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10.477.02

DOCKET
06-AFC-7

DATE	MAY 27 2010
RECD.	MAY 30 2010

May 27, 2010

SEE ATTACHED ADDRESSEE LIST

Re: Notice of Commencement of Proceeding Alleging Violation of
CEQA (Public Resources Code § 21167.6.5(b))

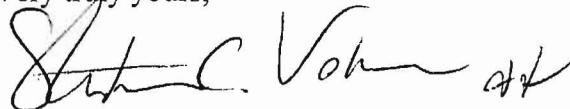
To Whom It May Concern:

Enclosed please find petitioner Robert Sarvey's Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and Attorneys' Fees in the matter *Sarvey v. North Coast Unified Air Quality Management District, et al.*, Superior Court for the County of Humboldt, Case No. CV100303

Service of this document is in accordance with the requirements of Public Resources Code section 21167.6.5(b).

Please contact me if you have any questions concerning this matter. Your courtesy and cooperation are appreciated.

Very truly yours,



Stephan C. Volker
Attorneys for Petitioner/Plaintiff
Robert Sarvey

SCV:taf

Enclosure: as stated

ADDRESSEE LIST

California Energy Commission
Attn: Docket No. 06-AFC-07
1516 Ninth Street, MS-4
Sacramento, CA 95814

National Oceanic and Atmospheric Administrations
Fisheries Service
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

USEPA
Gerardo Rios, Chief Permits Office
75 Hawthorne Street
San Francisco, CA 94015

U.S. Fish and Wildlife Service
Greg Goldsmith
1020 Ranch Road
Loleta, CA 95551

U.S. Army Corps of Engineers
San Francisco District
Ed Wiley
333 Market Street, Room 923
San Francisco, CA 94105

California Air Resources Board
Mike Tollstrup, Chief Project Assessment Branch
2020 L Street
Sacramento, CA 95814

California Coastal Commission
Tom Luster
45 Fremont Street, Suite 2000
San Francisco, CA 94105

California Department of Fish and Game
Gordon Leppig
619 Second Street
Eureka, CA 95501

North Coast Regional Water Quality Control Board
John Short, Senior Water Resource Control Engineer
5550 Skylane Blvd., Suite A
Santa Rosa, CA 95403

Humboldt Bay Municipal Water District
Carol Rische, General Manager
828 Seven Street
Eureka, CA 95501

Humboldt County Division of Environmental Health
Melissa Martel, CUPA Program Manager
100 H Street, Suite 100
Eureka, CA 95501

Humboldt County Public Works Department
Ken Freed
3015 H Street
Eureka, CA 95501

FILED

JOEL B.

APR 29 2010

SUPERIOR COURT OF CALIFORNIA
COUNTY OF HUMBOLDT

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5 Attorneys for Petitioner and Plaintiff
6 ROBERT SARVEY

7
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF HUMBOLDT

10 ROBERT SARVEY,
11
12 Petitioner and Plaintiff,

13 v.

14 NORTH COAST UNIFIED AIR QUALITY
15 MANAGEMENT DISTRICT HEARING BOARD,
16 NORTH COAST UNIFIED AIR QUALITY
17 MANAGEMENT DISTRICT, and DOES I through XX,
18 inclusive,

19 Respondents and Defendants,

20 and

21 PACIFIC GAS & ELECTRIC COMPANY, and DOES
22 XXI through L, inclusive,

23 Real Parties In Interest.

) Civ. No.

