UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

CAlifornians for Renewable Energy, Inc., (CARE) Complainant, v. Pacific Gas and Electric Company (PG&E), And California Energy Commission (CEC) Respondents.	Docket No. EL09-73-000

MOTION TO ANSWER AND ANSWER OF CALIFORNIANS FOR RENEWABLE ENERGY TO RESPONDENTS PG&E AND CEC

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. §§ 385.212 and 385.213[1], CAlifornians for Renewable Energy, Inc. ("CARE") hereby moves for leave to file a limited answer to the September 28, 2009 answer filed in the above-captioned proceedings by Respondents Pacific Gas and Electric Company (PG&E) and California Energy Commission (CEC) to the degree the Commission exercises its discretion allow it, and also to provide a Response (to the degree it is allowed) to the Joint Reply Brief of PG&E and CEC submitted on October 2, 2009.

I. MOTION FOR LEAVE TO FILE ANSWER

CARE has participated before the Commission these last ten years without the benefits of legal counsel to prepare and represent CARE before the Commission. Without funding for qualified experts and legal counsel CARE recognizes it has been unable to properly file a

[1] § 385.213 Answers (Rule 213). (a)(2) An answer may not be made to a protest, an answer, a motion for oral argument, or a request for rehearing, unless otherwise ordered by the decisional authority. A presiding officer may prohibit an answer to a motion for interlocutory appeal. If an answer is not otherwise permitted under this paragraph, no responsive pleading may be made. (d) Time limitations. (1) Any answer to a motion or to an amendment to a motion must be made within 15 days after the motion or amendment is filed, unless otherwise ordered.

complaint before the Commission that meets the standards for the Commission to provide its review. In its recent Order Dismissing another of CARE's complaints, under Docket EL09-65 *et al.* the Commission states CARE "failed to submit a pleading that meets the Commission's filing requirements contained in Rule 203."[2] CARE has requested and been denied funding to properly participate before the Commission as an Intervener with financial hardship in the energy crisis "Refund" proceedings where CARE has been seeking refunds for ratepayers (customers) who where overcharged for electric services during the crisis.

In response to CARE's request for financial assistance the ALJ stated on November 5, 2001 "CARE's request for financial assistance in the form of attorney's fees is premature. The established practice for Commission proceedings is for parties appearing before the Commission to bear their own legal fees. The public interest is represented by Commission Staff and state agencies and private interests are represented by interested parties who retain separate counsel. Any grant of attorney's fees and costs would fall under the discretionary authority of the Commission, and not this tribunal."[3]

On October 27, 2009 the Commission Chairman Wellinghoff testified before the Committee on Environment and Public Works, United States Senate regarding proposed changes to Section 151 of S. 1733 that would establish an Office of Consumer Advocacy (OCA). The legislation under consideration proposes in order to ensure its independence from FERC, OCA should be placed within another agency or created as a separate agency.[4]

In response the Chairman proposed the very mechanism under which CARE would be able to fund qualified experts and legal counsel necessary for CARE to participate fully and

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[2] *See* 129 FERC ¶ 61,075 at 1.

[3] See Issuance 20011106-0397 at http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=6002604

[4] See http://www.ferc.gov/EventCalendar/Files/20091027115535-Wellinghoff-10-27-09.pdf

meaningfully before this Commission in behalf of the customers CARE seeks to represent, and in particular those customers that are low income and people of color. “Congress may want to consider funding the Office of Public Participation identified in section 319 of the Federal Power Act, in lieu of enacting section 151. While this Office was intended to, among other things, compensate participants in FERC cases for their litigation costs under certain circumstances, Congress has never funded this Office.”

CARE asks the Commission accommodate CARE’s hardship in participating before the Commission. The Commission, based on its analysis of specific pleadings on a case-by-case basis, has often accepted otherwise prohibited[5] answers to answers that are offered for purposes of correcting misstatements and/or clarifying issues in dispute, in order to assist the Commission in its decision-making process and assure an accurate record as a basis for such decisions.[6]

Under Rule 101(e), 18 C.F.R. § 385.101(e), the Commission "may, for good cause, waive any provision of this part …." CARE submits that where, as here, the record is burdened by misstatement and misleading statements, good cause exists. Accordingly, CARE request that the Commission grant their motion for leave to answer in order to correct a misstatement and also to clarify the record and thereby assist the Commission's decision-making process.

II. ANSWER TO RESPONDENTS ANSWER AND JOINT REPLY BRIEF

PG&E and CEC have provided several false and misleading statements in their Motions, Answers and Joint Brief which CARE wishes to correct. Because CARE’s Officers are not attorneys they can not appear before a court of law in behalf of the 501 (C)(3) corporation. For

[5] *See* Rule 213(a)(2), 18 C.F.R. § 385.213(a)(2).

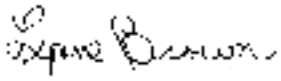
[6] *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 123 FERC ¶ 61,070 at 61,594 - 95 (2008) and 103 FERC ¶ 61,212 at 61,803 (2003); *Kinder Morgan Interstate Gas Transmission LLC*, 123 FERC ¶ 61,018 at 61,067 n.6 (2008); *Strategic Transmission, LLC v. PJM Interconnection, LLC*, 120 FERC ¶ 61,224 at 61,942 (2007); *Energy Services, Inc., et al.*, 101 FERC ¶ 61,289 at 62,163 (2002).

this reason we provide the Comments on the consent decree[7] filed in the US District Court, *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, prepared by the Environmental Law and Justice Clinic at Golden Gate University School of Law in behalf of the Contra Costa branch of Associations of Communities for Reform Now (ACORN) and Communities for a Better Environment. CARE believe these pleading should provide independent verification of the truthfulness to CARE's claims that PG&E and CEC have provided several false and misleading statements in their Motions, Answers and Joint Brief which CARE wishes to correct. (See attached authorization letter and comments)

Conclusion

For the foregoing reasons, CARE respectfully requests that FERC Deny the Motions to Dismiss Complaint of PG&E and CEC and grant the relief requested herein.

Respectfully submitted,



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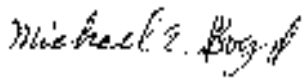

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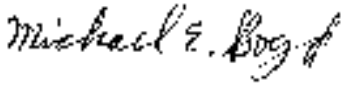
[7] This in no way implies we believe this consent decree to be lawful since we provide a 60-day to US EPA to bring a citizens suit under 42 USC § 7604 prior to the consent decree being filed, and the Notice notified US EPA that CARE would bring legal action if US EPA entered in to an agreement with PG&E that allowed the plant's continued operation without a PSD.

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 November 6th 2009, at Soquel, California



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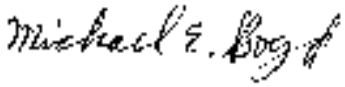
Certificate Of Service

I hereby certify that I have this day caused the foregoing document to be served electronically according to Rule 385.2010(f) of the FERC's Rules of Practice and Procedure, including eService and efiling at the FERC.

Executed on November 6, 2009, at Soquel, California



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Attachment 1

From: Deborah Behles <dbehles@ggu.edu>
Subject: word version of comment
To: Sarveybob@aol.com, RCox@pacificenvironment.org, rob@redwoodrob.com, michaelboyd@sbcglobal.net
Date: Wednesday, November 4, 2009, 12:41 PM

Rory, Mike, Rob and Bob -

Attached is the MS Word version of the comment we are filing today. Feel free to incorporate what you want from this comment, but I hope that you will also include all the other important things that I know you can say.

Thanks for continuing to work with us on this important issue.

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Attachment 2

GOLDEN GATE UNIVERSITY **School of Law**

Environmental Law and Justice Clinic

November 4, 2009

BY FIRST CLASS MAIL AND ELECTRONIC MAIL
Assistant Attorney General
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Re: *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

To the Assistant Attorney General:

On behalf of the Contra Costa branch of Associations of Communities for Reform Now (ACORN) and Communities for a Better Environment, the Environmental Law and Justice Clinic at Golden Gate University School of Law submits these comments to the proposed Consent Decree (CD or Decree) lodged in *United States v. Pacific Gas & Electric Company*, Civil Action No. 09-4503 (N.D. Cal).

I. INTRODUCTION

This Decree appears to be based on a fundamentally incorrect premise – that PG&E operated and constructed Gateway Generating Station (GGS) in good faith with no knowledge that it was breaking the law. To the contrary, as the relevant documents demonstrate, PG&E knew it needed to change its air permit months before it constructed and started operating GGS. Instead of waiting for the required approval, PG&E took a calculated risk when it finished construction and withdrew a pending air permit application. This illegal approach has not only resulted in the emission of tons of harmful air pollution without the required controls but also obstructed the community's ability to have a say in decisions affecting it.

