Office of the District Counsel
Telephone: (415) 749-4920
Fax: (415) 749-5103

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04-AFC-1
DATE MAR 15 2006
REC'D MAR 17 2006

March 15, 2006

Chairperson Thomas M. Dailey, M.D. and
Members of the Hearing Board
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109

Re: Docket No. 3511; Appeal
Appellant: Californians for Renewable Energy, Inc.
Opposition to Appeal

Dear Chairperson Dailey and Members of the Hearing Board:

The Air Pollution Control Officer of the Bay Area Air Quality Management District ("APCO") hereby submits this Opposition to the Appeal filed by Californians For Renewable Energy, Inc. ("CARE"). The Appeal should be dismissed as moot because the APCO has now cured the alleged defect that formed the grounds for the Appeal.

The Appeal is based on a contention that the APCO issued a Final Determination of Compliance ("FDOC") for the San Francisco Electric Reliability Project without having evaluated and considered the comments that Appellant submitted on the Preliminary Determination of Compliance ("PDOC") for the project. After receiving the Appeal, the APCO went back and evaluated and considered the comments in great detail, as evidenced by the letter the APCO sent to Appellant responding to each point that Appellant raised. The APCO then reissued the Final Determination of Compliance based on all the comments received. Appellant's complaint has thus been addressed and resolved.[1] The Appeal is therefore moot, and it must be dismissed.

Appellant has contended that the Appeal is not moot because it seeks to have the PDOC reissued, with another opportunity for Appellant to submit its comments. (*See* Notice of Title V Complaint, Feb. 27, 2006, at p. 4.) But as Appellant concedes, there was nothing wrong with the

[1] For the Board's convenience, copies of the FDOC and the APCO's letter to Appellant are attached as Exhibits A and B, respectively.

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District's process of notifying the public of the PDOC and providing the public with the opportunity to express their views on it to District staff. Indeed, Appellant clearly received notice of the PDOC and had ample opportunity to comment, as evidenced by the August 31, 2005, comment letter it submitted. Appellant simply has no legal or practical basis for requesting that the APCO reissue the PDOC.

Furthermore, some of the documents that Appellant has submitted in this proceeding have also hinted at broader substantive environmental concerns that Appellant has about the project. To the extent that these can be considered grounds for the Appeal (the Appeal itself claims to challenge only the procedure by which the FDOC was issued, not any substantive grounds), the Appeal must be dismissed because the forum for raising these issues is at the California Energy Commission ("CEC"), not the Air District. The CEC has jurisdiction over these issues pursuant to the Warren-Alquist Act (Public Resources Code §§ 25000 *et seq.*), which created a comprehensive process for providing public review of power plant siting issues – including environmental issues – in a single certification proceeding before the CEC. The Air District's role is limited simply to determining whether the project will comply with the District's regulations and what conditions must be imposed to achieve that end. To the extent that Appellant has broader concerns about environmental issues regarding this project, Appellant can take them up with the CEC – and indeed, Appellant has been participating fully in the CEC's process. The Air District, and this Hearing Board, simply have no jurisdiction to consider such issues. [A more detailed legal analysis of how the Warren-Alquist Act confers exclusive jurisdiction on the CEC is provided in the attached Appendix.]

Finally, with respect to the District's regulations that are the subject of the FDOC, the District has properly applied them. The Appeal does not cite a single substantive District regulation that it claims has been violated. As the APCO has explained in the FDOC and in the comment response letter (Exhibits A and B), there can be no doubt that the District properly applied its regulations and determined that, with the conditions set forth in the FDOC, the facility will comply with all District permit requirements.

For all of these reasons, the Appeal must be DISMISSED.

Sincerely,

Alexander G. Crockett, Esq.
Assistant Counsel

AGC:cf
cc: Mr. Lynne Brown
Mr. Michael E. Boyd
Jeanne Solé, Esq.

APPENDIX

The Process for Certification of New Power Plants in California Under the Warren-Alquist Act

Ultimate authority for permitting the San Francisco Electric Reliability Project resides with the California Energy Commission ("CEC") under the Warren-Alquist State Energy Resources Conservation and Development Act ("Warren-Alquist Act"), Public Resources Code sections 25000 *et seq.* The Warren-Alquist Act gives the CEC the lead role in the regulatory review process and grants it exclusive authority over new power plants under state law. The Air District plays an important supporting role in providing input to the CEC on air quality matters, but ultimate licensing authority lies exclusively with the CEC. This Appendix outlines how environmental issues are addressed in the CEC's power plant certification process under the Warren-Alquist Act, as well as how the process has been followed with respect to the San Francisco Electric Reliability Project.