) **CV 100303**
) VERIFIED PETITION FOR WRIT
) OF MANDATE AND COMPLAINT
) FOR DECLARATORY AND
) INJUNCTIVE RELIEF AND
) ATTORNEYS' FEES

24 By this Verified Petition, petitioner and plaintiff ROBERT SARVEY hereby alleges:

25 INTRODUCTION

26 1. This is a public interest lawsuit to protect the public's right to environmental health and
27 safety by setting aside an air emissions permit for a power plant that will emit harmful and dangerous
28 pollutants at levels far higher than any other power plant in California.¹ Petitioner/plaintiff ROBERT

¹According to the California Energy Commission ("CEC"), the Humboldt Bay Repowering Project would cause the highest ambient air quality impacts of any power project ever granted approval

1 SARVEY petitions this Court for a writ of mandate and for preliminary and permanent injunctive relief,
2 and declaratory relief, against respondents NORTH COAST UNIFIED AIR QUALITY
3 MANAGEMENT DISTRICT HEARING BOARD ("Board"), NORTH COAST UNIFIED AIR
4 QUALITY MANAGEMENT DISTRICT ("District") and DOES I-XX to challenge (1) respondent
5 District's December 2, 2009, approval of the Humboldt Bay Repowering Project ("HBRP" or "Project")
6 and its Authority to Construct/Prevention of Significant Deterioration ("ATC/PSD") permit; and (2)
7 respondent Board's March 29, 2010 Final Order purporting to reject petitioner's challenge to the permit.
8 In approving this Project and rejecting petitioner's attempts to have the permit set aside, respondents
9 violated the California Environmental Quality Act, the California Health and Safety Code, their own
10 rules and regulations, and the Code of Civil Procedure, as alleged hereinbelow.

11 VENUE AND JURISDICTION

12 2. This Court has jurisdiction over this action pursuant to Code of Civil Procedure sections
13 526 (injunctive relief), 1060 (declaratory relief), 1085 (traditional mandate), and 1094.5 (administrative
14 mandate); Public Resources Code sections 21168 and 21168.5 (California Environmental Quality Act);
15 Health and Safety Code section 40864 (judicial review of Hearing Board decisions); and Article VI,
16 section 10, of the California Constitution.

17 3. Venue is proper pursuant to Code of Civil Procedure sections 393(b) (actions against public
18 officers), 394(a) (actions against local agencies), and 395(a) (actions generally) because respondents
19 have their office within this County and the Project is located in this County.

20 4. This petition is timely filed within all appropriate statutes of limitations.

21 5. Pursuant to Code of Civil Procedure section 388, petitioner is serving the California
22 Attorney General with a copy of this Verified Petition and Complaint, and consistent with Public
23 Resources Code section 21167.5, petitioner has served respondents with notice of this suit.

24 PARTIES

25 6. Petitioner ROBERT SARVEY is an individual who recreates in Humboldt County and
26

27
28 by the CEC for the following pollutants: (1) 24-Hour PM-10 (particulate matter less than 10 microns
in size), (2) 24-Hour PM-2.5 and (3) Annual PM-2.5.

1 resides in Tracy, San Joaquin County, California. Petitioner actively participated in all phases of the
2 siting of the Project. Petitioner has in the past enjoyed traveling, sightseeing and recreating in Humboldt
3 County in the vicinity of the Project and intends to continue traveling, recreating and sightseeing in
4 Humboldt County with his family in the future. Petitioner would be harmed by the air pollution the
5 Project as approved by respondents would emit, as would other members of the public who live, work or
6 recreate in Humboldt County in the vicinity of the Project.

7 7. Petitioner has authorized his attorney to file this lawsuit on his behalf to vindicate his, and
8 the public's, substantial beneficial interest in securing respondents' compliance with CEQA, the Health
9 and Safety Code, and respondents' own rules and regulations, in connection with their review and
10 approval of the Project.

11 8. Respondent NORTH COAST UNIFIED AIR QUALITY MANAGEMENT DISTRICT
12 ("District") is a local governmental agency, formed in 1981, that regulates air pollution emissions in
13 Humboldt, Trinity, and Del Norte Counties pursuant to Health and Safety Code sections 40150 and
14 40151. On December 2, 2009, the District, through its Air Pollution Control Officer ("APCO"),
15 purported to approve the Project.

16 9. Respondent NORTH COAST UNIFIED AIR QUALITY MANAGEMENT DISTRICT
17 HEARING BOARD ("Board") is the body appointed by the Governing Board of the North Coast Unified
18 Air Quality Management District to adjudicate variances, appeals, and petitions pursuant to California
19 Health and Safety Code section 40800. On March 28, 2010, respondent purported to determine that the
20 ATC/PSD permit was properly issued by the APCO and District, despite voting 2-1 that the permit was
21 *improperly* issued.