Rather than penalizing PG&E for its illegal approach, the Decree is essentially rewarding PG&E with a much better deal than other similarly situated, law abiding, companies are currently receiving through the permitting process. Thus, not only is this deal unfair to the low income and minority community living next to and around GGS, but it is unfair to other utilities that are going through the PSD permitting process.

This unfair and unjust Decree is unacceptable. PG&E should be held liable for its actions by requiring it to meet the best available technology control standards and by penalizing it to deter future violations of the law. Therefore, the United States should withhold its consent of this Decree pursuant to Paragraph 43 of the Decree.

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II. DISCUSSION

A. The Decree is Unjust Because the United States Was Not Told the Complete Story.

As demonstrated by the whereas clauses, the CD was based on significant factual mistakes and therefore does not reflect an open, balanced bargaining process. "To measure procedural fairness, a court should ordinarily look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance." *United States v. Cannons Engineering Corp*., 899 F.2d 79, 86 (1st Cir. 1990).

Notably, this Decree was not the result of an adversarial process, which could be part of the reason the United States failed to learn the relevant information. The CD was lodged at the same time as this case was initiated, precluding the adversarial process that could have been commenced by concerned citizen groups on the claims covered by this Decree. This lack of adversarial process produced a deal that was not the result of a fair and balanced evaluation of the facts and background information of the violations. This shortfall is demonstrated by the Decree's injunctive relief provisions, penalty terms, and several whereas clauses, which appear to rely predominantly on PG&E's story rather than an independent evaluation of the facts.

In particular, one of the "whereas" clauses states that "BAAQMD believed EPA's withdrawal of delegation of PSD authority did not affect its authority to extend existing PSD permits." CD at 3. BAAQMD, however, is not a party to this Decree and therefore, it is unclear why this statement, for which BAAQMD cannot be held accountable, is made. In addition, based on our review of publicly available information, we have not seen any contemporaneous statements from 2003 or 2004 where BAAQMD stated that it believes that the withdrawal of PSD authority did not affect its authority to extend PSD permits. A March 3, 2003 letter from EPA shows the unlikelihood of such a belief on BAAQMD's part:

> the Environmental Protection Agency, (EPA) Region 9, is notifying you that effective Monday, March 3, 2002, we are revoking and rescinding your authority to implement the Prevention of Significant Deterioration (PSD) program for issuing and modifying federal permits for new and modified major sources of attainment pollutants.

Delegation Ltr from EPA Region 9 to BAAQMD (March 3, 2003). The March 3, 2003 letter further states that: "[w]e understand that there may be PSD permits in process at the District. Please have your staff contact Gerald Rios . . . to discuss how to ensure a smooth transition for those permits." *Id.* This language therefore confirms that EPA revoked BAAQMD's authority and that the PSD permits being processed should have been transitioned to EPA. There is no suggestion that this revocation is only partial. Moreover, if BAAQMD had any questions regarding the impact of this action, it was directed to contact EPA. *See id.*

In addition to sending BAAQMD the March 3, 2003 letter, EPA published notice of this revocation in the Federal Register to put companies and the public on notice that the delegation was revoked for federal PSD requirements. *See* 68 Fed. Reg. 19371 (March 21, 2003). Documents available during that time period also suggest that this was fundamentally understood. For instance, in another permit that was processed, the California Energy Commission, which oversees power plant siting, states that the authority for the federal program rested with EPA, not BAAQMD, during that time period. *See, e.g.*, California Energy Commission Tesla application, at Appendix A: LORS-1 (June 22, 2004) http://www.energy.ca.gov/sitingcases/tesla/documents/2004-06-22_FINAL.PDF.

Furthermore, if there was any question about the interpretation of the PSD regulations as applied to GGS, BAAQMD was *required* to check with EPA. The June 21, 2004 delegation agreement, which reinstated some of BAAQMD's authority, states: "[t]he District *shall* request and follow EPA guidance on any manner involving the interpretation of Sections 160-169 of the Clean Air Act or 40 CFR 52.21, relating to the PSD permits for" GGS. *See* U.S. EPA – Bay Area Air Quality Management District Agreement for Re-Delegation of Authority to Issue and Modify Prevention of Significant Deterioration Permits Subject to 40 CFR 52.21 (June 21, 2004) (emphasis added). Thus, BAAQMD's purported misunderstanding, which is not corroborated by any documentation that the community has seen through its public information request, is unreasonable, not properly part of this agreement and should not be an excuse for violating the law by either BAAQMD or PG&E.

Another problematic whereas clause states that, "at the request of Mirant, BAAQMD extended the ATC twice, in 2003 and 2005, and believed, at those times, it was also extending the PSD permit." CD at 3. This whereas clause, again, is not properly part of this agreement because it states the intent of BAAQMD, who is not a party to this decree and therefore cannot be held accountable for this statement. This clause also suffers from an even more fundamental defect – it is unclear whether the 2003 extension ever occurred. After diligently reviewing the publicly available information related to this facility at BAAQMD, we are unable to locate any document extending GGS's ATC in 2003. The only publicly available references to the GGS's authority to construct being extended in 2003 contained in documents written years after the supposed extension occurred. Notably, earlier this year, PG&E wrote BAAQMD stating that even PG&E was unable to locate this supposed 2003 extension. *See* Ex. 1. Further supporting that this purported extension may not exist, there is no record of such an extension in BAAQMD's permitting history for this site. *See* Ex. 2 (email from public records office at BAAQMD with permitting file history).

In addition to receiving incomplete information about the extensions of the permit, the United States also appears to have incomplete information about what transpired between PG&E and BAAQMD since PG&E became the sole owner of the GGS. As to this, the whereas clauses merely state that: "in January 2007, BAAQMD

transferred the ATC to PG&E and believed it was also transferring the still-effective PSD permit." CD at 3. This fails to explain how, when PG&E acquired the facility, it changed some of the equipment in the facility, applied for a new PSD permit, and constructed and started operating its facility despite its knowledge that it did not have a valid air permit.

Specifically, in December 2007, PG&E notified the District that its construction plans had changed and applied for an amended PSD permit and an amended ATC. *See* PG&E Application for Modifications to Authority to Construct Gateway Generating Station (Dec. 18, 2007)[1]. In this application, PG&E stated it was making "several changes to the physical design of the facility and to several of the operating assumptions." *Id.* PG&E also stated that it was not planning to begin construction of the modified units until a new permit was issued. *Id.* at 1. The proposed changes included: replacing the permitted preheater with a dewpoint heater and increasing allowable daily hours of operation; increasing the allowable emission rates for the gas turbines during startup; reducing the permitted hourly emission rates for NOx, CO, and PM_{10}, based on technology represented to be BACT at the time of the 2007 application and on operating experience at other facilities; and substituting a 300-hp diesel fire pump for the previously planned electrical pump. *Id.* In this application, PG&E admitted that construction of GGS had been suspended "longer than 18 months" and therefore, the "construction had not been continuous" triggering NSPS. *Id.* at 18.

In response to PG&E's application, the District published a draft permit in June 2008, which it opened up for public comment. *See* BAAQMD Engineering Evaluation for Proposed Amended Authority to Construct and Draft PSD Permit, Application 17182 (June 2008).[2] In that draft permit, the District evaluated the limits for NO_2, CO, POC, PM_{10} and SO_2 annual, hourly, startup and shutdown emissions. *Id.* As part of the proposed permit, the District proposed reducing the hourly NOx emission limit to 2.0 ppmvd @15% O_2 and the hourly CO limit to 4.0 ppmv on a 3 hour average. *Id.*at 4-5. In other words, the District had already proposed requiring two out of the three injunctive relief measures in the Decree. In addition to reducing hourly NOx and CO emissions, the June 2008 proposed permit also proposed reductions in annual and hourly PM_{10} and SO_2 emissions. *Id.* at 5. These reductions are not required in the Decree.

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[1] This permit application is available at http://www.energy.ca.gov/sitingcases/gateway/compliance/index.html as an attachment to the "Petition to Amend Air Quality Conditions" posted in January 2008.

[2] The draft permit is available at: http://hank.baaqmd.gov/pmt/public_notices/2008/17182/index.htm.

The public comment period for the draft permit for GGS ended on July 14, 2008. Several public comments were received including critical comments from Bob Sarvey and the California Energy Commission.[3]

Two weeks after this public comment period was over, on July 28, 2008, PG&E attempted to avoid triggering PSD requirements by changing the CO limits it requested. *See* PG&E Ltr to BAAQMD, July 28, 2008, Ex. 3 ("With this change, the proposed amendment will no longer constitute a major modification"). There is no indication that BAAQMD agreed that the change was sufficient to remove the amendment from the PSD process. Rather, the record shows that a BAAQMD engineer continued processing PG&E's amendment as an amendment to the entire PSD permit.

