Letter 34: San Francisco Architectural Heritage (1/11/10)

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Letter 34

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January 11, 2010

Mr. Stanley Muraoka
Environmental Review Officer
San Francisco Redevelopment Agency
One South Van Ness Avenue, Fifth Floor
San Francisco, CA 94103

Mr. Bill Wycko
Environmental Review Officer
San Francisco Planning Department
1650 Mission Street
San Francisco, CA 94103

Re: Candlestick Point-Hunters Point Shipyard Phase II Development Plan DEIR

Dear Mr. Muraoka and Mr. Wycko:

San Francisco Architectural Heritage would like to take the opportunity to comment on the Draft Environmental Impact Report issued for the Candlestick Point-Hunters Point Shipyard project.

It is our opinion that the DEIR is inadequate in the following areas relating to historic resources: evaluation of the historic resources present on the site, analysis of the impacts to the historic resources, a preservation alternative that meets the project goals, and mitigation measures to lessen impacts on the historic resources. **34-1**

The DEIR's evaluation of historic resources on the project site is incomplete. There is little to no analysis of architectural styling and its relationship to the historical context of the site (governmentally prescribed, utilitarian modern architecture). Even the specific architect for an individual building is not noted. There is also no analysis of the buildings outside the proposed district, which ignores many buildings from other periods of the site's history. The report claims there are examples of this type of architecture on other bases, but does not identify where they are or what condition they are in. This is critical in determining the rarity of the resource. Additionally, the evaluation of individual buildings is inconsistent with the findings as stated in the context statement. The context statement explains that the project site is one of significance, yet the individual buildings are not evaluated to support this statement. The few resources that were evaluated are insufficient in encompassing the entirety of the site history. **34-2**

It is also our opinion that Candlestick Point Stadium is not adequately evaluated. Even though it was the first major league baseball stadium constructed with concrete, the DEIR states that "if reviewed at the 50-year mark, (the stadium) would not meet criteria for listing on the NRHP or CRHR due to lack of physical integrity resulting from extensive alterations." Not only do we disagree with this conclusion, the technical **34-3**

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studies from Circa, which were used in the preparation of the DEIR, do not include any recommendation regarding the eligibility of the stadium now that it is over 50 years, nor does it include an evaluation of eligibility as per the California Register of Historic Resources.

34-3 cont'd.

In terms of impacts on the identified historic resources, the DEIR is insufficient in its analysis of the impacts of park development on the integrity and eligibility of the identified Hunters Point Commercial Dry Dock and Naval Shipyard Historic District. Individual dry docks are studied for compliance to the Secretary of Interior's Standards, but there is no analysis of comprehensive impacts to the district as a whole. Additionally, there is a general lack of diagrams and maps showing the impact on resources.

34-4

The DEIR does not provide for a preservation alternative for the removal of five of the eleven contributing elements in the California Register-eligible Hunters Point Commercial Dry Dock and Naval Shipyard Historic District. Alternative 4 is not a sufficient alternative, as it includes many additional variables not pertaining to preservation. An adequate preservation alternative would start with preservation as the main goal, and come closer to meeting the square footage goals of the project sponsor. The DEIR does not adequately show why retention and rehabilitation of the five contributing buildings that are proposed for demolition is infeasible. A preservation alternative does not mean that all development must stop, but it should retain the buildings identified in the potential historic district.

We believe this is inconsistent with federal requirements, which stipulates special efforts be made to protect historic sites. We disagree that a prudent and feasible alternative cannot be designed that would minimize harm to the known historic resources.

34-5

The mitigation measures outlined in the DEIR are unsatisfactory in compensating for the loss of resources if the proposed project is approved. HABS/HAER documentation and interpretive panels will not sufficiently convey the significance of the site. Mitigation measure MM CP-1b.2 states that "Interpretive displays related to the history of HPS shall be installed at Heritage Park at Drydocks 2 and 3." It is our opinion that interpretation should be included other places as well, since the site is so large and will be utilized in a variety of uses.

Additionally, a designation program should be established to ensure eligible buildings be listed through the project. In fact, the Hunters Point Shipyard Reuse Final EIR from 2000 includes a designation agreement through which the National Register eligible properties would be listed as San Francisco City Landmarks. It is our opinion that this would be an appropriate mitigation for this project and should be included in the EIR.

34-6

In summary, it is our conclusion that the DEIR for the Candlestick Point-Hunters Point Shipyard Phase II Development Plan is insufficient in its analysis and recommendations regarding historic resources. Heritage is supportive of the plan to reactivate and

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redevelop a site that contributes such a rich chapter to San Francisco's history, and we have no desire to delay the project longer than necessary. We do however believe that the DEIR needs further supplementary analysis before it can be certified, and we request that such additional work be completed.

34-7 cont'd.

Thank you for the opportunity to comment.

Sincerely,

Jack A. Gold
Executive Director
/ab

Cc: Joy Navarrete, Planning Department
Anthea Hartig, National Trust for Historic Preservation
Elaine Stiles, National Trust for Historic Preservation
Brian Turner, National Trust for Historic Preservation
Jennifer Gates, California Preservation Foundation
Charles Chase, Historic Preservation Commission
Courtney Damkroger, Historic Preservation Commission
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Diane Matsuda, Historic Preservation Commission
Gretchen Hilyard, Docomomo - Northern California

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Letter 34: San Francisco Architectural Heritage (1/11/10)

Response to Comment 34-1

This comment contains introductory information and refers to specific historic resource topics in the Draft EIR in subsequent paragraphs in the letter. Those comments are addressed below.

Response to Comment 34-2

Refer to Response 39-1 with regard to the Draft EIR evaluation of Hunters Point Shipyard, and the adequacy of conclusions on historic resources and potential historic districts.

Response to Comment 34-3

Refer to Response to Comment 39-4 with regard to the evaluation of Candlestick Park stadium under NRHP and CRHR criteria. That response cites and summarizes a recent study that evaluates Candlestick Park Stadium, as a 50-year-old structure in 2010, for eligibility for the National Register of Historic Places (NRHP), the California Register of Historical Resources (CRHR), and San Francisco historic registers. As discussed in Response to Comment 39-4, Candlestick Park stadium would meet NRHP and CRHR criteria as an historic resource for association with events, the introduction of major league baseball on the West Coast; and for association with persons, the career of Willie Mays with the San Francisco Giants. But the stadium lacks integrity related to its period of significance under both associative criteria, due to the extensive alteration of the stadium in the 1970s. Therefore, the stadium would not be considered a historic resource.

Response to Comment 34-4

The Draft EIR found that the Project would not have a significant adverse effect on the NRHP-eligible Hunters Point Commercial Drydock District. As stated on Draft EIR pages III.J-33 to -34:

> The Project proposes to retain the buildings and structures in the potential Hunters Point Commercial Dry Dock District, identified in 1998 as eligible for listing in the NRHP. Drydocks 2 and 3 and Buildings 140, 204, 205, and 207 would be rehabilitated using the Secretary of the Interior Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings. Page & Turnbull, architects and historic resource consultants, reviewed the proposed treatment and rehabilitation of Drydocks 2, 3, and 4. The treatments would include repair of concrete surfaces of the drydocks and addition of guardrails along their perimeter. Page & Turnbull found that the proposed treatments would provide a methodology for resolving severe deterioration issues, and ultimately provide for the longevity of the historic resources; the treatments would be consistent with the *Secretary of the Interior's Standards for Rehabilitation*[266] (refer to Appendix J [Drydock Assessment]). Heritage Park is proposed at Drydocks 2 and 3 and would include interpretive display elements related to the history of HPS. Per CEQA Guidelines Section 15064.5(b)(3), these impacts would be mitigated to a less-than-significant level.

