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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 aff

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
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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
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California Department of Fish and Game
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Eureka, CA 95501

North Coast Regional Water Quality Control Board
John Short, Senior Water Resource Control Engineer
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Humboldt Bay Municipal Water District
Carol Rische, General Manager
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Eureka, CA 95501

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ROBERT SARVEY

FILED
APR 29 2010
SUPERIOR COURT OF CALIFORNIA
COUNTY OF HUMBOLDT
JOEL B.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF HUMBOLDT

ROBERT SARVEY,

Petitioner and Plaintiff,

v.

NORTH COAST UNIFIED AIR QUALITY MANAGEMENT DISTRICT HEARING BOARD, NORTH COAST UNIFIED AIR QUALITY MANAGEMENT DISTRICT, and DOES I through XX, inclusive,

Respondents and Defendants,

and

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

Real Parties In Interest.

Civ. No. CV100303

VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND ATTORNEYS' FEES

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

INTRODUCTION

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

[1]According 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

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

VENUE AND JURISDICTION

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

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

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

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

PARTIES

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

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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.

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

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

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

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

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

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

operator of the existing Humboldt Bay Power Project ("HBPP") and is the Project applicant.

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

FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

22. On January 4, 2010, petitioner petitioned the Board under California Health and Safety Code section 40302.1 to "render a decision on whether the permit was properly issued."

23. On February 5, 2010, the Board convened a meeting at the Eureka City Hall Chambers. Only three members of the Board were present. (Two members failed to attend.) The February 5, 2010 hearing was continued to March 4, 2010; again, only three members attended.

24. After petitioner, the District, and PG&E provided testimony and documentary evidence relating to the appeal, the Board voted 2-1 to grant petitioner's petition to invalidate the permit, on the grounds "the permit was" *not* "properly issued" under Health and Safety Code section 40302.1. However, the Board then purported to reject the petition, assertedly because "although the vote was by a majority of the quorum, it was not a majority of the Hearing Board as required by Health and Safety Code section 40820."

GENERAL ALLEGATIONS

25. Petitioner has performed any and all conditions precedent to the filing of this Verified Petition and has exhausted any and all available administrative remedies.

26. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, within the meaning of Code of Civil Procedure section 1086. Unless this Court issues a writ of mandate setting aside respondents' approval of the Project, and ordering them to comply with the laws whose violation is alleged herein, the environmental interests of petitioner and the public will be substantially and irreparably harmed. No monetary damages or other legal remedy could adequately compensate for the harms to petitioner and the environment that would arise if respondents' unlawful conduct were allowed to stand.

27. Petitioner is also entitled to injunctive relief under Code of Civil Procedure section 526 because the Project threatens irreparable environmental harm. Unless enjoined, respondents and real parties in interest will implement the Project despite its lack of compliance with applicable environmental laws, causing increased air pollution. Petitioner will thereby suffer irreparable harm due to respondents' failure to take the required steps to adequately protect the environment. Injunctive relief is thus warranted under Code of Civil Procedure section 525 *et seq.* and Public Resources Code section 21168.9 to prevent irreparable harm to the environment.

28. An actual controversy exists between petitioner and respondents under Code of Civil Procedure section 1060. Petitioner contends that respondents have acted in violation of CEQA, the California Health and Safety Code, and the District's Rules, as alleged herein, and must therefore vacate and set aside their approvals of the Project. A judicial resolution of this controversy is therefore necessary and appropriate.

FIRST CAUSE OF ACTION

(Writ of Mandate, Declaratory and Injunctive Relief to Set Aside Project Approval as Contrary to California Environmental Quality Act)

(Against All Respondents)

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

30. Petitioner brings this First Cause of Action pursuant to Public Resources Code sections 21168 and/or 21168.5, on the grounds that respondents failed to act in accordance with law, and committed a prejudicial abuse of discretion, in that they considered and approved the Project without undertaking an analysis of its potential environmental impacts as required by CEQA.

31. Respondent Board, and the District, are "public agencies" within the meaning of CEQA. Pub. Res. Code § 21063. Respondents' discretionary actions approving and carrying out the Project are subject to the requirements of CEQA. Pub. Res. Code § 21065(c).