The following day, on July 29, 2008, a BAAQMD PSD permit for another power plant, the proposed Russell City Energy Center was remanded by EPA's Environmental Appeal Board holding that:

> The District's almost complete reliance upon [California Energy Commission] CEC's certification-related outreach procedures to satisfy the District's notice obligations regarding the draft permit resulted in a fundamentally flawed notice process . . . . Contrary to the District's statements, the District's notice omissions do not constitute "harmless error." . . . 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.

In re: Russell City Energy Center, Permit No. 15486, PSD Appeal No. 08-01 (July 29, 2008).

The Russell City EAB remand order had direct implications for the July 2008 GGS draft permit. To discuss the impact of the Russell City remand on GGS, representatives from BAAQMD and PG&E had a teleconference on August 4, 2008. *See* Ex. 4. During this call, as transcribed by PG&E, the District's attorney first briefed PG&E on the EAB Russell City decision because he was "concerned that the notice provided for the GGS amendment might also be viewed by the EAB as deficient" and that the "plaintiff in the RCEC case would appeal the GGS permit to the EAB on the same grounds." *Id.* According to PG&E's meeting notes, the District's attorney further indicated that:

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[3] The California Energy Commission's comments are available at http://www.energy.ca.gov/sitingcases/gateway/compliance/index.html.(date online July 16, 2008) and Mr. Sarvey's comments were an exhibit to Mr. Simpson's EAB filing, which is available at EAB Docket PSD 09-02, Filing No. 8, http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/77355bee1a56a5aa8525711400542d23/e21ed03510b6c284852575ae006ce586!OpenDocument.

> the RCEC plaintiff had been in contact with Bob Sarvey, who had submitted public comments on the GGS draft permit. He noted that power plant project opponents such as Sarvey appear to have discovered that the EAB appeal process is an effective means of delaying projects since an EAB appeal stays the PSD permit for 6 months or even more if EAB ultimately rejects the appeal.

Id. Due to this, the Air District's attorney indicated that the Air District wanted to re-notice the permit to potentially avoid the Russell City issue. *Id.* PG&E did not agree with this idea and warned that "if amendment is delayed beyond project startup, GGS may need to request variance from Hearing Board." *Id*. The Air District responded that: "[i]f GGS were to [wait to] withdraw permit amendment until after commissioning it would be hard for District staff to support, and the Hearing Board to grant, a variance." *Id.*

Later in the meeting, BAAQMD's engineer "indicated that the District was considering whether the modeling results for other non-PSD pollutants needed to be included in the public notice and engineering evaluation." *Id.* PG&E's consultant was concerned with this:

> this could make it appear as if the entire PSD permit was subject to public notice, and not just the requested amendment. The District staff indicated that this was their intent, as a fallback position. [PG&E's consultant] Gary [Rubenstein] indicated that while PG&E could figure out a way to deal with delays related to the pending permit amendment, if there was even a slight chance that the public notice for the amendment could be construed as a renotice of the entire PSD permit, and hence an appeal could stay the effectiveness of the initial PSD permit, PG&E would withdraw the amendment request.

Id.

For the next few months after this meeting, the District engineer continued to process PG&E's PSD/ATC permit application. This review continued despite the fact that PG&E finished construction and started operating in late 2008. In fact, in February 2009, the District's engineer was putting the finishing touches on a draft PSD permit that it was planning to publish for public comment. *See* Ex. 5 (an excerpt of this draft permit). In that draft, as indicated in the August 2008 meeting, the District stated that "the District has evaluated the project as a whole for compliance with applicable regulatory requirements." *Id.* PG&E, however, withdrew this amendment request before the draft permit was published in February 2009 as "no longer necessary." *See* February 13, 2009 Letter, *available at* http://www.energy.ca.gov/sitingcases/gateway/index.html (posted June 1, 2009).

Despite not having received a PSD permit, ATC, or a determination of compliance, PG&E finished construction of Gateway and started operating on or before November 10, 2008 or, at the latest, on January 4, 2009. The Gateway facility appears to be substantially similar to the facility PG&E proposed to construct in its 2007 permit application to the District, which it later withdrew. Specifically, the facility includes all of the equipment that was described in the 2007 permit application, including a new dewpoint heater and diesel engine. PG&E later had to reapply for many of the same changes that it withdrew as "no longer necessary."

PG&E knew its permit had not been updated to reflect its current configuration of the facility when it went ahead and finished construction and started operating. This important information should have been considered in the negotiation. Without this information, the United States was not in an equal bargaining position, and the Decree is unjust.

B. The Decree's Proposed Injunctive Relief Is Not BACT.

At a minimum, PG&E should be required to meet current-day BACT. The Decree's injunctive relief is inadequate because it fails to meet the basic requirements for BACT.

The Clean Air Act's PSD program bars construction in attainment areas of any major air pollutant emitting facility not equipped with BACT. Section 165(a)(4) of the Act, 42 U.S.C. § 7475(a)(4). The Act defines BACT as "an emission limitation based on the maximum degree of [pollutant] reduction ... 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 [the] facility." Section 169(3) of the Act, 42 U.S.C. § 7479(3). BACT is "principally a technology-forcing measure that is intended to foster rapid adoption of improvements in control technology." *In re: Columbia Gulf Transmission*, 1989 EPA App. LEXIS 26, *10.

The Air District, which is the current PSD permitting authority for GGS, defines BACT in SIP Rule 2-2-206, *available at* http://yosemite.epa.gov/R9/r9sips.nsf/AgencyProvision/411642DA93F3D7A4882569900057D386/$file/BA+rg2-2sip.PDF?OpenElement. BACT is "the most effective emission control" or "the most stringent emission limitation." In the Bay area, BACT is "the more stringent of":

> 206.1 The most effective emission control device or technique which has been successfully utilized for the type of equipment comprising such a source; or
>
> 206.2 The most stringent emission limitation achieved by an emission control device or technique for the type of equipment comprising such a source; or

> 206.3 Any emission control device or technique determined to be technologically feasible and cost-effective by the APCO; or
>
> 206.4 The most effective emission control limitation for the type of equipment comprising such a source which the EPA states, prior to or during the public comment period, is contained in an approved implementation plan of any state, unless the applicant demonstrates to the satisfaction of the APCO that such limitations are not achievable. Under no circumstances shall the emission control required be less stringent than the emission control required by any applicable provision of federal, state or District laws, rules or regulations.

SIP Rule 2-2, approved into the California SIP, 64 Fed. Reg. 3850 (Jan. 26, 1999). In the Air District's own words, "[c]learly the recurring theme in the above definitions of BACT . . . is 'the most effective emission control' or 'the most stringent emission limitation.'" BAAQMD BACT Guideline, *available at* http://www.baaqmd.gov/pmt/bactworkbook/default.htm (definition of BACT and TBACT).

Not only are the emission limits in the CD not BACT, but PG&E is getting less protective permit limits in the CD than it likely would have received through the Air District's permitting process. The CD only covers hourly CO emissions and hourly and annual NOx emissions although several other pollutants and conditions are covered by BACT. This comment will address some of the other pollutants from GGS that should be subject to BACT. The United States' failure to require GGS to comply with BACT leaves the facility in violation of the PSD requirements.

1. The Decree's Carbon Monoxide (CO) Emission Limits Are Not BACT.

For CO emissions, the Decree only proposes to require PG&E to immediately lower CO emissions from the combined cycle units "from 6.0 ppmv to 4.0 ppmv on a dry basis corrected to 15% oxygen and averaged over any rolling three-hour period." CD at Para. 6. This mere change to the hourly emissions for CO fails to bring GGS into compliance with current day BACT requirements.

Initially, the Decree fails to propose any startup and shutdown limits for CO, even though the CO emissions during startup and shutdown are specifically excluded from the limit. *See* CD Paras. 9 and 10 (excluding startup and shutdown emissions from Decree's CO limits). Startup and shutdown emission limits should have been included for CO. *See* SIP Rule 2-2-206. As the District recently stated: "the Air District agrees that BACT is applicable to and required for startup and shutdown operations." Russell City Energy Center, Additional Statement of Basis for Proposed

Permit (RCEC Draft Permit) at 58 (August 3, 2009).[4] The Decree similarly fails to require an annual emissions limit for CO emissions. These failures could mean that the Decree's reductions in hourly CO emissions may not result in annual emissions reductions. Similar to startup and shutdown, BACT limitations are also required for annual emissions.