As discussed on in Section III.J, pages III.J-33 to -34, the Project would demolish structures identified as part of the CRHR-eligible Hunters Point Commercial Drydock and Naval Shipyard Historic District; this would be a significant and unavoidable adverse effect. Refer to Response to Comment 28-1 with regard to Alternative 4 (Reduced CP-HPS Phase II Development, Historic Preservation) and Subalternative 4A (CP-HPS Phase II Development Plan with Historic Preservation) as preservation alternatives that would

retain the structures in the CRHR-eligible Hunters Point Commercial Drydock and Naval Shipyard Historic District and would avoid significant adverse effects on historic resources.

The Draft EIR includes supplementary information on the historic treatment of the Drydocks 2, 3, and 4 as atypical structures. All buildings to be retained in the NRHP-eligible Hunters Point Commercial Drydock Historic District, would, as noted, be rehabilitated under the Secretary of the Interior Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings. The Draft EIR, page III.J-29, third full paragraph, notes:

> CEQA Guidelines Section 15064.5(b)(3) states that "generally, a project that follows the Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring, and Reconstructing Historic Buildings or the Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings shall be considered as mitigated to a level of less than a significant impact on the historical resource.

Draft EIR Figure III.J-2 (Potential Historic District), page III.J-23, illustrates historic resources identified in the Draft EIR. The legend indicates the boundary of the NRHP-eligible Hunters Point Commercial Drydock Historic District, and the location of Drydocks 2 and 3, and Buildings 140, 204, 205, and 207 that are contributory to that district. Figure III.J-2 also indicates the boundary of the CRHR-eligible Hunters Point Commercial Drydock and Naval Shipyard Historic District (which encompasses the smaller NRHP district), and the locations of Buildings 208, 224, 211, 231, and 253 that are contributory to that district. (It should be noted that Building 208 would now be retained as part of the Project and all variants and alternatives.)

Response to Comment 34-5

Refer to Response to Comment 28-1 with regard to Alternative 4 (Reduced CP-HPS Phase II Development, Historic Preservation) and Subalternative 4A (CP-HPS Phase II Development Plan with Historic Preservation) as preservation alternatives that would retain the structures in the CRHR-eligible Hunters Point Commercial Drydock and Naval Shipyard Historic District and would avoid significant adverse effects on historic resources. As discussed therein, Subalternative 4A would retain and rehabilitate the structures in the CRHR historic district, including structures in the National Register of Historic Places (NRHP)-eligible Hunters Point Commercial Drydock Historic District: Drydocks Nos. 2 and 3, and Buildings 104, 204, 205, and 207. Subalternative 4A would maintain the land use program at HPS Phase II and avoid significant adverse effects on historic resources.

Response to Comment 34-6

The Project would develop interpretive materials and displays related to the history of the site at appropriate locations, including Heritage Park—the Hunters Point Commercial Drydock Historic District—and other locations related to the nineteenth and twentieth century history of the Shipyard.

The following underlined text changes on Draft EIR page III.J-21, paragraph two, note that the Navy is completing the National Register process for the Hunters Point Commercial Drydock Historic District identified in 1998:

> The HPS Phase II site contains buildings and structures identified historic significance. Since Shipyard decommissioning in 1974, two studies evaluated historic resource at the Shipyard. In 1988, a report concluded that four properties were eligible for listing on the NRHP: Drydock 4; Building

253; the 450-ton Re-gunning crane, and the Hunters Point Commercial Dry Dock Historic District (including Drydock 2, Drydock 3, remnants of Drydock 1 and Buildings 140, 204, 205, and 207).[252] The Deputy State Historic Preservation Officer (SHPO) concurred with the findings of the 1988 report. In 1997, JRP Historical Consulting Services completed an updated report for HPS and concluded that Drydock 4 and the potential Hunters Point Commercial Dry Dock Historic District appeared eligible for listing in the NRHP. The JRP report concluded that Building 253 and the Re-gunning crane, identified in the 1988 study, were not eligible due to integrity issues. In 1998, the SHPO concurred with findings that the Drydock 4 and the potential Hunters Point Commercial Dry Dock Historic District appeared eligible for inclusion in the NRHP.[253] The Navy is currently completing National Register nominations and Historic American Engineering Records documentation for the Hunters Point Commercial Dry Dock Historic District, pursuant to the Memorandum of Agreement with SHPO and the Advisory Council on Historic Preservation, discussed under "Regulatory Framework," below.

Response to Comment 34-7

This comment contains concluding information and refers to preceding specific historic resource topics in the Draft EIR. Those comments are addressed above.

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Letter 35: Hamman, Michael (1/12/10)

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Letter 35

Michael Hamman, General Contractor
702 Earl Street
San Francisco, CA 94124

January 12, 2010

Mr. Stanley Muraoka
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One South Van Ness Avenue, 5th Floor
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Mr. Bill Wycko
Environmental Review Officer
San Francisco Planning Department
1650 Mission Street
San Francisco, CA 94103

RE: Candlestick Point–Hunters Point Shipyard Phase II Development Plan DEIR.

Dear Mr. Muraoka and Mr. Wycko:

I am writing to comment on several Sections of Draft Environmental Impact Report for this project.

Section: **III D Transportation.**

1. The transportation Analysis is based on the Nov 4, 2009 Transit Study by Fehr & Peers referenced and included. That study describes the method used to determine: a.) transportation demand and, b.) The method to apportion that demand between the principal modes of transit, i.e., cars, Public Transit, and Walking. This analysis is seriously flawed.

    a. The determination of demand in the form of trips generated is in error. This study assumes that over thirty percent of all trips will be internal, that is, within the Shipyard. This is based on the assumption that there will be sufficient opportunities for employment, recreation and especially retail close by. This is not the case, as the planned development of these amenities will not

35-1

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happen (if at all) for twenty or more years. In the interim period and until these amenities are actually operational the residents of this project will be very isolated and will need to travel significant distances for all their daily needs. It is over five miles to the nearest supermarket, almost two miles to even a drugstore. This condition is not even planned to change for almost two decades and the plan is already a year behind schedule. For twenty plus years, these residents will need to drive to have even their most basic needs met. For many this will be the remainder of their lives. This EIR must recalculate the demand based upon the near term conditions and assume 100% of the calculated demand and not reduce it for factors that are not even planned to be built for at least twenty years. It is unacceptable to the existing residents and indeed the new residents to accept intolerable conditions for a period that long.

35-1 cont'd.

b. The assumptions for transit ridership are skewed by the same error. When people live so far away from retail outlets they tend to shop less frequently and then to make larger purchases. These larger purchases will be transported by car, not transit. How often do you see a transit rider attempting to carry six bags of groceries? Transit use is predicated on the ability to shop on the way home from work and secure the necessities on a daily basis. When people live in an area distant from retail shops, as in suburbia, they behave like suburbanites, that is, they shop less often and buy large quantities and carry them in a car! The convenient availability of transit will not by itself change that behavior. The residents will ride the transit home from work and get into the car to drive the five miles each way to the supermarket. The calculation of transit ridership must be revised down to a more realistic level for what will be essentially suburban conditions. Further the patterns of behavior established in the first twenty years of the project will carry on for some time even if retail is finally built. Also such patterns of shopping elsewhere will inhibit the successful development of local stores as people will continue to shop in their established patterns.