32. CEQA requires public agencies to conduct environmental review before the agency approves any project that may have a significant impact on the environment. Pub. Res. Code §§ 21002.1, 21061, 21151; CEQA Guidelines § 15004(a). Under CEQA, the term "project" means the "whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." Guidelines § 15378(a).

33. "Approval" of a project, for purposes of CEQA, means a decision by the agency "which commits the agency to a definitive course of action in regard to a project intended to be carried out by any person." Guidelines § 15352(a).

34. Respondents' discretionary consideration and approval of the Project constitutes the "approval of a project" with the potential for significant environmental impacts within the meaning of

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

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

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

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

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[2] The fact that the APCO made this finding demonstrates that the District considered itself to be 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).

b. If the District instead considered itself to be a "responsible" rather than lead agency, the California Energy Commission ("CEC") would be the lead agency and the District would be required to consider the CEC's environmental documentation, and approve a permit only if consistent therewith. Guidelines § 15096. At the time the Project was approved on December 2, 2009, neither the District nor the CEC had yet completed and certified the Project's environmental documentation. Respondents thereby abused their discretion in failing to wait for the lead agency's completion of environmental review. Furthermore, the amended permit issued by respondents is not consistent with the mitigation measures approved by the CEC, contrary to CEQA, in that respondents have decided to allow the Project to operate longer and/or generate more emissions than permitted by the CEC. Therefore, respondents' approvals violate CEQA, are invalid, and should be set aside.

SECOND CAUSE OF ACTION

(Writ of Mandate and Declaratory Relief to Set Aside March 29, 2010
Final Order as Contrary to Health & Safety Code)

(Against Respondent Board)

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

38. Petitioner brings this Second Cause of Action pursuant to Health and Safety Code section 40864, on the grounds that respondent Board failed to act in accordance with law, exceeded its jurisdiction, and committed a prejudicial abuse of discretion, when it purported to reject petitioner's challenge to the December 2, 2009 permit issuance, despite the absence of a sufficient vote in favor of such rejection.

39. As alleged above, on January 4, 2010, petitioner brought a petition before respondent Board pursuant to California Health and Safety Code section 42302.1. Section 42302.1 allows those who – like petitioner – "participated in the action before the district" to "request the hearing board of the district to hold a public hearing to determine whether the permit was properly issued." If such a request is properly made, "the hearing board *shall* hold a public hearing and *shall* render a decision on whether the permit was properly issued." *Id.* (emphasis added). Thus, respondent Board had an affirmative obligation to decide whether (1) the permit *was* properly issued; or (2) the permit was *not* properly issued.

40. Health and Safety code section 40820 provides that "no action shall be taken by the hearing

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

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

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

THIRD CAUSE OF ACTION

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

(Against Respondent District)

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

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

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

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

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

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

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

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

a. Appendix A(2.0) states:

> If the APCO determines that (1) the application is for a project or a portion of a project for which another public agency has already acted as the lead agency in compliance with CEQA[,] (2) the project is categorically exempt, (3) the project is ministerial or (4) it can be seen with certainty that the project will not have a significant effect on the environment, then neither a negative declaration nor an environmental impact report will be required. *If 1, 2 and 3 above are not applicable and the APCO determines that a project may have a 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.* <u>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.</u> [Emphases added.]

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

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

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

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

b. Such approvals were not granted based on the findings required by law; and

c. Such approvals and determinations were not based on, or were contrary to, the evidence in the record before the District.

50. The District's actions in approving the Project without complying with the procedures required by the District's Rules, exceeded its jurisdiction and constitute a prejudicial abuse of discretion, and therefore are invalid and should be set aside.

FOURTH CAUSE OF ACTION

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

(Against Respondent Board)

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

52. Petitioner brings this Fourth Cause of Action pursuant to Health and Safety Code section 40864, on the grounds that respondent Board failed to act in accordance with law, exceeded its jurisdiction, and committed a prejudicial abuse of discretion, when it purported to determine that the permit was properly issued, because such determination violates the District Rules, in the following respects, among others.