Moreover, even the Decree's hourly CO emissions limit is not current BACT. In a recent permitting action the Russell City Energy Center (RCEC) in Hayward, which was discussed previously, the Air District stated that:

> The Air District has reconsidered its BACT determination and is now proposing a lowered BACT limit for CO, at 2.0 ppm (1-hour average). The Air District reevaluated the operating data from the Metcalf Energy Center, which is a similar facility that the District looked to in its original analysis, and notes that the CEM data show that only 0.4% of the days of operation showed any exceedance of 2.0 ppm after the first year of operation. The Air District has concluded that a more critical analysis of this data suggests that it should be possible to design the system to ensure that Carbon Monoxide emissions are maintained below 2.0 ppm at all times.
>
> The Air District also examined a number of other CO permit conditions for other facilities – many of which were pointed out in comments submitted during the initial comment period – and found that the consensus of permitting agencies around the country appears to be forming around a CO BACT limit of 2 ppm. The Air District notes that there were a total of 8 permits identified in the initial Statement of Basis with Carbon Monoxide limits of 2 ppm (either with 1-hour averages or 3-hour averages), suggesting an emerging consensus that this performance level is achievable. (*See* Statement of Basis, Table 11, pp. 32-33.) Based on this further assessment of the data, and on the large number of permitting agencies that have required other similar facilities to limit CO emissions to 2.0 ppm averaged over 1 hour, the Air District concludes that this 2.0 ppm limit (1-hour average) should be required here as BACT.

RCEC Draft Permit at 45-47. Although we believe that limits below 2.0 ppm (1 hour average) are achievable and should constitute BACT, at the very least, 2.0 ppm (1 hour average) should be BACT. The fact that the Decree is proposing a higher limit for a 3-hour average is unfair and unreasonable and should be revised. To do

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[4] The RCEC draft permit is available at http://www.baaqmd.gov/Divisions/Engineering/Public-Notices-on-Permits/2009/080309-15487/Russell-City-Energy-Center/15487-SB-080309/Additional-Statement-of-Basis-for-the-Proposed-Permit.aspx..

otherwise would be to reward PG&E with a less-protective limit than a utility in the same district.

2. The Decree's NOx Emission Limitations Are Not BACT.

For NOx emissions, the Decree only requires that GGS lower the limit for its "oxides of nitrogen (NOx) emissions from the combined cycle units from 2.5 parts per million volume ("ppmv") to 2.0 ppmv on a dry basis corrected to 15% oxygen and averaged over any one-hour period" and lower the "rolling 12-month NOx emissions cap for the combined cycle units from 174.3 tons per year to 139.2 tons per year beginning on June 1, 2010." CD at Para. 6.

Again, the Decree is deficient because it fails to specify conditions for startup and shutdown emissions. *See* RCEC Draft Permit at 58 (startup and shutdown emission limits should be part of BACT analysis). This failure is particularly glaring when the Decree's "mitigation project" is meant to lower startup and shutdown emissions. Without any actual requirements for reductions in startup and shutdown emissions, the reductions that can be achieved with the additional software requirement may not be enforceable.

Moreover, the District recently evaluated startup and shutdown emissions for a similar, though larger, facility. *See, e.g., id.* Importantly, even though this facility is rated as 20MW larger than GGS, its startup and shutdown emission limits are lower for NOx emissions than GGS's expired 2001 limits. *Compare* RCEC Draft Permit at 104-05 *with* GGS 2001 Permit Conditions Nos. 21, 23. For example, the startup NOx emissions in the expired 2001 air permit for GGS are allowed to be over 250 lbs per event (59 lbs per hour for up to 256 minutes). *See* GGS 2001 Permit Conditions. On the other hand, the recently proposed start-up limitations for the RCEC permit are 95 lbs per startup for hot starts and 125 lbs per startup for cold starts. *See* RCEC Draft Permit at 104. Thus, by negotiating a deal with the EPA, instead of going through the BAAQMD permitting process, PG&E obtained less-protective proposed limits.

Furthermore, with regard to the NOx hourly restriction, PG&E had previously applied to revise its hourly NOx limit to be lowered from 2.5 to 2.0 ppmv. *See* PG&E's GGS Dec. 2007 Permit Application.[5] Therefore, this requirement in the Decree does not reflect any new relief – it only restates what PG&E previously offered.

In addition, the annual limit is higher than the limit for RCEC. The annual NOx limit proposed for RCEC is 127 tons, while the Decree's limit is 139.2 tons, even though RCEC is a larger facility. *See* RCEC Draft Permit at 105. Again, the

[5] This permit application is available at http://www.energy.ca.gov/sitingcases/gateway/compliance/index.html as an attachment to the "Petition to Amend Air Quality Conditions" posted in January 2008.

CD would likely give PG&E a cheaper, easier way to operate than if it had followed the required permitting process. This is unfair and unjust

3. Particulate Matter Emissions Are Not Covered by the Decree, and the Old 2001 Limits Are Not BACT.

As the District summarized in the June 2008 permit, PM_{10} is subject to BACT requirements under the relevant PSD requirements. *See* June 2008 Draft PSD Permit for GGS at 6.[6] In fact, the maximum PM emissions are over 100 tons for this facility -- the limit in the 2001 expired permit was 624 pounds per day, or 113.88 tons per year -- and the District was designated as being in non-attainment for $PM_{2.5}$ last year.[7] Yet, particulate matter emissions are not covered by the Decree. This is especially problematic because the particulate matter emission limits in the expired 2001 permit are not current BACT. The 2001 expired permit has an hourly limit for PM_{10} emissions of 13 pounds per hour. *See* 2001 FDOC, condition 20(h). The 13 pounds per hour limit is not close to BACT as confirmed by the Air District in its recent permitting action concerning RCEC:

> Since the Air District initially issued the Draft Federal PSD permit, the District has explored whether particulate emissions limits for the turbines and heat recovery boilers could be further reduced in order to ensure that the facility will not cause exceedances of the National Ambient Air Quality Standards for particulate matter. Based on this further review, the Air District is proposing a revised limit on particulate matter emissions (for both PM10 and PM2.5) from each gas turbine and heat recovery boiler train of 7.5 lb/hr or 0.0036 lb/MMBTU natural gas fired (with or without duct firing). This emissions limit would include all filterable and condensable particulate emissions (*i.e*., "front" and "back" half, respectively).
>
> The Air District has concluded that a lower limit of 7.5 lb/hr would be achievable by this equipment based on a review of additional source testing data from a number of similar combined-cycle facilities. These 73 source tests showed average particulate emissions of 4.58 lb/hr, with a high of 10.65 lb/hr.98 The Air District believes that some of the higher test results may be attributed to anomalies in the testing and analytical methods, the influence of which may be mitigated by application of more rigorous quality assurance/quality control ("QA/QC") by the testing contractor or analytical laboratory. The Air District has therefore concluded that it would not be appropriate to establish a compliance margin that would accommodate these high test results. Instead, the Air District is discounting the highest 5% of the

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[7] EPA issued a final notice designating Contra Costa County as a nonattainment area for fine particulate matter on October 8, 2009.

> test results (4 of the 73), and proposing a permit limit based on the remaining 95%. This approach yields a proposed permit limit of 7.5 lb/hr. The Air District has also reviewed available permits for other similar facilities and has not found any lower permit limits. The Air District is therefore proposing a revised PM10/PM2.5 limit for each gas turbine/heat recovery boiler train of 7.5 lb/hr, or 0.00335 lb/MMBTU of natural gas fired, as the BACT limit for the sources. The Air District is also revising its proposed conditions for the daily and annual particulate matter limits accordingly.

RCEC August 3, 2009 Draft Permit, at 51. In other words, after an analysis of technology and limits currently being required, the District decided to impose a 7.5 lb/hr limitation on a similarly-situated, but larger, facility. This is yet another example of how the proposed CD would let PG&E get a less protective permit by violating the law than a law abiding company could ever get following the permitting process.

4. PG&E Should Be Required to Comply With BACT for SO_2 Emissions.

Pursuant to the District's requirements under the SIP, any new source with the potential to emit 10 pounds or more per highest day of SO2 is subject to BACT requirements for that pollutant. *See* BAAQMD SIP Requirement 2-2-301.1. Similar to particulate matter, the Decree fails to cover SO_2 emissions even though GGS has the potential to emit over 10 pounds per day. This failure is especially problematic when the District required reductions of SO_2 emissions in the Draft June 2008 permit. *See* June 2008 permit at 4.