35-2

2. The estimated need for parking is in error for the reasons identified in #1 above. The residents and neighbors will need to use their cars more and they will have more cars that the study assumes. Inadequate parking for what ever reason has serious negative impacts on the quality of life for the neighboring residents as well as the new residents. Cars are stuffed into all sorts of inappropriate places, and the conflicts over existing spaces often get out of hand. If the need for parking declines as the level of local amenities increases the excess space is easily converted to other uses. Whereas the lack of adequate parking is difficult to ameliorate.

35-3

2

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3. The proposal to create a Bicycle lane on each side of Innes will have several unavoidable negative impacts. None of the following impacts were analyzed.

   a. Removing the existing on street parking will create a real hardship for those existing residents living in older (in some cases historic) homes with no garage or other off street parking. Innes is unique in that there are no parallel streets on either side, and there is only one half of a side street in a six block stretch of Innes. Quite simply, there is no other place to park and to remove the only possible parking option would constitute a "taking" to those home owners along Innes.

   b. It is not good planning to locate bike lanes on such a heavily traveled route with BRT lines and possible future rail lines. Further this is designated as a major truck route. Mixing bicycles with this traffic will be dangerous and slow down the traffic. Separate stripped pathways will not prevent this mixing (especially see c. below).

   c. Innes Avenue now has, and current planning for the future continues to provide for, a separate driveway for each twenty five foot parcel. The disruption to traffic from cars backing in and out of garages is significant and is especially dangerous for bicyclists. This hazard and impediment to traffic flow was not analyzed.

   d. Locating the Bay Trail on Innes (even for a few blocks) with the trucks, BRT and traffic, defeats the purpose of the Bay Trail which was intended to be a peaceful route for one to enjoy the many joys and pleasures of our wonderful Bay. Dodging traffic and breathing exhaust were not the intended benefits.

   e. The Hudson Avenue alignment was not studied as a mitigation for the problems identified in; a. – d. above, and the EIR is inadequate without such study.

35-4

III Q Utilities

1. There is no analysis of the possible impacts on the local domestic water pressure. The separate high pressure fire supply system, AWSS, is analyzed and mitigations for the adverse impacts are recommended. However, there no discussion of the local domestic delivery system, i.e. the pipes that travel under India Basin. The existing water pressure is very, very low throughout the Bayshore and especially in India Basin. Even the Water Department considers it marginal, but for some residents the delivered pressure is actually BELOW the allowed minimum. The Shipyard plans to use the existing distribution system, i.e. pipes, and that increase in load can be

35-5

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expected to further lower the pressure. Let me be clear I am not talking about the supply of water, there was plenty of discussion as to how the PUC has sufficient capacity, but I question the ability of the existing pipes to "deliver" the necessary pressure. This question must be studied to complete the EIR.

35-5 cont'd.

2. The electrical power needs of the development will be supplied by the High Capacity Trunk Line running down Innes Avenue. These wires carry very high voltage that will be "stepped down" at the new transformer constructed at the corner of Earl & Innes. This line is unusual in that it is one of the very few remaining High Voltage trunk Lines in San Francisco that is still run overhead. The project will draw 44MW through these lines and the impacts of that usage need to be evaluated.

35-6

   a. Large current draw through such high voltage lines generate significant fields of Electromotive Force (EMF). The effects of EMF exposure should be evaluated, and possibly mitigated.

   b. The physical hazards of overhead high voltage wires in the event of a collision with a pole should be evaluated. The likelihood of such a collision will increase dramatically with the increase in traffic on Innes.

   c. The safety of the residents of Innes should be evaluated in the event of an earthquake. Very tall wood power poles are known to behave poorly in earthquakes. And the severity of damage is proportional to the voltage of the lines overhead.

   d. The reliability of the power supply should be evaluated as this will be the main supply for the development. Is it acceptable to have that many people subject to interruptions due to accidents, weather, and earthquakes? Because these lines are such high voltage and capacity their repair will be more time consuming. This risk should be evaluated.

3. The telephone service and the CATV service is also planned to run overhead on the same poles. Today, communications via phone and high speed internet on the CATV cables is a necessity, and no longer a luxury. The adequacy and reliability of that service shares the same threats as does the power above. The safety and reliability of this service should be evaluated in the EIR.

35-7

4. The obvious mitigation to these problems would be to underground the overhead lines down Innes Avenue. The accessibility of such critical

35-8

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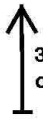
infrastructure invites terrorist attack and this possibility needs to be addressed and possibly mitigated.



35-8 cont'd.

Sincerely,

Michael Hamman

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Letter 35: Hamman, Michael (1/12/10)

Response to Comment 35-1

The commenter notes that the transportation analysis is based on full build-out of the project, which includes a mix of uses that reduce the external vehicle traffic generation, since many trips can be made within the project site. The commenter suggests that the residential component of the project would be constructed prior to construction of essential neighborhood-serving retail services and that the reductions taken in the transportation analysis are not valid until those retail services are constructed.

While the commenter is correct that the Project would be built out over many years, it is important to note that each major phase of development would include a mix of uses, including residential units and neighborhood-serving retail. In addition, transit lines serving the development phases would be extended and increased in frequency to support transit-oriented travel behavior. This would be matched with street and sidewalk improvements to support increased walking and bicycle trips.

As described in Section B (Project Refinements), since publication of the Draft EIR, the development schedule has been updated to reflect that site preparation activities would begin 1 to 2 years later than originally planned, and the completion of building construction would be extended from 2029 to 2031, with full occupancy by 2032. Section F (Draft EIR Revisions) contains updated text and figures (including Table II-15). As shown in Table II-15 on page II-79 of the Draft EIR, the first phase of development includes 2,160 residential dwelling units, 583,000 square feet of research and development space, and 84,000 square feet of neighborhood-serving retail space at the Hunters Point Shipyard site. Ultimately, as shown on the table, all of the neighborhood-serving retail in HPS and Candlestick Point (a total of 250,000 square feet) would be constructed by the third development phase (out of four). The fourth development phase consists of additional residential development at Candlestick Point, such that the retail referenced by the commenter would be constructed prior to the full residential program.

Therefore, even in early phases, when the overall trip generation would be less than it would be under full build-out, the Project would contain a mix of uses that would offer essential neighborhood serving retail trips that could be made within the project site. The analysis presented in the transportation study, which is based on full project build-out, presents a worst-case analysis, since the trip generation would be less during interim years.

Response to Comment 35-2

The commenter states that residents of the Project would live far away from retail, which would cause them to be more likely to travel by auto than by transit. Refer to Response to Comment 35-1, above, which describes that the retail component of the Project would actually be fully built out prior to build-out of the residential component.

The commenter also questions the validity of the transit mode share forecasts. The predicted transit usage is based on a statistical regression analysis developed from travel patterns currently made by travelers within other neighborhoods of San Francisco. The forecasting model accounts for type of trip (work vs. non-work), parking costs, and travel times as influential predictors of transit use. Other variables were considered but found to not be statistically significant (i.e., they were not useful predictors of transit use).

The commenter also notes that if large amounts of development occur prior to implementation of transit services, auto-oriented travel patterns would develop that are difficult to change making transit less successful once implemented. The transit phasing plan has been designed with this concept in mind, such that transit services would be implemented earlier in the Project schedule, and transit-oriented travel patterns would be encouraged from the early stages. New transit service would be established at approximately 20 percent of completion of the first major development phase, and transit services to each development area would largely be fully in place by the time approximately 50 percent of completion of build-out of each of the Candlestick Point and Hunters Point Shipyard sites.