22 10. The true names and capacities of respondents DOES I-XX, inclusive, are unknown to
23 petitioner who therefore sues said respondents by such fictitious names pursuant to Code of Civil
24 Procedure section 474. Petitioner will seek leave of Court to amend this Verified Petition when the true
25 names and capacities of said DOE respondents have been ascertained.

26 11. Real party in interest PACIFIC GAS AND ELECTRIC COMPANY ("PG&E") is one of the
27 largest combined natural gas and electric utilities in the United States. PG&E is a San Francisco-based
28 subsidiary of PG&E Corporation and was incorporated in California in 1905. PG&E is the owner and

1 operator of the existing Humboldt Bay Power Project (“HBPP”) and is the Project applicant.

2 12. Petitioner is unaware of the true names and capacities of real parties in interest DOES XXI-
3 L, inclusive, and sues such real parties herein by fictitious names. Petitioner is informed and believes,
4 and based on such information and belief alleges, that the fictitiously named real parties are entities or
5 individuals who have a direct and substantial economic interest in, or are the recipients of, respondents’
6 approval of the Project. When the true identities and capacities of these real parties have been
7 determined, petitioner will, with leave of the Court if necessary, amend this Petition to insert such
8 identities and capacities.

9 **FACTUAL BACKGROUND**

10 13. The District issued a combined Permit to Operate under Title V of the federal Clean Air
11 Act, 42 U.S.C. sections 7661-7661f, and Final Determination of Compliance/Authority to Construct
12 Permit No. 443-1 under the California Clean Air Act, Health and Safety Code section 42300, *et seq.* on
13 or about April 14, 2008, for the Humboldt Bay Repowering Project (“HBRP”). The permit was
14 conditioned to expire 545 days after its issuance and contained no provisions permitting renewal of the
15 permit.

16 14. The permit was for a new power plant to replace the old power plant for the existing HBPP.
17 The HBPP consists of two steam turbine-generators, of 52 and 53 megawatts (“MW”), respectively,
18 which are primarily fueled by natural gas (with No. 6 fuel oil used as a secondary fuel); and two mobile
19 emergency power plants (“MEPPs”), which consist of diesel-fueled turbines that operate as backup units
20 and peaker units. A non-operating 63 MW nuclear power plant also exists at the facility.

21 15. The new facility – thus named the “Humboldt Bay Repowering Project” (“HBRP”) – would
22 consist of ten 16.5 MW dual fired reciprocating engines fired on natural gas with a diesel pilot. These
23 engines are designed and intended to be fired exclusively by highly polluting diesel fuel during periods
24 when natural gas is unavailable, rather than by less polluting fuels such as propane and liquefied natural
25 gas.

26 16. In April 2009, PG&E applied for a “modification” of its ATC/PSD permit (No. 443-1) for
27 the Humboldt Bay Repowering Project.

28 17. On or about September 14, 2009, the District issued a draft revised ATC/PSD permit for the

1 Humboldt Bay Repowering Project for public comment. The purpose of the amended permit, according
2 to PG&E's application, was to clarify the type of permit PG&E holds, and to include provisions for
3 permit extension/renewal as the original permit was scheduled to expire on October 12, 2009.

4 18. Petitioner timely commented on the draft permit and pointed out that the permit had been
5 improperly issued by the District. Petitioner demonstrated that the draft permit did not comply with the
6 District's rules and regulations, or with the California State Implementation Plan ("SIP") under the
7 federal Clean Air Act, 42 U.S.C. section 7410(a)(2).

8 19. The District finalized the amended permit on December 2, 2009. Its Engineering
9 Evaluation accompanying the December 2, 2009, permit states for the first time that "the APCO has
10 determined that the proposed modifications to the ATC/PSD Permit will have no significant effect on the
11 environment." Because this language was not included with the draft permit, petitioner and other
12 members of the public were denied the opportunity to comment on this new assertion.