C. The CD's Penalty Is Not Fair, Reasonable, or Adequate.

The Consent Decree imposes a civil penalty of only $20,000, which is an unreasonably low amount that pales in comparison to civil penalties assessed in similar cases and in effect rewards PG&E for its violation of the law. This penalty is unfair, unjust, inadequate, and violates the CAA and EPA's own penalty policies.

1. The Civil Penalty Fails to Negate the Revenue and Savings PG&E Gained Through Non-Compliance.

If this Decree is entered, PG&E would have saved and earned hundreds of thousands of dollars through its non-compliance. The central component of developing a civil penalty, as codified in the CAA and repeated countless times in EPA's guidance documents, is that a civil penalty must at least be set at an amount that deters future violations. In order to effectively deter future violations, a penalty must negate any economic benefit or savings conferred on a company as a result of its illegal conduct. 42 U.S.C.A. § 7524(c)(2) (penalty must consider "the economic benefit or savings (if any) resulting from the violation."); *see also* Calculation of the

Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, 70 Fed. Reg. 50326-01 (Aug. 26, 2005) ("The Agency's policy is that any civil penalty should *at least* recapture the economic benefit the violator has obtained through its unlawful actions.") (emphasis added); Clean Air Act Stationary Source Civil Penalty Policy at 4 ("any penalty should, at a minimum, remove any significant economic benefit resulting from noncompliance")[8] (emphasis in original); A Framework for Statute-Specific Approaches to Penalty Assessment at Appendix at 6-11 (Framework) (discussing importance of negating economic benefit);[9] Combined Enforcement Policy at 6-7 (same);[10] Clean Air Act Stationary Source Civil Penalty Policy at 4 (same);[11] Policy on Civil Penalties: EPA General Enforcement Policy # GM-21[12] (same). This economic deterrence figure is the minimum level at which a penalty should be set. As a general rule, EPA should never settle for less than this deterrence amount. Framework at 11.

The Decree's proposed $20,000 penalty does not negate the economic benefit and savings PG&E received as a result of its violations of the Clean Air Act. Here, PG&E (a) earned significant revenues by operating several months before it would have been able to under the permit process; (b) saved money by avoiding the lengthy, and likely contentious, permit process; and (c) saved money by not having to comply with BACT during its initial operations, and, if the CD is approved, it will save money by not having to comply with the level of BACT the Air District currently requires. These savings and earnings likely resulted in hundreds of thousands of dollars for PG&E.

In particular, each day that PG&E has commercially operated GGS during at least the last nine months is a day that it has earned revenue from its illegal operation. Had PG&E complied with the Clean Air Act, and waited to begin construction and operation of the facility until it had received the proper certification and permitting, PG&E would have been delayed from operating GGS, and thus acquiring any revenue from its operation until much later than now. *See, e.g.*, Russell City 8/3/09 Draft Permit (company that applied for PSD permit before GGS is still waiting for final permit); *see also* Framework at 7 (stating that company gains an economic advantage from deferred costs of compliance).

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[8] Document available at:
http://www.epa.gov/compliance/resources/policies/civil/caa/stationary/penpol.pdf

[9] Document available at:
http://www.epa.gov/compliance/resources/policies/civil/penalty/penasm-civpen-mem.pdf.

[10] Document available at:
http://epa.gov/compliance/resources/policies/civil/caa/stationary/caa112r-enfpol.pdf.

[11] Document available at:
http://www.epa.gov/compliance/resources/policies/civil/caa/stationary/penpol.pdf.

[12] Document available at:
http://www.epa.gov/compliance/resources/policies/civil/penalty/epapolicy-civilpenalties021684.pdf.

PG&E's illegal actions also conferred an economic benefit by circumventing the required permitting process. The PSD permitting process would have cost PG&E a minimum of $100,000 dollars.[13] This does not include attorney fees, consultant fees, and other expenditures that are necessary parts of the permitting process. Thus, the Decree's unreasonably low penalty of $20,000 means that at the very least, PG&E actually *saved* money by not applying for the required PSD permit. *See also* Framework at 9 (company gains an economic advantage from avoiding permitting costs).[14]

By avoiding permitting fees and the delay from waiting for a permit, PG&E gained a competitive advantage through its illegal operation of GGS. Law abiding companies will spend hundreds of thousands of dollars maneuvering through the permitting process.

For example, in comparison to Calpine, which owns RCEC, PG&E has been rewarded for violating the law and has gained a significant competitive advantage. Like GGS, RCEC had a PSD permit issued several years ago, in 2002. Also like GGS, RCEC amended its plans and applied for a new permit. In 2007, the Air District issued Calpine, owners of RCEC, a PSD permit. Several administrative and judicial proceedings and appeals followed, challenging the Air District's compliance with PSD's public participation requirements during the issuance of the RCEC PSD permit. Ultimately, the EAB remanded the RCEC permit, requiring the Air District to re-notice the PSD permit for public review using the stricter federal notice requirements. RCEC was then issued a draft permit in December 2008. After extensive public comment and a public hearing, which Calpine had originally avoided because of the District's defective notice, the District decided to re-notice the draft PSD permit in August 2009. Surely RCEC has spent thousands of dollars complying with PSD requirements and adhering to the public process.

The CD's penalty fails to create a "level playing field" between companies who abide by the law and those that do not. Thus, the penalty does not deter future violations.

Further, the economic deterrence level is the minimum amount at which a penalty should be set. EPA should increase the penalty based on a variety of factors including the size of the violator and its ability to pay. Framework at 3 (size of violator is relevant factor when setting penalty); Penalty Policy at 15 (size of violator is relevant consideration and "in the case of a company with more than one facility, the size of the violator is determined based on the company's entire operation, not just the violating facility").

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[13] *See* BAAQMD Fee Calculation Guidance, available at: http://hank.baaqmd.gov/pmt/handbook/rev02/PH_00_06_03.pdf.

[14] PG&E did apply for a modified PSD permit in late 2007. However, PG&E withdrew this application before any modifications were granted and yet pushed forward with the GGS project anyway. PG&E thereby never completed the PSD permitting process.

Since it fails to come close to covering the amount PG&E saved by violating the law, the penalty does not penalize PG&E at all. While a $20,000 penalty may be appropriate deterrence level for a small company, it fails to consider PG&E's size and financial stability. PG&E is a multi-billion dollar company.[15]

PG&E is also expanding. In fact, it is involved with two new proposed facilities in the same area: the proposed Contra Costa and Marsh Landing Facility. *See* CPUC A.09-09-021.[16] Not only is this evidence of its ability to pay a higher penalty, but PG&E's expansion makes a proper penalty even more important in order to encourage CAA compliance with regard to its new facilities. EPA has even assessed higher penalties against PG&E in another consent decree. In 1997, PG&E agreed to settle a case for $14 million dollars, including $7.1 million in civil penalties, over violations of federal and state water laws pertaining to another California power plant.[17] In addition, because PG&E is a high-profile polluter, other facilities will look to PG&E, and how EPA responds to its CAA violations, when determining whether it is economically advantageous to comply with the CAA. By setting such a low penalty, EPA has given the green-light to PG&E and other companies to rationalize CAA violations as cost-effective.

Moreover, EPA cannot attempt to justify the civil penalty in this Decree by considering the amount that PG&E will pay on purported Supplemental Environmental Projects (SEPs). As discussed further below, the SEP imposed in the decree – installation of OPFlex– is not actually a SEP at all, but is instead merely one step toward compliance with the CAA's requirement to use BACT. Because installation of OpFlex is already required under BACT, the Decree is incorrect to categorize it as a SEP. Therefore, if EPA used the cost of installing OpFlex to decrease civil penalties that analysis is also incorrect.

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[15] "In total, [PG&E] grew net income by 33 percent compared with 2007, to $1.34 billion or $3.63 per share, as reported under generally accepted accounting principles (GAAP)." 2008 Annual Report at 2. PG&E is in the "top 25% of among comparable utilities." *Id.* "Total spending capacity last year was $3.7 billion, consistent with our plans to invest an average of $3.5 to $4 billion per year over the 2008 through 2011 timeframe." *Id.*. 2008 Annual Report available at:
http://www.pgecorp.com/investors/financial_reports/annual_report_proxy_statement/ar_html/2008/index.html

[16] *See* PUC 09-09-021, http://docs.cpuc.ca.gov/published/proceedings/A0909021.htm (PG&E applying for funding to add two new plants to this area).

[17] PG&E To Pay $14 Million to Settle Diablo Canyon Missing Data Case, available at:
http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/ab6685d34a474acf852570d8005e1256!OpenDocument

2. The Consent Decree's $20,000 Penalty Is Less Than the Allotted Per Day Penalty Despite PG&E's Illegal Actions Continuing for Over Two Years.