Response to Comment 35-3

As described on page III.D-63 of the Draft EIR, parking demand was estimated based on the SF Guidelines methodology. The parking demand rates in the SF Guidelines were based on citywide average demand surveyed throughout the City. As described on pages II-34 and II-35, the Project would include a number of Transportation Demand Management (TDM) strategies designed to reduce automobile travel and encourage residents, employees, and visitors to the Project to walk, bicycle, and use transit. These strategies, in addition to the robust transit service planned for the new neighborhoods, should reduce automobile dependence, thereby reducing parking demand. The parking demand analysis presented in the Draft EIR does not include any reduction or credit for the TDM strategies described above, and is thus considered conservatively high.

The project's forecasted parking demand, supply, and projected parking shortfall is discussed as part of Impact TR-35, presented on pages III.D-120 through III.D-125. As described, in San Francisco, parking supply is not considered a permanent physical condition, and changes in the parking supply would not be a significant environmental impact. Therefore, the parking shortfall associated with the Project is considered a less than significant environmental impact.

Response to Comment 35-4

As noted on page III.D-125, Impact TR-36 discusses the impact of removing on-street parking. The provision of a bicycle lane on Innes Avenue would result in removal of 51 parking spaces on the south side of the street. Parking would still be available on the north side of Innes Avenue, adjacent to residential development. In addition, off-street parking would likely be provided as part of any new development along Innes Avenue (i.e., new development not part of this Project). Project-related parking impacts discussed in Impact TR-36 are considered less than significant because the parking demand could be accommodated along other portions of Innes Avenue and other streets in the study area. At some locations, residents and visitors would have to walk further between their parking space and destination. In addition, the City of San Francisco does not consider loss of parking supply to be a significant impact.

Finally, the commenter suggests that removal of public on-street parking spaces would be considered a taking. On-street parking spaces are publicly owned and not for the sole use of adjacent uses, and are therefore, not considered a taking.

The commenter suggests that BRT and/or light rail is proposed for Innes Avenue. Neither BRT nor light rail is proposed for Innes Avenue. Further, the commenter suggests that bicycle lanes adjacent to truck routes would be dangerous. While Innes Avenue is identified as an existing route with substantial truck

traffic, redevelopment of the Shipyard would transform the roadway's character from primarily industrial traffic to traffic from residential and office uses, which would be less truck-intensive.

A Class II bicycle lane, as proposed for Innes Avenue, is consistent with the bicycle lanes for Innes Avenue included in the San Francisco Bicycle Plan, which was cleared in its own environmental review process. Further, the proposed roadway design would meet City of San Francisco design standards. These standards were developed to safely accommodate all roadway users, including transit, bicycles, trucks, pedestrians, and private automobiles.

Although there is a separate planning study underway contemplating potential future development along Innes Avenue, there is no planning that identifies that a separate driveway would be provided for each 25-foot-wide parcel on Innes Avenue. The existing and potential future conditions on Innes Avenue would not be unlike other streets in San Francisco. However, even if there were driveways for each 25-foot-wide parcel, they would be designed according to City standards and exiting vehicles would be visible to bicyclists.

As shown on Figure III.D-5 in the Draft EIR, the Bay Trail is not proposed to extend on Innes Avenue. The Project would not affect the Bay Trail west of Earl Street.

The commenter suggests an alignment of the Bay Trail through the India Basin site along Hudson Street be considered as a mitigation measure. As discussed above, no impact to bicycles was identified and therefore no mitigation is required. Further, the Project Applicant does not have control over the Hudson Avenue alignment, which is part of a separate development project. However, the Project would not preclude the use of Hudson Avenue as a continuation of a recreational Bay Trail, and such a use could be studied as part of the planning for redevelopment of India Basin. The analysis of bicycle impacts on Innes Avenue is therefore adequate and additional analysis for the EIR is not required.

Response to Comment 35-5

Continued analysis of the low-pressure water systems since issuance of the Draft EIR has confirmed no off-site modifications to the City system are required and that the systems will meet or exceed the City's pressure requirements.[104] Specifically, an analysis of the low-pressure water system has shown that no improvements to the City water system are required between the Project site and the University Mound water storage/supply (located in the vicinity of the intersection of Bacon Street and Bowdoin Street), as existing piping will provide the required pressure and flow without any modifications. The Draft Low Pressure Water Analysis for CP-HPS Phase II has been reviewed by the SFPUC and the SFPUC has not required any improvements to the existing system outside of the Project site.

Response to Comment 35-6

The scientific evidence suggesting that electromagnetic field exposures pose any health risk is weak, according to a report published by the National Institutes of Health.[105] According to the World Health

[104] *Candlestick Point/ Hunters Point Shipyard Infrastructure Concept Report* (2007) prepared by Winzler & Kelly Consulting Engineers.
[105] NIEHS Report on Health Effects from Exposure to Power-Line Frequency Electric and Magnetic Fields, NIH Publication 99-4493, May 1999.

Organization (WHO),[106] some individuals have reported a variety of health problems that they relate to exposure to electromagnetic fields (EMF). This reputed sensitivity to EMF has been generally termed "electromagnetic hypersensitivity" or EHS. EHS is characterized by a variety of non-specific symptoms that differ from individual to individual. EHS has no clear diagnostic criteria and there is no scientific basis to link EHS symptoms to EMF exposure. Further, EHS is not a medical diagnosis, nor is it clear that it represents a single medical problem. Not only has there been no accepted link between EHS symptoms and EMF exposure, there has been no determination of a threshold of exposure, expressed in length of exposure or magnitude of the field, beyond which there are substantiated adverse health effects. There is no demonstrable impact related to EMF exposure as a result of the Project, and this impact does not require further analysis.

Overhead power lines exist all over the City, and could represent a safety hazard if a vehicle collides with a power pole with sufficient force or a seismic event causes power lines to break. These events could cause interruption in service. However, interruption in service is not an identified CEQA threshold and requires no further analysis. While traffic would increase on Innes Avenue as a result of the Project, there is no measurable increased risk of collisions with power poles that independently warrants undergrounding of the power lines along Innes Avenue. The undergrounding of utility lines is within the purview of Department of Public Works: Utility Undergrounding Program. Within the Bayview, major corridors contain undergrounded utilities, including 3rd Street, Mendell Avenue, and Evans Avenue.[107]

The Project has not yet selected an electricity provider. The electricity provider may service the project via new extensions of the 12KV distribution and or 115KV transmission lines into the Project site and improvements could include a new substation within HPS Phase II (page III.Q-61 of the Draft EIR). Because the exact connection is unknown, it is also unknown what voltage increases would occur along the High Capacity Trunk Line on Innes Avenue as a result of Project connections. Page III.Q-61 of the Draft EIR states:

> … all utility connections would be constructed in accordance with the Uniform Building Code, City ordinances, and Department of Public works standards to ensure an adequately sized and properly constructed electrical transmission and conveyance system.

Thus, voltage increases along this distribution line, if any, are regulated, and would not represent a substantial safety risk to area residents. With regard to reliability of the power supply, that is within the purview of the utility providers. PG&E and California Public Utilities Commission (CPUC) have indicated there is sufficient capacity to accommodate the needs of the Project.

Response to Comment 35-7

The reliability of telecommunications services are outside the scope of the CEQA process. There are no known safety problems associated with existing telecommunications service in the City. Further, no evidence is provided by the commenter to substantiate that there are safety problems associated with existing telecommunications service in the City, and there is no reason to believe that there would be any safety concerns arising as a result of the Project.

[106] World Health Organization, "Electromagnetic Fields and Public Health," Fact Sheet No. 296, December 2005.
[107] http://www.sfgov.org/site/sfdpw_page.asp?id=32694. Accessed March 12, 2010.