13 20. The final permit also contains numerous modifications to the 2008 permit. The
14 modifications include, but are not limited to, a relaxation of the limitations on (1) emissions during the
15 commissioning period; (2) operating hours during the commissioning period; and (3) the number of
16 engines that may be operated simultaneously. Despite these substantial changes allowing *increased*
17 emissions, the APCO incorrectly characterized the permit amendment as allowing no increase in
18 emissions: "The proposed action will *not* include a modification which authorizes an increase in the
19 quantity of emissions from the facility nor a change in the nature or type of the emissions released."
20 (Emphasis added.) Thus, the APCO has determined that the proposed modifications to the ATC / PSD
21 Permit will have no significant effect on the environment." December 2, 2009 Engineering Evaluation,
22 p. 28. However, no negative declaration was ever issued by the APCO or District as required under
23 CEQA, Public Resources Code sections 21064 and 21080.1, and CEQA Guidelines [14 C.C.R.;
24 "Guidelines"] §§ 15070-15075.

25 21. The permit also allows the replacement and original boilers to operate simultaneously until
26 the commissioning process is complete, increasing the pollutants above the level that would be emitted
27 by either operating separately. No attempt has ever been made to assess the harm from the increased
28 emissions that will result from this simultaneous operation.

1 CEQA. Pub. Res. Code § 21065(c). Accordingly, respondents were required to comply with CEQA
2 prior to taking any action to approve the Project.

3 35. For each project, one agency – the “lead” agency – is responsible for conducting
4 environmental review; other agencies – “responsible” agencies – are bound by the lead agency’s
5 determinations. Guidelines §§ 15050, 15096. Guidelines section 15051 specifies which agency shall act
6 as lead agency “[w]here two or more public agencies will be involved with a project.” All other agencies
7 with discretionary approval power over the project are considered “responsible” agencies. Guidelines §
8 15381.

9 36. The District considers itself to be the lead agency for the Project.

10 a. Assuming the District is the “lead” agency, it was required to **either** (1) determine
11 that the Project *would not* have *any* significant environmental effects, and prepare a negative declaration,
12 **or** (2) find that the Project *may* have a significant effect on the environment, and prepare an
13 environmental impact report. Pub. Res. Code §§ 21080(c), (d). As noted above, the District through its
14 APCO found that the Project would “have no significant effect on the environment.”² This finding was
15 based on the incorrect premise that the Project would not authorize *any* increases in emissions. Because
16 the amended permit instead *relaxes* emissions limits during the Project’s commissioning phase, and also
17 permits the simultaneous operation of both the existing and the replacement boilers where the additional
18 emissions created by such simultaneous operation have never been assessed, the District abused its
19 discretion in finding that the Project would not have any significant environmental effects. The District
20 also abused its discretion by failing to disclose the Project’s inconsistency with the State Implementation
21 Plan. Guidelines § 15125(d). Furthermore, the Board abused its discretion in purporting to determine
22 that these findings by the APCO were proper. The District also abused its discretion in failing to
23 document its findings by adopting a Negative Declaration. Pub. Res. Code §§ 21069, 21080.1(a);
24 Guidelines §§ 15070-15075. Therefore, respondents’ approvals violate CEQA, are invalid, and should
25 be set aside.

26
27 ² The fact that the APCO made this finding demonstrates that the District considered itself to be
28 the lead agency, as such a finding would not be made by a responsible agency. See District Rule
103(11.0) and Appendix A(2.0).

1 board except in the presence of a quorum and upon the affirmative vote of a majority of the members of
2 the hearing board.” Because the full Board consists of five members, three votes are therefore required
3 before *any* action, including the making of the section 42302.1 determination, may be taken by the
4 Board.

5 41. At the March 4, 2010, hearing, respondent Board voted 2-1 that the permit was *not* properly
6 issued. Yet the Board purported to reject petitioner’s petition, assertedly because “although the vote was
7 by a majority of the quorum, it was not a majority of the Hearing Board as required by Health and Safety
8 Code section 40820.” March 29, 2010 Final Order, at 2.