53. District Rule 605(1.9.2.3) states, "If any member of the Hearing Board believes he or she has a conflict of interest or for some other reason should recuse him or herself, the member shall announce such conflict and withdraw from participation in the hearing." Contrary to this requirement, two members of respondent Board purported to recuse themselves from the proceeding without ever stating that they had a conflict or otherwise "announc[ing] such conflict." District Rule 605(1.9.2.3). Petitioner was denied a fair hearing by respondent Board's failure to abide by its rules; this Court should accordingly remand to the Board for an unprejudiced hearing.

54. District Rule 110(5.7) states, "The owner or operator of a proposed new or modified source shall certify to the APCO that all sources having a potential to emit in excess of 25 tons per year that are owned or operated by such person (or by an entity controlling, controlled by, or under common control) in California are in compliance, or on a schedule for compliance, with all applicable emission limitations and standards." Rule 110(5.6) provides that the "AQMD shall deny" any ATC/PSD permit that does not

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

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

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

with the law.

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

a. Appendix A(2.0) states:

> If the APCO determines that (1) the application is for a project or a portion of a project for which another public agency has already acted as the lead agency in compliance with CEQA[,] (2) the project is categorically exempt, (3) the project is ministerial or (4) it can be seen with certainty that the project will not have a significant effect on the environment, then neither a negative declaration nor an environmental impact report will be required. *If 1, 2 and 3 above are not applicable and the APCO determines that a project may have a 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.* <u>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.</u>

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

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

58. The Board proceeded in excess of its jurisdiction and abused its discretion in purporting to determine that the permit was properly issued, because such determinations violate the District Rules in the following respects, among others:

a. Said determinations were not made in accordance with the procedures required by law; and

b. Such determinations were not based on, or were contrary to, the evidence in the record before the Board.

59. The Board's action in approving the Project, and purporting to determine that the permit was properly issued, without complying with the procedures required by the District's Rules, exceeded its jurisdiction and constitutes a prejudicial abuse of discretion, and therefore is invalid and should be set aside.

FIFTH CAUSE OF ACTION

(Writ of Mandate, Declaratory and Injunctive Relief to Set Aside Project Approvals as Contrary to CCP §§1085 and 1094.5)

(Against All Respondents)

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

61. Respondents proceeded in excess of their jurisdiction and abused their discretion in purporting to approve the Project, and in purporting to determine that the permit was properly issued, because such approvals and determinations violate Code of Civil Procedure sections 1085 and 1094.5 in the following respects, among others:

a. said approvals were not granted, and said determinations were not made, in accordance with the procedures required by law;

b. such approvals were not based on the findings required by law; and

c. such approvals were not based on, or were contrary to, the evidence in the record before respondents.

62. Respondents' actions in approving the Project without complying with the procedures required by Code of Civil Procedure sections 1085 and 1094.5 exceeded their jurisdiction and constitute a prejudicial abuse of discretion, and therefore are invalid and should be set aside.

RELIEF REQUESTED

WHEREFORE, petitioner prays for judgment and further relief as follows:

1. For interlocutory and permanent injunctive relief restraining respondents and real parties in interest from taking any action to carry out the Project pending, and following, the hearing of this matter;

2. For declaratory relief declaring the Board's purported rejection of petitioner's administrative petition to be unlawful;

3. For a peremptory writ of mandate and declaratory judgment directing respondent District to set aside and vacate its approval of the permit;

4. For a peremptory writ of mandate directing respondent Board to determine whether the permit was properly issued, pursuant to Health and Safety Code section 42302.1;

5. For a peremptory writ of mandate directing respondents and real parties in interest to suspend all activity pursuant to the Project that could result in any change or alteration in the physical environment until they have taken all actions necessary to bring their approval of the Project into compliance with CEQA;

6. For an award to petitioners of their attorney's fees and costs of suit (including reasonable attorney, witness and consultant fees and the costs of reproducing the administrative record) as authorized by Code of Civil Procedure section 1021.5.

7. For such other equitable or legal relief as the Court deems appropriate.

Dated: April 27, 2010

Respectfully submitted,

Stephan C Volker

STEPHAN C. VOLKER
Attorney for Petitioner ROBERT SARVEY

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