Response to Comment 35-8

Whether overhead power lines would be the subject of a terrorist attack is speculative and outside the scope of the CEQA process. Comment is noted.

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Letter 36: San Francisco Green Party (1/12/10)

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Letter 36

1/12/2010

Public Comments On:

- CITY AND COUNTY OF SAN FRANCISCO PLANNING DEPARTMENT File No. 2007.0946E

- SAN FRANCISCO REDEVELOPMENT AGENCY File No. ER06.05.07
- State Clearinghouse No. 2007082168

Candlestick Point-Hunters Point Shipyard Phase II Development Plan Project (formerly the "Bayview Waterfront Project") Draft Environmental Impact Report

TO:

Bill Wycko
Environmental Review Officer
San Francisco Planning Department
1650 Mission Street, Suite 400, San Francisco, CA 94103

and

Stanley Muraoka
Environmental Review Officer
San Francisco Redevelopment Agency
One South Van Ness Avenue, Fifth Floor, San Francisco, CA 94103

FROM:

Eric Brooks
Sustainability Chair, San Francisco Green Party
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Environmental Review Officers,

I am submitting these comments to point out, and insist upon correction of, serious inadequacies, in the the Draft Environmental Impact Report (DEIR) for the Candlestick Point-Hunters Point Shipyard Phase II Development Plan Project, and in the project plans to which the DEIR refers.

I will focus my comments in two categories -

1) SERIOUS INADEQUACIES IN ADDRESSING, AND FAILURES TO ACCOUNT FOR, PROJECTED SEA LEVEL RISE

2) FAILURE TO ACCOUNT FOR AND AVOID HEALTH AND ENVIRONMENTAL HAZARDS OF TOXIC MATERIALS, INCLUDING BUT NOT LIMITED TO CHRYSOTILE ASBESTOS AND IONIZING RADIATION; AND, FAILURE TO MEET THE LEGAL PRECAUTIONARY PRINCIPLE ESTABLISHED BY ORDINANCE IN THE SAN FRANCISCO, CALIFORNIA, ENVIRONMENT CODE CHAPTER 1: - PRECAUTIONARY PRINCIPLE POLICY STATEMENT - SECTIONS 100-104 (see http://library.municode.com/HTML/14134/level1/C1.html)

36-1

Comments:

1) SERIOUS INADEQUACIES IN ADDRESSING, AND FAILURES TO ACCOUNT FOR, PROJECTED SEA LEVEL RISE

36-2

As is now commonly understood and established by widespread and

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overwhelming scientific consensus, the Earth's oceans and the San Francisco Bay are now undergoing sea level rise due to planetary climate warming.

Until very recently, science policy groups, including and especially the Intergovernmental Panel on Climate Change (IPCC) had been projecting that the worst case scenario for global sea level rise would be no higher than 1.5 meters by the year 2100.

However new data and reports released in November 2009 now indicate that the worst case scenario for global sea level rise is now projected to be at least 2 meters by the year 2100. More importantly, NASA's James Hansen, widely recognized as the preeminent climate change expert on Earth, argued credibly as early as 2007 that worst case scenario sea level rise will instead be 5 meters by the year 2100. In light of the fact that the IPCC's predictions of sea level rise from just two years ago have been found to be inadequate by an entire one half meter, and that James Hansen had previously argued in 2007 that the IPCC's projections were indeed inadequate, Hansen's projection of a worst case scenario of 5 meters sea level rise by the year 2100, must now be assumed as the guide for all plans for the Candlestick Point-Hunters Point Shipyard Phase II Development Plan Project.

The following data and reports prove this case:

36-2 cont'd.

- On Nov 22, 2009 NASA released new satellite gravimetric data from a 7 year study of Antarctica showing that the massive East Antarctic Ice Sheet, which scientists previously thought was gaining in volume, is suddenly (as of 2006) undergoing rapid and widespread melting. See http://www.guardian.co.uk/environment/2009/nov/22/east-antarctic-ice-sheet-nasa
The NASA study report itself can be ordered from Nature Geoscience at http://www.nature.com/ngeo/journal/v2/n12/full/ngeo694.html
This research also shows massive new and more rapid melting in West Antarctica and Greenland.

- As of November 24, 2009, in a report entitled 'The Copenhagen Diagnosis', even historically overly equivocal IPCC scientists revised their sea level rise projections to a possible 2 meters (6.5 feet) by the year 2100. See the Reuters news release on the report at http://www.reuters.com/article/idUSTRE5AN4L620091124
and the actual report itself at
http://www.copenhagendiagnosis.org/download/default.html
The portion of this report which describes new sea level rise projections begins on page 37 of the report.

- In a March 2007 report, NASA's James Hansen, who first alerted the general public and policy makers to the global climate crisis, discusses the probability of a 5 meter (16.25 feet) sea level rise. See Hansen's report at:
http://www.iop.org/EJ/article/1748-9326/2/2/024002/erl7_2_024002.html
Note that Hansen's report is speculative by nature, simply because ice sheet melting and other data will not exist to prove the case that he argues, until that level of melting is already happening. However, given that the NASA gravimetric data noted above shows that Antarctic and Greenland ice sheets are currently undergoing rapidly accelerating melting at previously unforeseen rates (and at rates which continue to accelerate even further) there is absolutely no reason whatsoever to doubt Hansen's predictions; especially in light of the fact that Hansen's past predictions have consistently proved to be correct.

CONCLUSIONS - SEA RISE:

Hence, since James Hansen's prediction of a worst case 5 meter sea level

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rise by the year 2100 is highly credible, it is, at the very least, that standard of a predicted 5 meter rise which must be used as the guideline for all plans for the Candlestick Point-Hunters Point Shipyard Phase II Development Plan Project.

More importantly, good engineering practice (especially when dealing with a factor with such high unpredictability and potentially severe and costly outcomes as climate induced sea level rise) would call for at least an additional 100% margin of safety over worst case projections to be adopted for the Candlestick Point-Hunters Point Shipyard Phase II Development Plan Project. This means that the standard for assumed sea level rise in the project should be at least 10 meters (32.5 feet) of sea level rise by the year 2100. Even if planners were to use the likely far too equivocal 2 meter worst case sea rise projection in The Copenhagen Diagnosis, an additional 100% margin of safety would still demand a minimum 4 meter rise assumption.

Since the project plans and DEIR for the Candlestick Point-Hunters Point Shipyard Phase II Development Plan Project could not have envisioned the November 2009 reports noted above, and since planners and drafters were apparently unaware of Hansen's earlier and even more serious 5 meter rise projection, the project plans and DEIR are therefore utterly inadequate in addressing and including sufficiently high sea level rise projections.

Specific Inadequacies Numerous And Widespread - In Addition Most DEIR Sections Have No Sea Rise Analysis At All, And Must Now Include Such Analysis

The sections of the DEIR which deal most comprehensively with sea level rise; Volume 2 Section II. Project Description; and Volume 2 Section III.M. Hydrology and Water Quality; have numerous entries on sea level rise. In nearly every instance, the core predictions and plans referenced in the DEIR are dramatically overwhelmed by even the new -minimum- worst case scenario described above of 2 meters (78 inches) sea level rise. Most of the DEIR and project plan sections mentioning sea level rise assume a maximum of 36 inches sea level rise. Most notably, even where a potential 55 inch rise is mentioned as theoretically possible, that potential is downplayed with the following statement which, in light of the new information shown above, can now be seen to be completely and dangerously incorrect;

"Even among projections considered plausible, albeit high, by the CALFED Independent Science Board, a SLR of 36-inches would not occur until about 2075 to 2080 and by about 2100 the SLR could reach 55 inches. However, sea level observations since the publication date of the ice cap melt studies, although not conclusive to establish a new trend in SLR, do not show the accelerated SLR trajectory predicted by some of the reports."