9 42. In rejecting the petition, respondent Board effectively purported to determine that the permit
10 was properly issued under section 42302.1. However, such a determination could not be taken except
11 “upon the affirmative vote of a majority of the members of the hearing board.” Because only one, and
12 not three, members voted that the permit was properly issued, respondent Board’s purported rejection of
13 the petition was unlawful, ineffective, an abuse of discretion, and contrary to law. This Court should
14 remand petitioner’s petition to the Board to enable the Board to finally determine, “upon the affirmative
15 vote of a majority of the members of the hearing board,” whether or not the permit was properly issued.

16 **THIRD CAUSE OF ACTION**

17 (Writ of Mandate and Declaratory Relief to Set Aside Project
18 Approval As Contrary to District Rules)

19 (Against Respondent District)

20 43. The paragraphs set forth above are realleged and incorporated herein by reference.

21 44. Petitioner brings this Third Cause of Action on the grounds that respondent District failed to
22 act in accordance with law, exceeded its jurisdiction, and committed a prejudicial abuse of discretion,
23 when it purported to approve the Project, because such approval violates the District Rules, in the
24 following respects, among others.

25 45. District Rule 110(5.7) states, “The owner or operator of a proposed new or modified source
26 shall certify to the APCO that all sources having a potential to emit in excess of 25 tons per year that are
27 owned or operated by such person (or by an entity controlling, controlled by, or under common control
28 of such source) in California are in compliance, or on a schedule for compliance, with all applicable

1 emission limitations and standards.” Rule 110(5.6) provides that the “AQMD shall deny” any ATC/PSD
2 permit that does not comply with this rule. PG&E is the “owner or operator of a proposed new or
3 modified source” and accordingly was required to make the 110(5.7) certification. However, all of
4 PG&E’s facilities are *not* in compliance, or on a schedule for compliance, with all applicable emissions
5 limitations and standards. Specifically, PG&E’s Gateway Generating Station received a Notice of
6 Violation from the United States Environmental Protection Agency on August 12, 2009, for not having a
7 valid PSD permit. The Gateway Generating Station was still not “on a schedule for compliance” when
8 the permit was approved by the APCO on December 12, 2009. Thus, the District was required to “deny”
9 the permit. District Rules 110(5.6), 110(5.7). Therefore, respondent District failed to act in accordance
10 with the law, abused its discretion, and exceeded its jurisdiction in issuing the permit and approving the
11 Project, and the approval should be overturned.

12 46. By its terms, the original April 14, 2008 permit was valid for a period of 545 days. The
13 permit failed to include an extension provision. Thus, the permit expired on October 12, 2009, and,
14 because no extension provision was included, issuance of an entirely new permit, not an amended
15 permit, was the only permit action properly before the District on December 12, 2009. Respondent
16 District accordingly abused its discretion, failed to act in accordance with the law, and exceeded its
17 jurisdiction when it purported to amend a permit that was already expired, and the amendment and
18 approval should be overturned.

19 47. District Rule 110(8.8) states, in pertinent part, “Where a new or modified stationary source
20 is, in whole or part, a replacement for an existing stationary source on the same property, the APCO may
21 allow a maximum of ninety (90) days as a start-up period for simultaneous operations of the existing
22 stationary source and the new source or replacement.” Rule 110(5.6) provides that the “AQMD shall
23 deny” any ATC/PSD permit that does not comply with this rule. Contrary to this Rule 110(8.8)
24 requirement, the amended permit allows “simultaneous operation[] of the existing stationary source and
25 the new source or replacement” for longer than 90 days. Thus, the permit should have been denied.
26 Rule 110(5.6), 110(8.8). Therefore, respondent District failed to act in accordance with the law, abused
27 its discretion, and exceeded its jurisdiction in issuing the permit, and the approval should be overturned.

28 48. District Rules 103(11.0) and Appendix A set forth the District’s environmental review

1 provisions. The District, regardless of whether it is the lead or a responsible agency, failed to comply
2 with these rules. Therefore, the District abused its discretion in issuing the permit.

