necessary to provide clarity to both the record and the public in identifying the conditions that are appealable at the time of issuance and to help a member of the public appeal the permits to the proper forum, should he/she choose to do so. Identification of the conditions' underlying authority also helps ensure that a member of the public does not prematurely appeal a PSD condition due to confusion or concern over the finality of that condition.

PROOF OF SERVICE (REVISED \_\_\_\_\_) FILED WITH  
ORIGINAL MAILED FROM SACRAMENTO ON 07/31/00  
MCA

Second, to further ensure that there is clarity regarding the distinction between which conditions in the FDOC are final conditions and which are PSD conditions that are not final, the District should include language in the FDOC stating that it is not a final PSD permit, in addition to making a statement to that effect in the public notice.

Third, if there are nonattainment (NSR) or other terms/conditions in the FDOC that overlap with PSD conditions such that the PSD conditions are inextricable from them, then these NSR terms/conditions should be designated as not final in the FDOC in order for EPA to ensure compliance with its ESA obligations.

Finally, we would like to note that bifurcating the FDOC may not be the best means for addressing EPA's ESA requirements. The bifurcation process is a strained procedure, particularly where permit terms and conditions for nonattainment NSR overlap with PSD conditions in one document that is labeled the "FDOC." In addition, in some instances, EPA may determine that revisions to the PSD conditions are required as a result of ESA consultation, and the PSD revisions may necessitate changes to the non-PSD portions of the FDOC. For these reasons, we would prefer that the FDOC not issue until the ESA process is concluded and EPA has determined that it has satisfied its ESA obligations.

With regard to the draft letters that the District is considering sending to commenters and/or interveners on the bifurcation process (according to Metcalf's consultant, Gary Rubenstein), we offer some additions (in bolds) to the language in these letters as shown in the paragraphs below. We believe that these changes are necessary to accurately reflect EPA's responsibilities during and following the ESA consultation process and the circumstances under which a PSD permit may issue in light of these responsibilities.

First letter:

"...As you are aware, the District has in the past issued a FDOC that also serves as a Final Prevention of Significant Deterioration Permit (PSD Permit); **however, this FDOC does not constitute a Final PSD Permit.** In this case, the United States Environmental Protection Agency (US EPA) is involved in a consultation with the U.S. Fish and Wildlife Service (USFWS) pursuant to Section 7 of the Endangered Species Act related to the potential impacts of the Metcalf Energy Center on the federally protected Bay Checkerspot Butterfly. The consultation process is expected to be completed on or about August 9, 2000, when it is anticipated that the Fish and Wildlife Service will issue the Biological Opinion. The District believes that it is prudent to issue the Final PSD Permit after the Section 7 consultation process is completed and **after US EPA has determined that issuance of the permit will be consistent with US EPA's obligations under the Endangered Species Act.** Accordingly, any PSD conditions in this FDOC are not final at this time, and the District will issue the Final PSD Permit terms and conditions for the Metcalf Project upon completion of the Section 7 consultation and US EPA's determination that **issuance of the permit will be consistent with the requirements of the Endangered Species Act."**

Second letter:

"...The US EPA consultation process is now complete and the Biological Opinion for the Metcalf Energy Center was issued on \_\_\_\_\_, 2000; U.S. EPA has also determined that issuance of the permit will be consistent with the requirements of the Endangered Species Act. Accordingly, the attached document constitutes the Final PSD Permit for the project under 40 CFR 52.21 and the terms of the District's delegation of authority from US EPA under that section. The Final PSD Permit will become effective 30 days from the date of this letter unless a timely appeal is submitted to the Environmental Appeals Board pursuant to 40 CFR 124.19."

If you have any questions, please contact Duong Nguyen of my staff at (415) 744-1142 or our counsel, Pamela Schultz, at (415) 744-1354.

Sincerely,

*N. Zouestigh For Rios*

Gerardo Rios  
Acting Chief, Permits Office

cc: Gary Rubenstein, Sierra Research  
Paul Richins, CEC  
Cecilia Brown, FWS  
Ray Menebroker, ARB