Clearly, new observations do -indeed- show such accelerated sea level rise.

Other sections of the DEIR which specifically mention sea level rise and which need to be carefully and extensively revised to account for both the new data and Hansen's report are:
Volume 2 Sections III.K and III.L
and
Volume 3 Sections III.N and III.S, Section IV. and Section VI.

Furthermore, almost every -other- section of the DEIR and the project plan referenced, is impacted by sea level rise; and in light of the much higher 2 to 5 meter sea level rise projections now shown to be warranted, nearly the entire DEIR and the project plan that it

36-2 cont'd.

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references must be carefully reexamined and revised to account for sea level rise impacts.

To get a sense of why such an overarching reexamination of nearly the entire DEIR is necessary, see the following online interactive sea level rise projection maps:

The Project Area At 2 Meters Sea Level Rise:
http://flood.firetree.net/?ll=37.7293,-122.3995&z=3&m=2

The Project Area At 5 Meters Sea Level Rise:
http://flood.firetree.net/?ll=37.7293,-122.3995&z=3&m=5

Even at the minimum 2 meter rise worst case assumption, the sea inundations into the project area clearly and profoundly impact the entire project in fundamental ways that are not adequately addressed in the DEIR and the referenced project plan. And the 5 meter projection map is undeniably astounding in its implications.

Therefore the following sections; III.A. Intro to Analysis; III.B. Land Use; III.C. Pop., Housing, & Employment; III. D. Transportation; III. E. Aesthetics; III.H. Air Quality; III.J. Cultural and Paleontological Resources; III.O. Public Services; III.P. Recreation; III.Q. Utilities; III.R. Energy; and V. Other CEQA Considerations; all of which shockingly contain no significant references to sea level rise whatsoever, must now all be carefully reviewed and revised to account comprehensively for the far reaching impacts of the sea level rise projections indicated above.

Furthermore, all of the DEIR Appendices must likewise be assessed as to their accuracy in regard to sea level rise. Most notably, Appendices L, S, and V-2 each reference sea level rise, largely mirror the same serious shortcomings and errors shown in the DEIR, and must therefore be strongly questioned. And as in the case of the overall DEIR itself, all of the other Appendices are also affected and should be reexamined in relation to the new data and reports as to their adequacy. Particularly important in this respect is Appendix N-2 which discusses Yosemite Slough with almost no mention of sea level at all; this when sea level rise will clearly have profound impacts on plans for the Slough.

Sea Level Rise Interactions With Liquefaction & Hazardous Materials

The most important inadequacies of the DEIR and project plan lie in their failure to account adequately for the potential of sea level rise to severely exacerbate both liquefaction and the leaching and harmful interactions of hazardous materials in the project area.

Liquefaction

In the report entitled 'Vulnerability assessment to liquefaction hazard induced by rising sea-levels due to global warming' (see http://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=155784183 - or purchase the full article with graphics at http://eproceedings.worldscinet.com/9789812701602/preserved-docs/9789812701602_0069.pdf) the report authors establish clearly that liquefaction dangers increase as sea levels rise, and increase rapidly after sea level rise exceeds 1 meter.

Shockingly, neither the DEIR section III.L. Geotechnical; nor section III.M. Hydrology and Water Quality; mention in any substantial way the dangers of potential interactions between sea level rise and liquefaction.

It is absolutely imperative that the DEIR and the project plan, outline

36-2 cont'd.

36-3

36-4

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a detailed analysis of these potentially extremely hazardous interactions, and outline plans for how they would be prevented; all with the full range of 2 to 5 meters sea level rise assumed.

36-4 cont'd.

Hazardous Materials

By far the most troubling aspect of the DEIR and project plan's neglect of sea level rise assessments is in their failure to sufficiently address potential sea level rise interaction with hazardous materials in and on the project site.

In 'Implications of Sea Level Rise for Hazardous Waste Sites in Coastal Floodplains' (see http://www.epa.gov/climatechange/effects/downloads/Challenge_chapter9.pdf)
the authors establish clearly the extensive dangerous interactions that can occur as sea level rise exacerbates flooding and triggers other negative impacts in hazardous waste sites, such as those in the Candlestick Point-Hunters Point Shipyard Phase II Development Plan Project.

Yet astoundingly, neither the DEIR section III.K. Hazards and Hazardous Materials; III.L. Geotechnical; nor section III.M. Hydrology and Water Quality; assess in any comprehensive or substantial way the very serious dangers of potential interactions between sea level rise and the numerous hazardous materials and residues in the project plan area.

36-5

It is crucial that comprehensive detailed assessments of such potential interactions be included in the DEIR and project plan; assessments which assume the full spectrum of 2 to 5 meters sea level rise projected above.

However, regardless of the findings of such new assessments, the dramatic sea level rise scenarios projected above could so overwhelm the project area that unforeseen and unavoidable extremely dangerous leaching, flushing, mixing, out-gassing and dispersion of a veritable toxic soup of hazardous materials could take place in the project area. It is therefore imperative that all hazardous materials be completely removed from the entire project area before any development is permitted to proceed. Under a scenario of sea level rise between 2 and 5 meters, no capping or other on-site containment of any hazardous wastes can be adequate to assure the prevention of unacceptably dangerous leaching, flushing, mixing, out-gassing and dispersion of hazardous materials; all which in turn would lead to the inevitable poisoning of the environment, animals, and people, living in, working in, and visiting the area.

These remarks on sea level rise disrupted hazardous materials now segue well into the second and final category of my comments.

2) FAILURE TO ACCOUNT FOR AND AVOID HEALTH AND ENVIRONMENTAL HAZARDS OF TOXIC MATERIALS, INCLUDING BUT NOT LIMITED TO CHRYSOTILE ASBESTOS AND IONIZING RADIATION; AND, FAILURE TO MEET THE LEGAL PRECAUTIONARY PRINCIPLE ESTABLISHED BY ORDINANCE IN THE SAN FRANCISCO, CALIFORNIA, ENVIRONMENT CODE CHAPTER 1: - PRECAUTIONARY PRINCIPLE POLICY STATEMENT - SECTIONS 100-104 (see http://library.municode.com/HTML/14134/level1/C1.html)

36-6

Chrysotile Asbestos

Two recent European Union (EU) directives can be viewed at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31999L0077&model=guichett
and at

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http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32003L0018&model=guichett

In those directives, the EU establishes that "No threshold level of exposure has yet been identified below which chrysotile asbestos does not pose carcinogenic risks;".

In those directives, the EU also bans all applications and uses of chrysotile asbestos as of the year 2005.

Chrysotile or 'white' asbestos is the same type existing naturally in serpentine rock at the Candlestick Point-Hunters Point Shipyard Phase II Development Plan Project area and in other development areas in the Bayview Hunters Point. Previous grading and other development activities in those other development areas has resulted in chrysotile dust contamination on the Candlestick Point-Hunters Point Shipyard Phase II Development Plan Project area.

Because it has been established that there is no safe level of exposure to chrysotile asbestos, all asbestos dust which has arisen from other construction sites must be completely removed from the Candlestick Point-Hunters Point Shipyard Phase II Development Plan Project area before any any development can begin in the area.

Further, because it has been established that there is no safe level of exposure to chrysotile asbestos, no grading whatsoever of any asbestos laden serpentine rock can be allowed in the Candlestick Point-Hunters Point Shipyard Phase II Development Plan Project area. Such grading presents unnecessary and unacceptable risks to human health.