3 a. Appendix A(2.0) states:

4 If the APCO determines that (1) the application is for a project or a portion of a project for
5 which another public agency has already acted as the lead agency in compliance with
6 CEQA[,] (2) the project is categorically exempt, (3) the project is ministerial or (4) it can
7 be seen with certainty that the project will not have a significant effect on the environment,
8 then neither a negative declaration nor an environmental impact report will be required. *If
9 1, 2 and 3 above are not applicable and the APCO determines that a project may have a
10 significant effect upon the environment and that the AQMD is the lead agency, then an
11 environmental impact report for the project will be required; provided, however, that only
12 a negative declaration will be required for the project if the APCO determines that the
13 project does not require an environmental impact report due to the circumstances particular
14 to the specific project. If the APCO determines that another public agency should act as
15 lead agency and 1, 2 and 3 above are not applicable the matter shall be referred to the lead
16 agency for compliance with CEQA. [Emphases added.]*

11 b. If the District is the lead agency, the APCO must determine whether the project will
12 have a significant effect on the environment. Rule 103(11.0). If, pursuant to subclause (4), the APCO
13 determines – as here – that “it can be seen with certainty that the project will not have a significant effect
14 on the environment,” the italicized language in Appendix A(2.0) would then operate such that “a
15 negative declaration will be required for the project.” Here, no negative declaration was issued, despite
16 CEQA’s contrary requirement. Therefore, respondent District failed to act in accordance with the law,
17 abused its discretion, and exceeded its jurisdiction in issuing the permit, and the approval should be
18 overturned.

19 c. If the District is a responsible agency, the APCO was required to “refer[]” “the
20 matter . . . to the lead agency for compliance with CEQA.” Appendix A(2.0) (underlined language); *see*
21 *also* Appendix A(12.0) (APCO “shall consider” the lead agency’s environmental review). Here, the lead
22 agency’s CEQA review was incomplete when the permit was issued; the District accordingly failed to
23 satisfy Appendix A(2.0). Therefore, respondent District failed to act in accordance with the law, abused
24 its discretion, and exceeded its jurisdiction in issuing the permit, and the approval should be overturned.

25 49. The District proceeded in excess of its jurisdiction and abused its discretion in purporting
26 approve the Project, because such approvals and determinations violate the District Rules in the
27 following respects, among others:

28 a. Said approvals were not granted in accordance with the procedures required by law;

1 comply with this rule. Real party in interest PG&E is the “owner or operator of a proposed new or
2 modified source” and accordingly was required to make the 110(5.7) certification. However, all of real
3 party in interest PG&E’s facilities are *not* in compliance, or on a schedule for compliance, with all
4 applicable emissions limitations and standards. Specifically, PG&E’s Gateway Generating Station
5 received a Notice of Violation from the United States Environmental Protection Agency on August 12,
6 2009, for not having a valid PSD permit. The Gateway Generating Station was still not “on a schedule
7 for compliance” when the permit was approved by the APCO on December 12, 2009. Accordingly, the
8 permit should have been denied by the APCO. District Rule 110(5.6), 110(5.7). Therefore, respondent
9 Board failed to act in accordance with the law, abused its discretion, and exceeded its jurisdiction in
10 determining that the permit was properly issued; this Court should remand this matter to the Board for a
11 decision that complies with the law.

12 55. By its terms, the original April 14, 2008 permit was valid for a period of 545 days. The
13 permit failed to include an extension provision. Thus, the permit expired on October 12, 2009, and,
14 because no extension provision was included, issuance of an entirely new permit, was the only permit
15 action properly before the District on December 12, 2009. Respondent Board abused its discretion,
16 failed to act in accordance with the law, and exceeded its jurisdiction in purporting to find the District’s
17 amendment of an already-expired permit to be proper; this Court should remand this matter to the Board
18 for a decision that complies with the law.