The CAA provided for a $32,500 per day penalty before January 2009 and $37,500 per day after January 2009. 42 U.S.C. § 7413(b); *see also* EPA Finding and Notice of Violation (NOV) at 4-5 ¶ 17 (Aug. 13, 2009) (stating that EPA is authorized to issue $32,500 per day penalty before January 2009); *see also* 42 U.S.C. § 7413(e)(2) ("A penalty may be assessed for each day of violation").

According to the dates provided by EPA's NOV, PG&E illegally operated GGS for a thirty-two month period (roughly two and a half years). *See* EPA NOV at 4 ¶ 14 (Aug. 13, 2009) (stating that violations began when PG&E began operation of GGS without a PSD permit in January 2007). Even though GGS was illegally constructed and operated for up to a thirty-two month period, EPA has imposed a penalty that is less than the maximum per day penalty. In comparison, EPA could have imposed a penalty of approximately $32.55 million.[18] The sheer exponential disparity between the allowable amount of penalties and the $20,000 amount is unreasonable especially considering that PG&E knew it needed to amend its air permit before it finished construction.

In *Northwest Environmental Defense Center v. Owens*, 434 F.Supp.2d 957 (D. Or. 2006), private parties brought a CAA case against a company constructing a polystyrene foam insulation manufacturing facility without first having obtained the pre-construction permits. Defendant moved to limit the demand for civil penalties to only one day's penalties. *Id.* at 971. The court rejected defendant's argument that, because they had *commenced* construction without a permit only once, it was only subject to one day's penalty. *Id.* The court found that additional penalties should be assessed for each day the defendant continued its construction activity without a permit, noting that by assessing a one-day penalty, defendants "have little incentive to cease construction and obtain the necessary permit . . . if the violator flaunted the law and completed construction, the maximum penalty to which it was subject would be a single day's civil penalties, *i.e.*, just $32,500. . . A single day's penalty also is dwarfed by the benefits that a company might hope to achieve by constructing a major stationary source without a pre-construction permit. . . A $32,500 civil penalty might

[18] This figure was reached by calculating the total number of days PG&E illegally constructed or operated GGS: 690 days were governed by the rule allowing a per day penalty of $32,500 and 270 days during the time period allowing a per day penalty of $37,500, for a total of 972 days (total number of days in a thirty-two month period, averaging 30 days per month), multiplied by the $32,500 and $37,500 respectively. Note that this figure also assumes that violations ceased when the Decree was lodged, which we contend is not the case. *See supra* at 8-12 (describing how the CD's injunctive relief fails to comply with BACT requirements). Also note that this presumes only a single per day penalty, not a penalty per day per violation, which includes failure to secure a permit and failure to comply with BACT for each pollutant.

seem a bargain, in comparison, if it meant avoiding the permit process." *Id* at 971-972.

The court in *Northwest Environmental Defense Center* recognized that assessing a penalty of only $32,500 failed to achieve the purpose of the Clean Air Act to deter violations, just as a penalty of $20,000 fails to account for two and a half years of illegal activity.

3. There Are No Mitigating Factors Justifying the Unreasonably Low Penalty.

Litigation risk in this case does not justify the low penalty amount. EPA, including Region 9 EPA, has negotiated numerous consent decrees with other multi-million dollar companies in similar cases and successfully reached penalties far in excess of $20,000.

Based on the whereas clauses, PG&E appears to have argued a fair notice type of argument as a reason why it should not be imposed with a large penalty. In particular, the Consent Decree seems to suggest that the blame lies with BAAQMD. We entirely agree that the actions of the BAAQMD were inconsistent with the CAA requirements. However, PG&E continued construction and operation of GGS with full knowledge that its permit did not comply with the CAA. *See supra* discussion above. Thus, any argument that PG&E makes that it should be given a break from penalties lacks merit and should be rejected. When assessing the gravity of the violation, EPA should take into account the willfulness of the violation, including whether the violator was knowledgeable of the law and its violations.

Further, virtually every company settling PSD claims has claimed some type of fair notice defense. These defenses have routinely been rejected by reviewing courts and have not resulted in penalties as low as the penalty here. This is especially the case when the company knew that it was violating the law. *See e.g., United States. v. Alabama Power Co.*, 372 F. Supp. 2d 1283, 1291 (N.D. Ala. 2005) (rejecting fair-notice argument that reliance on State environmental agency precluded EPA enforcement,); *United States. v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 889 (S.D. Ohio, 2003) (rejecting defendant utility company's argument that it lacked fair notice of whether and how EPA would enforce PSD permitting requirements); *United States. v. East Kentucky Power Co-op. Inc*., 498 F.Supp.2d 976, 983 (E.D. Ky. 2007)(rejecting defendant utility company's argument that it lacked fair notice of whether and how EPA would enforce PSD permitting requirements).

This is especially the case when the company knew that it was violating the law. "[T]he fair notice doctrine will not save the company because the doctrine does not save parties who take calculated risks." *United States v. Cinergy Corp.*, 495 F. Supp. 2d 892, 905 (S.D. Ind. 2007) (Court rejected fair notice argument in case where utility had modified its facility prior to obtaining PSD permit).

In *United States v. SIGECO*, EPA brought suit against SIGECO, a major utility comparable to PG&E, who made modifications to its facility without obtaining a PSD permit. SIGECO attempted to rely on the Indiana Department of Environmental Management's determination that the CAA was inapplicable to SIGECO's facility modifications. *United States v. SIGECO*, 2002 WL 1760699, 1 (S.D. Ind. 2002). The court rejected this argument, finding that "[t]here is no language in the Act that precludes the Government from initiating an enforcement action if a source has already obtained a permit-or in this case, an applicability determination-from a state agency." *Id.* at 4. Notably, despite the purported conflicts between federal law and state agency decisions presenting litigation risk and complication, the defendant was required to pay a civil penalty of $600,000 dollars.[19]

4. A Penalty of Only $20,000 Renders the Consent Decree Unfair and Unreasonable.

EPA has ignored the important policy goal to "ensure that . . . civil penalties are assessed in accordance with the CAA and in a fair and consistent manner." Combined Enforcement Policy at 5; *see also* Framework at 27 ("Treating similar situations in a similar fashion is central to the credibility of EPA's enforcement effort"). By substantially deviating from how penalties are normally assessed, and by establishing a far lower penalty than in prior similar cases, EPA has failed to apply the CAA in a consistent manner. EPA should conform to its own policies on establishing civil penalties.

Moreover, assessing penalties in an inconsistent manner, resulting in an unreasonably low penalty, has created an unlevel playing field between PG&E and law-abiding companies. Notably, EPA's penalty is even lower than it has been for companies who self-reported their violations. *See, e.g., United States v. INVISTA*, C.A.1:09-cv-00244, D. Del. ($1.7 million penalty).[20] Finally, please see the table below demonstrating that the penalty in this case is significantly lower than penalties for similar cases where a PSD permit was violated or never obtained.

Penalty Table

CASE	ALLEGED CLEAN AIR ACT VIOLATIONS	PENALTY IN CONSENT DECREE	CITATION
U.S. v. CEMEX	Cement manufacturer	Civil penalty of	Notice of Lodging of Consent Decree Under the Clean Air Act, 74 FR

[19] Notice of Lodging of the "SIGECO" Proposed Consent Decree Under the Clean Air Act, 68 FR 36840-01 (June 19, 2003).