All plans of the Candlestick Point-Hunters Point Shipyard Phase II Development Plan Project which permit the grading of asbestos laden serpentine rock must be nullified, and alternative plans which will not disturb chrysotile asbestos must be adopted.

36-6 cont'd.

Ionizing Radiation

In June 2005 the National Academies of Science reported that there is no safe dose of ionizing radiation (see http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=11340)

Therefore no development can be allowed to proceed in the Candlestick Point-Hunters Point Shipyard Phase II Development Plan Project area until all radiological waste materials are completely removed from the area. Proceeding with any development while such wastes remain anywhere in the project area, presents unnecessary and unacceptable risks to human health.

36-7

The Precautionary Principle And All Hazardous Materials

Furthermore, because San Francisco's own legally established Precautionary Principle also requires that no person be unnecessarily exposed to chrysotile asbestos, ionizing radiation, or any other hazardous materials, it is doubly mandated that all asbestos laden serpentine rock must be left completely undisturbed, and all radiological and other hazardous materials must be completely removed from the Candlestick Point-Hunters Point Shipyard Phase II Development Plan Project area before any development can proceed.

36-8

-end of comments-

Eric Brooks

7 of 7

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Letter 36: San Francisco Green Party (1/12/10)

Response to Comment 36-1

This comment contains introductory or general background information and is not a direct comment on environmental issues or the content or adequacy of the Draft EIR. No response is required.

Response to Comment 36-2

Refer to Master Response 8 (Sea Level Rise) and Responses to Comments 57-1 and 58-3 for a comprehensive discussion of the sea level rise documents reviewed, the levels of sea level rise taken into account for various Project components, and the plan to provide flood protection if higher levels of sea level rise occur.

Thousands of journal articles, newspaper stories, and publications on the topic of climate change, and associated sea level rise, have been published in the past 20 years, and no document of reasonable size could summarize them all. Instead, the EIR selected eight peer-reviewed documents that are not only widely recognized as very credible sources in the scientific community, but are also accepted as the most relevant to the specific subject of sea level rise.

Additional documents that are either not refereed (peer-reviewed) or are less high-profile, but are illustrative of ongoing development in the scientific, engineering, and planning communities, were also reviewed. Most of these publications do not include specific analysis of sea level rise; instead, they present observations of ice sheet melt rates, carbon dioxide (CO_2) levels, temperature changes, etc. along with empirical or hypothetical Projections of sea level rise. For example, the recent *Copenhagen Diagnosis—Updating the World on the Latest Climate Science* report was a summary of ongoing literature rather than new analysis. A few quotes from the report that are specific to sea level rise are reproduced below:

> Future sea level rise is highly uncertain, as the mismatch between observed and modeled sea level already suggests.
>
> Based on a number of new studies, the synthesis document of the 2009 Copenhagen Climate Congress (Richardson et al. 2009) concluded that "updated estimates of the future global mean sea level rise are about double the IPCC Projections from 2007."
>
> Although it is unlikely that total sea level rise by 2100 will be as high as 2 meters (Pfeffer et al. 2008), the probable upper limit of a contribution from the ice sheets remains uncertain.

Additionally, commentaries on the methods which have been used to determine sea level rise estimates have been published by individuals such as James Hansen. Hansen's commentary states:

> As an example, let us say that ice sheet melting adds 1 centimetre to sea level for the decade 2005 to 2015, and that this doubles each decade until the West Antarctic ice sheet is largely depleted. This would yield a rise in sea level of more than 5 metres by 2095.
>
> Of course, I cannot prove that my choice of a 10-year doubling time is accurate but I'd bet $1000 to a doughnut that it provides a far better estimate of the ice sheet's contribution to sea level rise than a linear response.

These types of articles do not provide fact-based scientific analysis of sea level rise, but rather provide illustrative cases. As such, they have not been reviewed or included in our sea level rise estimates.

Also, it is recognized that recent reports published by NASA scientists show that there is active ice sheet melting which has the potential to impact estimates of sea level rise. However, the reports referenced by the commenter provide no scientific analysis of the relation of this ice sheet's melting rate to the estimate of sea level rise by 2100, or over the next century.

The EIR recognizes that the science related to climate change and sea level rise rates will continue to evolve into the future; therefore, Project plans do not include a specific upper limit of sea level rise. Rather a risk-based analysis was conducted, based on development elevations, setbacks, and a Project-specific Adaptation Strategy was prepared for the Project. The Adaptation Strategy includes preparing an Adaptive Management Plan which outlines an institutional framework, monitoring triggers, a decision-making process, and an entity with taxing authority that would pay for infrastructure improvements necessary to adapt to higher than anticipated sea levels.

With respect to the effects of sea level rise on the design of Yosemite Slough bridge, Draft EIR Appendix N2 (MACTEC, Yosemite Slough Bridge Drawings—Stadium and Non-Stadium Options) states that 55 inches of sea level rise are incorporated into the design to the bridge clearance over the existing 100-year flood elevation.

Response to Comment 36-3

Refer to Master Response 8 (Sea Level Rise) for a discussion of the potential effect of sea level rise on liquefaction potential and potential interaction with and leaching of hazardous materials.

Response to Comment 36-4

Refer to Master Response 6 (Seismic Hazards), Master Response 7 (Liquefaction), Master Response 8 (Sea Level Rise), as well as Impacts GE-5, GE-7, and HY-12, and mitigation measures MM GE-5a and MM HY-12a.1 for discussions on the interrelationship between potential liquefaction and sea level rise. Liquefaction occurs in loose, non-plastic soils below the groundwater table. The comment presents a concern that sea level rise will cause a subsequent rise in the groundwater table, thereby increasing the amount of soil susceptible to liquefaction. As indicated in Master Response 7, design-level liquefaction analysis will factor in a 36-inch rise in groundwater elevation to account for the impacts of predicted sea level rise on liquefaction susceptibility of site soils. Site-specific final design geotechnical studies will be performed to determine what engineering and construction measures need to be implemented to mitigate liquefaction potential if present.

Response to Comment 36-5

Refer to Master Response 8 (Sea Level Rise) for a discussion of the potential effect of sea level rise interaction with hazardous materials and a discussion of sea level rise considered and how the Project will deal with higher levels of sea level rise should they occur.

Refer to Master Response 13 (Post-Transfer Shipyard Cleanup) for a discussion of the residual contaminants that may remain at the Hunters Point Shipyard site after transfer of Shipyard property from the Navy.

Response to Comment 36-6

Refer to Master Response 9 (Status of CERCLA Process for a discussion of the current status of the Navy's progress on the cleanup of hazardous materials. Refer to Master Response 11 (Parcel E-2 Landfill) for a discussion of landfill investigation and cleanup. Refer to Master Response 12 (Naturally Occurring Asbestos) for a discussion of the asbestos monitoring and control measures that would be implemented during soil-disturbing activities. Refer to Master Response 13 (Post-Transfer Shipyard Cleanup) for a discussion of the cleanup of hazardous materials. Refer to Master Response 15 (Proposition P and the Precautionary Principle) regarding concerns about toxins. Refer to Master Response 16 (Notification Regarding Environmental Restrictions and Other Cleanup Issues) for a discussion of the notice that will be given to property owners, residents, and neighbors on the environmental restrictions and other cleanup issues.

Response to Comment 36-7

Refer to Master Response 9 (Status of the CERCLA Process) and Master Response 13 (Post-Transfer Shipyard Cleanup) regarding ionizing radiation.