The intent behind the Warren-Alquist Act was to create a comprehensive regulatory scheme to provide for public review of power plant siting issues – including environmental issues – in a single certification process before the CEC. The Act is intended to streamline new power plant siting by providing a "one-stop" reviewing and permitting process, based on the Legislature's express findings that electricity is essential to the health and welfare of the state's citizenry and the state economy (Pub. Res. Code § 25001); and that the state requires a consolidated program for energy policy, including power plant siting (*id.* § 25006). To accomplish these ends, the Warren-Alquist Act grants the CEC exclusive licensing authority for all thermal power plants in California that are 50 megawatts (MW) or greater in generation capacity. (*Id.* §§ 25000, 25120.) This CEC permitting authority supersedes all other local and state permitting authority, as the Act provides that the CEC license "shall be in lieu" of any permit, certificate, or similar document required by any state, local or regional agency . . . ." (*Id.* § 25500.)

The heart of the CEC's environmental review is the Staff Assessment process, governed by the CEC's regulations at Cal. Code Regs., tit. 20, sections 1742-47. The Staff Assessment process is intended to implement the CEC's mandate to "ensure that the applicant incorporates into the project all measures that can be shown to be feasible, reasonably necessary, and available to substantially lessen or avoid the project's significant adverse environmental effects, and to ensure that any facility which may cause a significant adverse environmental effect is certified only if the benefits of such facility outweigh its unavoidable adverse effects." (Cal. Code Regs., tit. 20, § 1741(b)(1).); see also *id.* § 1740(a).) CEC staff review and report on the potential environmental consequences of each project, in conjunction with other interested agencies, and then include the environmental report along with other required reports in a document known as the "Final Staff Assessment" ("FSA"). (*Id.* §§ 1742.5(b), 1747.) The FSA then becomes the California Environmental Quality Act ("CEQA") environmental review document on which the CEC bases its final certification decision.

The CEC is specifically directed to address air quality issues as part of the Staff Assessment process. Section 1744.5 of the CEC's regulations require the CEC to obtain a "Determination of Compliance" from the local air pollution control agency – the Air District in the San Francisco Bay Region – certifying that the proposed project will comply with all applicable air pollution control requirements. (*Id.* § 1744.5.) The Air District has adopted corresponding regulations for making such a Determination of Compliance for power plant applications in the Bay Area. Those regulations require the Air District to apply strict air pollution controls to new power plants, including the use of "best available control technology" (District Regulation 2-2-301) and the "offsetting" of new emissions caused by the project with emissions reductions from other sources (District Regulation 2-2-303); as well as a requirement that the project will not cause or contribute to a violation of any applicable air quality standards in the region (District Regulation 2-2-304); among other requirements. Once the Air District has determined that the project complies with all such requirements, it adopts a Preliminary Determination of Compliance ("PDOC"). The Air District is then required to publish the PDOC and provide the public with an opportunity to comment on it; to review, evaluate and consider any comments received; and then to issue a Final Determination of Compliance ("FDOC"). (District Regulations 2-3-201, 2-3-301, 2-3-402 through 405.) The FDOC identifies the applicable regulations with which the project will be required to comply and specifies the required air pollution control technology and mitigation measures to be implemented. (Cal. Code Regs., tit. 20, § 1744.5(b).) The CEC then incorporates the FDOC's findings into its own environmental review process (*id.* § 1742.5(d)), and uses them as a basis for the air quality analysis in its Final Staff Assessment (*id.* § 1747). Thus, through the Staff Assessment process, the Warren-Alquist Act ensures that the CEC, in coordination with other expert regulatory agencies such as the Air District, undertakes a full review of all potential environmental impacts associated with new power plants, and especially potential air quality impacts.

Finally, in keeping with its intention to provide a "one-stop" permitting process for new power plants, the Legislature has conferred sole jurisdiction to review CEC power plant licensing decisions on the California Supreme Court. (Pub. Res. Code § 25531(a).) The Legislature also prohibited collateral appeals on CEC licensing decisions, providing that:

> Subject to the right of judicial review of decisions of the commission [in the Supreme Court], no court in this state has jurisdiction to hear or determine any case or controversy concerning any matter which was, or could have been, determined in a proceeding before the commission, or to stop or delay the construction of any thermal power plant . . . .

(*Id.* § 25531(a).) Thus, any person concerned with the potential air quality impacts of a proposed power plant is provided with an opportunity to air those concerns administratively before the CEC's approval process, and with an opportunity to seek judicial review if it believes those concerns have not been adequately addressed. Conversely, such persons are barred from raising such concerns elsewhere.