[20] Consent Decree available at: http://www.epa.gov/compliance/resources/decrees/civil/mm/invista-cd.pdf

	modified its manufacturing facility without first obtaining a PSD Permit.	$2 million dollars.	4233-01 (Jan. 23 2009).
US v. United States v. CF&I Steel	Steel manufacturer violated PSD permit and New Source Performance Standards at steel-manufacturing facility.	Civil penalty of $450,000.	Notice of Lodging of Consent Decree Under the Clean Air Act, 68 FR 20174-01 (April 24, 2003).
U.S. v. Nevada Power Co.	Power company violated PSD permit and BACT requirements.	Civil penalty of $300,000.	Notice of Lodging of Consent Decree Under the Clean Air Act, 72 FR 35263-02 (June 27, 2007).
U.S. v. Salt River Project Agr. Improvement and Power	Power company began modifications of generating station without obtaining PSD permit.	Civil penalty of $950,000 in addition to $4 million in SEPs.	2008 WL 5332023 (D. Ariz. 2008).
U.S. v. Mosaic Fertilizer	Fertilizer plant violated terms of its PSD permit.	Civil penalty of $2.4 million in addition to SEP.	Consent Decree and Federal Register notice available at: http://www.usdoj.gov/enrd/2119.htm.
U.S. v. Kentucky Power	Utility company modified a unit of its power plant without first obtaining	Civil penalty of $1.4 million, as well as $3 million for	Notice of Lodging of Consent Decree in United States v. Kentucky Utilities Company Under the Clean Air Act, 74 FR 6419-01 (Feb. 9, 2009).

	a PSD permit.	SEPs and $135 million in installing BACT.	
U.S. v. St. Mary's Cement, Inc.	Cement company made a major facility modification without obtaining a PSD permit.	Civil penalty of $800,000.	Notice of Lodging of Consent Decree Under the Clean Air Act, 73 FR 53903-01 (Sept. 17, 2008).
U.S. v. Michigan Sugar Co.	Sugar manufacturing facility commenced construction of a natural gas fired dryer without first obtaining a PSD permit.	Civil penalty of $210,000.	Notice of Lodging of Consent Decree Pursuant to the Clean Air Act, 73 FR 31146-01 (May 30, 2008).
U.S. v. East Kentucky Power Cooperative, Inc.	Utility company modified facility without first obtaining a PSD permit.	Civil penalty of $750,000.	Notice of Lodging of Consent Decree in United States v. East Kentucky Power, 72 FR 37797-02 (July 11, 2007).
U.S. v. South Carolina Public Service Authority	Utility company modified and operated power plant without first obtaining a PSD permit.	$2 million dollar civil penalty and $4.5 million in additional injunctive relief.	Notice of Lodging of Consent Decree Under the Clean Air Act Between the United States, the State of South Carolina, and the South Carolina Public Service Authority, 69 FR 16958-01 (March 31, 2004).
U.S. v. Ace Ethanol	Ethanol facility violated PSD requirements.	Civil penalty of $300,000.	Notice of Lodging of Consent Decree Under the Clean Air Act, 69 FR 5576-01 (Feb. 5, 2004).

D. The CD Is Not Fair, Reasonable, or Adequate Because It Failed to Consider the Impacts on the Local Community.

Like all federal agencies, EPA must "make achieving environmental justice part of its mission" by addressing "disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." Executive Order No. 12898. "Environmental Justice" is defined by EPA as

> [t]he fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including racial, ethnic, or socioeconomic group should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations.

http://www.epa.gov/environmentaljustice. Here, the EJ implications of GGS's illegal operations were ignored even though the Contra Costa branch of ACORN alerted EPA in a letter dated September 10, 2009 that ACORN had been left out of the process and that ACORN has significant concerns related to the impact of this power plant on their local community.

Problematically, community members were not given information that it rightly requested. On May 22, 2009, EPA received a Freedom of Information Act (FOIA) request seeking documents related to this facility. *See* FOIA Request # 09-RIN-00372-09. To date, we have only received the consent decree, delegation agreement missing from the EPA website, and complaint related to air issues from our request. Further, ACORN sent out a 60-day notice of intent to sue PG&E and BAAQMD, which described, *inter alia*, the failure to obtain a valid PSD permit before construction and operation of GGS in violation of the Clean Air Act. Although copies of ACORN's 60-day notices were sent to EPA, we were still not informed of or sent a copy of the NOV. By failing to produce relevant air documents, EPA has cut the community out of the process, which is especially of concern given the history of the case and the demographics of the community. Moreover, despite ACORN's FOIA request, 60-day notices and letter to EPA on September 10, 2009, ACORN was completely left out of the negotiation process. This circumvention of community participation has resulted in an unfair deal that does not consider the impacts of GGS on the local community.

Indeed, GGS is currently emitting tons of harmful air pollution each and every day without the required PSD permit in a predominantly low-income and minority community already overburdened by pollution. Problematically, GGS is sited in Contra Costa County, an area already overburdened by pollution and hosting most of the Bay Area's power plants. According to the California Energy Commission's

power plant database,[21] the current breakdown of power plants in the Bay Area is as follows:

County:	MW
Alameda	616
Contra Costa	5638
Marin	0
Napa	18
SF County	582
San Mateo County	39
Santa Clara	1279
Solano	665
Sonoma	1172
Total MW	10,008

In addition, Contra Costa County is home to numerous other large stationary sources of pollution, including several refineries and chemical manufacturing facilities.[22] Due to this disproportionate number of facilities, Contra Costa County accounts for more than one third of the total sulfur dioxide emissions for the entire Bay Area, and as a county is one the highest emitters of carbon monoxide and PM_{10}.[23] A significant addition of these pollutants into the air from GGS only worsens the air. Contra Costa County already has five times the number of facilities that emit criteria air pollutants per square mile than the California average.[24]

GGS is sited in low-income and minority communities. Pittsburgh and Antioch are home to many minority communities, especially around the facility,[25] and a significant percentage of the residents in those cities live below the federal poverty line (19.9% in Antioch and 28.5% in Pittsburgh).[26] These communities are disproportionately impacted by illnesses known to be related to exposure to industrial pollution. For instance, in Contra Costa County, the hospitalization rate due to asthma for African American children is almost five times that of Caucasian

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[21] Information for table is from California Power Plant Database (Excel File), http://energyalmanac.ca.gov/powerplants/POWER_PLANTS.XLS.

[22] *See* Air Resources Board, Facility Search Engine, *available at* http://www.arb.ca.gov/ei/disclaim.htm.

[23] Bay Area Air Quality Management District. Base Year 2005 Emissions Inventory. http://www.baaqmd.gov/Divisions/Planning-and-Research/Emission-Inventory-and-Air-Quality-Related/~/media/A06B5C918A5F413B9BDBE0B63AC2340E.ashx.

[24] Density of Pollution Sources, *available at* http://www.scorecard.org/community/ej-report.tcl?fips_county_code=06013#risk.

[25] *See* United States Census, 2005-2007 Community Survey Data; *see also* http://cchealth.org/groups/chronic_disease/framework.php (describing how West Contra Costa County is composed of significant percentage of minorities).

[26] Contra Costa Health Services, *available at* http://cchealth.org/health_data/hospital_council/pdf/poverty.pdf.. .

children.[27] Childhood asthma rates in Contra Costa County are nearly twice the national average.[28] There is also a significant disparity of disease rates between whites and people of color in Contra Costa County. For instance, African-Americans in Contra Costa County have a 59% higher death rate from all causes of death, including heart disease, cancer, and stroke, than the country average.[29]

Death rates from cardiovascular and respiratory diseases in Contra Costa County are also currently higher than statewide rates and are continuing to rise.[30] Further, Richmond, Pittsburgh, and Antioch have significantly higher hospital discharge rates for chronic diseases than other cities and the county overall.[31]

Contra Costa County's cancer death rate is also higher than the state average.[32] In addition, scientific links have been made between certain types of cancer – including lung, nasal cavity, and skin cancers – and pollutant emissions in Contra Costa County.[33] All of these health impacts are especially problematic and severe for those without health insurance: 43% of low-income residents in Contra Costa County are un-insured.[34]

Because of the unusually large cluster of power plants and other industrial facilities sited in this relatively small geographic area, EPA should have considered the environmental justice issues exacerbated by the GGS's violations of the Clean Air Act. Specifically, environmental justice impacts should have been central to any settlement of PG&E's violations and in fashioning mitigation measures necessary to remedy the violations.

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[27] Contra Costa Health Services, Health Disparities in Contra Costa, *available at* http://cchealth.org/groups/rhdi/pdf/health_disparities_in_cc.pdf.

[28] *See* Contra Costa Asthma Coalition, *available at* http://www.calendow.org/uploadedFiles/CAFA3_CCscreen.pdf (Contra Costa County asthma rate in children is 23.7%, whereas national rate is 14.2%).

[29] Community Health Indicator for Contra Costa County, Community Health Assessment, Planning and Evaluation Group Executive Report (June 2007), *available at* http://cchealth.org/health_data/hospital_council_2007/.

[30] *See* A Framework for Contra Costa County, *available at* http://cchealth.org/groups/chronic_disease/framework.php.

[31] *See* Contra Costa Health Services, Health Disparities in Contra Costa, *available at* http://cchealth.org/groups/rhdi/pdf/health_disparities_in_cc.pdf.

[32] *See* A Framework for Contra Costa County, *available at* http://cchealth.org/groups/chronic_disease/framework.php.

[33] *See* Cancer Incidence and Community Exposure to Air Emissions from Petroleum and Chemical Plants in Contra Costa County, California: A Critical Epidemiological Assessment, Otto Wong, and William J. Bailey; Journal of Environmental Health, Vol. 56 1993, *available at* http://www.questia.com/googleScholar.qst;jsessionid=KngJLJhFRCYFhpTfY5K100wTX5dSl4BvRR1qZvvDwL7bKfCG921F!568259201!-950397748?docId=5002198605.