19 56. District Rule 110(8.8) states, in pertinent part, “Where a new or modified stationary source
20 is, in whole or part, a replacement for an existing stationary source on the same property, the APCO may
21 allow a maximum of ninety (90) days as a start-up period for simultaneous operations of the existing
22 stationary source and the new source or replacement.” Rule 110(5.6) provides that the “AQMD shall
23 deny” any ATC/PSD permit that does not comply with this rule. Contrary to this Rule 110(8.8)
24 requirement, the amended permit allows “simultaneous operation[] of the existing stationary source and
25 the new source or replacement” for longer than 90 days. Thus, the permit should have been denied by
26 the District. Rule 110(5.6), 110(8.8). Therefore, in determining that the permit was properly issued,
27 respondent Board failed to act in accordance with the law, abused its discretion, and exceeded its
28 jurisdiction. Accordingly, this Court should remand this matter to the Board for a decision that complies

1 with the law.

2 57. District Rules 103(11.0) and Appendix A set forth the District's environmental review
3 provisions. The District, regardless of whether it is the lead or a responsible agency, failed to comply
4 with these rules. Therefore, the Board abused its discretion in determining that the permit was properly
5 issued by the District.

6 a. Appendix A(2.0) states:

7 If the APCO determines that (1) the application is for a project or a portion of a project for
8 which another public agency has already acted as the lead agency in compliance with
9 CEQA[,] (2) the project is categorically exempt, (3) the project is ministerial or (4) it can
10 be seen with certainty that the project will not have a significant effect on the environment,
11 then neither a negative declaration nor an environmental impact report will be required. *If*
12 *1, 2 and 3 above are not applicable and the APCO determines that a project may have a*
13 *significant effect upon the environment and that the AQMD is the lead agency, then an*
environmental impact report for the project will be required; provided, however, that only
a negative declaration will be required for the project if the APCO determines that the
project does not require an environmental impact report due to the circumstances particular
to the specific project. If the APCO determines that another public agency should act as
lead agency and 1, 2 and 3 above are not applicable the matter shall be referred to the lead
agency for compliance with CEQA.

14 b. If the District is the lead agency, the APCO must determine whether the project will
15 have a significant effect on the environment. Rule 103(11.0). If, pursuant to subclause (4), the APCO
16 determines – as here – that “it can be seen with certainty that the project will not have a significant effect
17 on the environment,” the italicized language in Appendix A(2.0) would then operate such that “a
18 negative declaration will be required for the project.” Here, no negative declaration was issued, despite
19 CEQA's contrary requirement. Thus, the permit approval was improper and contrary to law. Therefore,
20 respondent Board failed to act in accordance with the law, abused its discretion, and exceeded its
21 jurisdiction in determining that the permit was properly issued; this Court should remand this matter to
22 the Board for a decision that complies with the law.

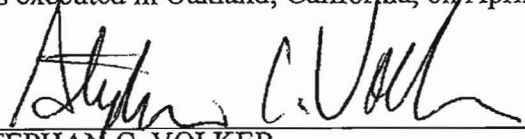
23 c. If the District is a responsible agency, the APCO was required to “refer[]” “the
24 matter . . . to the lead agency for compliance with CEQA.” Appendix A(2.0) (underlined language); *see*
25 *also* Appendix A(12.0) (APCO “shall consider” the lead agency's environmental review). Here, the lead
26 agency's CEQA review was incomplete when the permit was issued; the District accordingly failed to
27 satisfy Appendix A(2.0). Therefore, respondent District failed to act in accordance with the law, abused
28 its discretion, and exceeded its jurisdiction in issuing the permit, and the approval should be overturned.

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VERIFICATION

I, Stephan C. Volker, am the attorney for petitioner/plaintiff in this action. I make this verification on behalf of the petitioner/plaintiff because such party is absent from the county in which my office is located. I have read the foregoing Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and Attorney's Fees and know its contents. The facts therein alleged are true and correct to the best of my knowledge and belief, and are based on documents within respondents' record underlying the approvals challenged herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Verification was executed in Oakland, California, on April 27, 2010.


STEPHAN C. VOLKER