With respect to the San Francisco Electric Reliability Project, the CEC and the Air District have followed this process to the letter. In keeping with the requirements of District

Regulation 2, Rule 3, the District reviewed the air emission impacts from the Project, and issued its PDOC on or about July 25, 2005. The Air District gave notice to the public that the PDOC was issued and invited interested members of the public to comment. A number of parties submitted comments, including Appellant. However, Appellant's comments either were not received by the Air District, or if they were received, the document was misplaced within the Agency. In any event, the Air District was not aware at the time that Appellant had comments to provide on the PDOC. The District did consider all of the other comments that were submitted, and proceeded to issue an FDOC on or about Dec. 12, 2005. Appellant then filed this Appeal on or about January 13, 2006, on the grounds that the Air District had not considered the comments Appellant had submitted.

Upon receiving Appellant's Appeal, the Air District realized that it had not considered Appellant's comments. To remedy the situation, the Air District went back and carefully reviewed and considered each and every point Appellant raised (as well as a few other minor administrative points made by other commenters). After doing so, the District reissued a revised FDOC on or about January 19, 2006. The Air District also sent a detailed letter to Appellant responding to each point Appellant raised in its comment letter. (A copy of the Comment Response Letter is attached hereto as Exhibit B).

CEC staff then used the revised and reissued FDOC in preparing its FSA, which was issued on February 21, 2006. To give the Board an idea of the comprehensiveness of the FSA's analysis of all types of environmental concerns, the Air Quality chapter of the FSA is attached as Exhibit C. The Full FSA is not being provided because it is over 900 pages, but if the Hearing Board is interested in examining additional portions the entire document is available at http://www.energy.ca.gov/2005publications/CEC-700-2005-021/CEC-700-2005-021-FSA.PDF.

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA

APPLICATION FOR CERTIFICATION FOR THE SAN FRANCISCO ELECTRIC RELIABILITY PROJECT

Docket No. 04-AFC-01
PROOF OF SERVICE
Revised 2/17/06

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1516 Ninth Street
Sacramento, CA 95814-5512

Also send a printed ***or*** *electronic copy of all documents to each of the following:*

APPLICANT

Barbara Hale, Power Policy Manager
San Francisco Public Utilities Commission
1155 Market Street, 4th Floor
San Francisco, CA 94102
BHale@sfwater.org

Applicant Project Manager
Karen Kubick
SF Public Utilities Commission
1155 Market St., 8th Floor
San Francisco, CA 94103
kkubick@sfwater.org

APPLICANT'S CONSULTANTS

Steve De Young
De Young Environmental Consulting
4155 Arbolado Drive
Walnut Creek, CA 94598
steve4155@astound.net

John Carrier
CH2MHill
2485 Natomas Park Drive, Suite 600
Sacramento, CA 95833-2943
jcarrier@ch2m.com

COUNSEL FOR APPLICANT

Jeanne Sole
San Francisco City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlet Place
San Francisco, CA 94102-4682
Jeanne.sole@sfgov.org

INTERESTED AGENCIES

Emilio Varanini III
Special Counsel
California Power Authority
717 K Street, Suite 217
Sacramento, CA 95814
drp.gene@spcglobal.net

Electricity Oversight Board
770 L Street, Suite 1250
Sacramento, CA 95814

Donna Jordan
CA Independent System Operator
151 Blue Ravine Road
Folsom, CA 95630
djordan@caiso.com

Dept. of Water Resources
SERS
Dave Alexander
3301 El Camino Avenue, Ste. 120
Sacramento, CA 95821-9001

INTERVENORS

*** Jeffrey S. Russell**
VP West Region Operations
Mirant California, LLC
P.O. Box 192
Pittsburg, California 94565
Jeffrey.russell@mirant.com

*** Mark Osterholt**
Mirant California, LLC
P.O. Box 192
Pittsburg, California 94565
mark.osterholt@mirant.com

Michael J. Carroll
Latham & Watkins LLP
650 Town Center Drive, Suite 2000
Costa Mesa, CA 92626
michael.carroll@lw.com

Potrero Boosters Neighborhod
Association
Dogpatch Neighborhood Association
Joseph Boss
934 Minnesota Street
San Francisco, CA 94107
joeboss@joeboss.com

San Francisco Community Power
c/o Steven Moss
2325 Third Street # 344
San Francisco, CA 94107
steven@sfpower.org

Californians for Renewable Energy, Inc.
(CARE)
Michael E. Boyd, President
5439 Soquel Drive
Soquel, California 95073
michaelboyd@sbcglobal.net

Lynne Brown – Member, CARE
Resident, Bayview Hunters Point
24 Harbor Road
San Francisco, California 94124
L_brown123@yahoo.com

Robert Sarvey
501 West Grantline Road
Tracy, CA 95376
sarveyBob@aol.com

DECLARATION OF SERVICE

I, **Laura J. Murphy**, declare that on **March 17, 2006**, I deposited copies of the attached **Opposition to Appeal** in the United States mail at Sacramento, California with first class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above. Transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. I declare under penalty of perjury that the foregoing is true and correct.

Laura J. Murphy

[signature]

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