[34] *See* Community Health Indicator for Contra Costa County, Community Health Assessment, Planning and Evaluation Group Executive Report (June 2007), *available at* http://cchealth.org/health_data/hospital_council_2007/.

Problematically, community members living by GGS likely have not been afforded even the basic level of public participation required by the PSD regulations. *See* 40 C.F.R. part 124. By failing to obtain a PSD permit before commencing operation, members of the public, including community members, never had an opportunity to comment on a proposed PSD permit. Furthermore, the original 2001 PSD permit was likely not properly noticed since it was issued during the time BAAQMD likely erroneously relied on the California Energy Commission to meet its PSD public participation requirements. *See* In re Russell City Energy Center, PSD Appeal No. 08-01 (EAB July 29, 2009).

EPA has authority under its SEP policy to implement SEPs that specifically address environmental justice impacts. U.S. EPA, *Final SEP Policy* (April 10, 1998) at 2 ("EPA encourages SEPs in communities where environmental justice may be an issue."). Although environmental justice is not explicitly listed as a particular SEP category, it is EPA's policy to encourage SEPs when violations impact low-income and minority communities. U.S. EPA, *Final SEP Policy* (April 10, 1998) at 2. Indeed, EPA has overseen numerous SEPs that seek to mitigate the environmental and public health impacts of violations on low-income/minority communities. *See, e.g.,* U.S. EPA, *Beyond Compliance: Supplemental Environmental Projects* (January 2001) at 11, 20, 28, *available at* http://www.epa.gov/Compliance/resources/publications/ civil/programs/ sebrochure.pdf.

Therefore, EPA should have taken these factors into account in the settlement and mitigated the adverse impacts to this already disproportionately impacted community. This failure to consider the impact of GGS's illegal operation on the community violates EPA's requirements to consider EJ when making decisions that impact an EJ community.

E. The CD's Mitigation Project Should Be Required as BACT and Suffers from Other Defects.

For an "environmental mitigation" project, the CD does not include an EJ focused project that would benefit the community that lives around the facility. Instead, the CD requires PG&E to "install and make fully operational" the General Electric OpFlex Turndown product and the General Electric OpFlex Startup product. CD Paras. 14, 15. The CD's designation of these controls as an environmental mitigation project, rather than a requirement under the Decree, is problematic and incorrect. Under the Supplemental Environmental Project policy, "SEPs cannot include actions which the defendant/respondent is likely to be required to perform: (a) as injunctive relief in the instant case; (b) as injunctive relief in another legal action EPA, or another regulatory agency could bring; (c) as part of an existing settlement or order in another legal action; or (d) by a state or local requirement." SEP Policy at 4. The installation of OpFlex cannot be a SEP because it is injunctive relief that PG&E is likely to be required to perform if a legal action was brought to require PG&E to comply with BACT.

OpFlex is defined as a "software solution that optimizes the combustion process, extending the low-emissions operating range." *See* GE Ecomagination: OpFlex Turndown Technology, *available at* http://ge.ecomagination.com/products/opflex-turndown.html. This technology, which optimizes the unit's process to reduce emissions, fits squarely in the definition of BACT.

OpFlex is not only commercially available and achievable, but it has also been used and demonstrated to work in practice as a reduction measure for emissions. In particular, the Palomar Energy Center installed OpFlex technology in October 2006. After several months of operation, the Palomar facility reported the following results:

> OpFlex lowers the NOx produced by the turbine during the startup process at all loads above approximately 25%. The NOx is lowered enough above the 45% load that in conjunction with the SCR, the stack emissions are reduced below the permit limit of 2.0 ppmvd @ 15% O2. . . . Recent normal startups following a typical nightly shutdown have resulted in NOx emissions of 28 lbs NOx, and 10 lbs CO. For NOx, these results are the combination of OpFlex and early ammonia injection. Prior to the OpFlex and early ammonia projects, a typical regular startup would have produced approximately 120 lbs of NOx and 35 lbs of CO. . . . All of the CO reduction for recent startups is attributable to the shorter startup allowed by OpFlex, which 45 lbs. of NOx reduction are attributable to early ammonia injection, and 47 lbs. attributable to OpFlex.

Ltr from D. Baerman, Palomar Facility to Hearing Board, San Diego County Air Pollution Control District (April 11, 2007), *attached hereto* as Ex.6. In other words, OpFlex technology is achievable and has been achieved in practice resulting in significant reductions. Consequently, this OpFlex technology, which also limits pollutants subject to Nonattainment New Source Review, is BACT, which should not be characterized as a separate environmental mitigation project.

There are several other problems with the OpFlex project in the Decree. Under the language of the Decree, there is no guarantee that PG&E will actually use the OpFlex once it is installed. Indeed, the relevant language only requires PG&E to "install and make fully operational" the OpFlex technology. *See* Decree Paras. 14, 15. There is no requirement that PG&E run the software, only that it makes the software "fully operational." As users of computers know well, there is a huge difference between installing and operating (using) the software. Similarly, the Stipulated Penalty provision only requires PG&E to "implement" these requirements. *See* Para. 16. Again, there is no requirement that PG&E use the software during its operations. This drafting is inexcusable and makes the entire mitigation project's benefits illusory.

In addition to the drafting problem, the Decree has absolutely no requirements that PG&E comply with enforceable emission limitations after the installation of OpFlex. Again, this significant oversight means that this "project" may not result in *any* real benefit to the environment. Further, it allows PG&E to wrongfully benefit from the installation of this software by acquiring saleable emission reduction credits of pollutants such as NOx now and of CO2 under a future GHG market. In fact, the information available from GE makes it appear that companies like PG&E may achieve a net monetary benefit from the installation of OpFlex. *See* GE Ecomagination: OpFlex Turndown Technology, *available at* http://ge.ecomagination.com/products/opflex-turndown.html (stating that average customer saves $510,000 in fuel costs alone). Therefore, installation of OpFlex is not a SEP, and should not be used to offset a penalty PG&E must pay.

F. The CD Is Not Adequate Because It Fails To Include Other Requirements of Getting a PSD Permit.

By failing to go through the process, PG&E avoided meeting the PSD requirements before constructing its facility, including air quality modeling, health impact analysis, and public participation.

The failure to require PG&E to go through the permitting process is particularly egregious here when PG&E has knowingly tried to circumvent public participation. *See supra* at 6 (memo describing meeting between PG&E and BAAQMD discussing public participation).

G. The Emission Reduction Credits Are Illegal.

It appears under the Decree that PG&E can count a portion of the emission reductions achieved under the Decree as credits to offset emission increases for specific future modifications. This, in part, as described above, is because the Decree's limit for NOx does not account for any reductions in startup or shutdown emissions from the mitigation technology and gives PG&E the advantage of having the more favorable NOx annual limit until June 1, 2010. Further, it allows PG&E the benefit of not having to obtain offsets for the time it was operating illegally at levels that did not reflect current day BACT. For all of these reasons, the CD's failure to address offsets when settling out these requirements is illegal under the Clean Air Act, which prohibits use of offsets from "[e]mission reductions otherwise required by this chapter." CAA Section 173(c)(2). The emission reductions in this Decree are being required of PG&E pursuant to the CAA's New Source Review provisions. Therefore, the reductions are being required under CAA's judicial enforcement provisions. CAA Section 113.

Further, the Degree fails to include any limitation on using the emissions reduced under the Decree for netting or offsets. This is contrary to many decrees entered with similar facilities. *See, e.g.*, Nevada Power CD ("For any and all actions taken be Nevada Power to comply with the requirements of this Consent Decree . . .

any emission reductions shall not be considered a creditable contemporaneous emission decrease for the purpose of obtaining a netting credit"), *available at* http://www.epa.gov/region09/air/enforcement/consent-docs/cd-nevada-power-clark-station-081307.pdf; *U.S. v. SIGECO* CD (stating same).

III. CONCLUSION

This Decree is unjust, unfair, inadequate, and unreasonable for PG&E's construction and operation without a valid PSD permit. This Decree sets a horrible precedent in the Bay Area by letting PG&E off with a better deal than law abiding companies. PG&E should be required to comply with all BACT requirements and subject to a meaningful penalty, as well as a SEP that actually makes the community whole for the added pollution GGS brings and PG&E's circumvention of the public process. Litigation risk in this case simply cannot justify the compromise reflected in this Decree.

Sincerely,

/s/ Shanna Foley

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* Shanna Foley is a certified student under the State Bar Rules governing the Practical Training of Law Students, working under the supervision of Professor Deborah Behles pursuant to the PTLS rules.

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