Response to Comment 36-8

Refer to Master Response 12 (Naturally Occurring Asbestos) and Master Response 15 (Proposition P and the Precautionary Principle) regarding removing toxins.

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Letter 37: San Francisco Bay Herring Fisherman's Association (1/12/10)

1 of 1

Letter 37

Dear Mr. Wycko,

It has been brought to my attention that the development of the Candlestick-Bayview-Hunters project will include a automobile bridge over Yosemite Slough and that this bridge will be supported by three hundred pilings.

The area around Yosemite Slough is a herring spawn site that is frequently visited by returning schools during the months of December, January and February. In light of this I would request that you consider the following; 37-1

1. Pilings should be concrete or should be sheeted in ABS plastic to facilitate the survival of herring eggs that may be deposited on the surfaces of the pilings (if they are seaward of the high tide mark in that vicinity). Un-sheated creosote soaked pilings are unnacceptable and toxic to the eggs of fish that utilize them for egg deposition.

2. Placement of pilings should not occur during the spawning season of herring during the months of December through February.

Thank you for your consideration of these requests on behalf of the members of our association and the resource of San Francisco Bay herring.

Ernie Koepf, President
San Francisco Bay Herring Fishermen's Association

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650 678 7124
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Letter 37: San Francisco Bay Herring Fisherman's Association (1/12/10)

This letter is identical to Letter 95. To avoid duplication, all responses are provided to Letter 37, which is the first occurrence of these two letters in this C&R document.

Response to Comment 37-1

The Draft EIR identifies known herring spawning areas near the project site, as discussed on page III.N-34 of the Draft EIR and depicted in Figure III.N-4:

> According to NMFS, known herring spawning areas within the area immediately adjacent to the Project site include several piers and areas of shoreline both north and south of the proposed marina (refer to Figure III.N-4 [Pacific Herring Spawning Habitat]).

With respect to the type of piles to be used, as discussed in Impact BI-9b, page III.N-82 (and Table ES-2, page ES-104) , the current design for the Yosemite Slough bridge would have columns supported by steel piles. Nevertheless, unsheathed creosote-soaked pilings are not proposed and will not be used. In response to the comment, the text in mitigation measure MM BI-9b, to add a third design measure, has been revised as follows:

MM BI-9b …

2. *Design structures that can be installed in a short period of time (i.e., during periods of slack tide when fish movements are lower).*

3. *Do not use unsheathed creosote-soaked wood pilings.*

…

With respect to the placement of pilings during the herring spawning season (December through February), mitigation measure MM BI-9b also requires installation of steel piles during the June 1 to November 30 work window, or as otherwise recommended by National Marine Fisheries Services (NMFS). However, in response to the comment, the text in mitigation measure MM BI-9b has been revised to add the following construction measure:

MM BI-9b …

3. *Avoid installation of any piles during the Pacific herring spawning season of December through February. Consult with the CDFG regarding actual spawning times if pile installation occurs between October and April.*

~~3~~4. *If steel piles must be driven with an impact hammer, an air curtain shall be installed to disrupt sound wave propagation, or the area around the piles being driven shall be dewatered using a cofferdam. The goal of either measure is to disrupt the sound wave as it moves from water into air.*

~~4~~5. *If an air curtain is used, a qualified biologist shall monitor pile driving to ensure that the air curtain is functioning properly and Project-generated sound waves do not exceed the threshold of 180-decibels generating 1 micropascal (as established by NMFS guidelines). This shall require monitoring of in-water sound waves during pile driving.*

~~5~~6. *Unless the area around the piles is dewatered during pile driving, a qualified biologist shall be present during pile driving of steel piles to monitor the work area for marine mammals. Driving of steel piles shall cease if a marine mammal approaches within 250 feet of the work area or until the animal leaves the work area of its own accord.*

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Letter 38: Da Costa, Francisco (1/11/10)

1 of 13

Letter 38

From: Francisco Da Costa <fdc1947@gmail.com>

To: John Rahaim <john.rahaim@sfgov.org>, Fred Blackwell <fred.blackwell@sfgov.org>, Ron Miguel <rm@well.com>, Christina Olague <c_olague@yahoo.com>, Gwyneth Borden <plangsf@gmail.com>, "Michael J. Antonini" <wordweaver21@aol.com>, "William L. Lee" <bill.lee@flysfo.com>, Kathrin Moor <mooreurban@speakeasy.net>, Hisashi Sugaya <hs.commish@yahoo.com>, Lawrence Badiner <larry.badiner@sfgov.org>, Linda Avery <Linda.Avery@sfgov.org>, Stanley Muraoka <Stanley.Muraoka@sfgov.org>, Dennis Herrera <CityAttorney@sfgov.org>, Matt Dorsey <Matt.Dorsey@sfgov.org>, "Gavin. Newsom" <gavin.newsom@sfgov.org>, Michael Cohen <michael.cohen@sfgov.org>, Michael Farrah <mike.farrah@sfgov.org>, Tiffany Bohee <tiffany.bohee@sfgov.org>, Rosemary Cambra <muwekma@muwekma.org>, Monica Arellano <marellano@muwekma.org>, Norma Sanchez <nsanchez@muwekma.org>, Espanola Jackson <EspanolaJackson@sbcglobal.net>, Alan Leventhal <aleventh@email.sjsu.edu>, Jaron Browne <jaron@peopleorganized.org>, Mishwa Lee <mishwa.lee@gmail.com>, Corrina Gould <shellmoundwalk@yahoo.com>

Date: 01/11/2010 06:19 PM

Subject: A short history of the Muwekma Ohlone

This is a short history of the Muwekma Ohlone that has to be incorporated with the other comments linked to the Draft, EIR - Hunters Point Shipyard and Candlestick Park.

http://www.coloredreflections.com/decades/Decade.cfm?Dec=2&Typ=3&Sty=1&PID=1027

38-1

Tomorrow, there will be a Press Conference by several Ohlone Tribes and supporters of the Ohlone.
Rosemany Cambra will be present and so will experts on Shellmounds and ethno-historians.
The purpose is simple - time should be given to address the over 20 Sacred Burial Sites some within the area of the Draft, EIR and others within a quarter mile area of Hunters Point Shipyard and Candlestick Point.

The Press Conference will be held on the steps of City Hall at 12 noon.

Several State Laws have be compromised and the SF Planning Department with intent chose to avoid contacting the Muwekma Ohlone for sure but other tribes too.

Francisco Da Costa

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COLORED REFLECTIONS

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The Muwekma Ohlone Tribe

Perspective

The following was a paper presented by Rosemary Cambra, invited panalist and chair of the Muwekma Ohlone Tribe during last October's 30th anniversary of Alcatraz. Presently, Muwekma has a formal determination of "previous unambiguous Federal Recognition (as of May 24, 1996) by the Interior Department and is listed for Ready Status for Active Consideration in the Federal Register. Also Muwekma is named under the present bill sponsored by Congress George Miller to be reaffirmed as a Federally Recognized Tribe under the 106 Congress.

38-2

The Muwekma Ohlone Tribe of the San Francisco Bay and Alcatraz and Angel Islands by Alan Leventhal (Tribal Ethnohistorian), Hank Alvarez (Tribal Councilman), Monica Arellano (Tribal Councilwoman), Carolyn M. Sullivan (Tribal Councilwoman), Concha Rodriguez (Tribal Councilwoman), and Rosemary Cambra (TribalChair)

Introduction: Cultural and Geographical Landscape of the Muwekma Territory - 10,000 Years Ago to European Contact in 1769

Over ten thousand years ago, before the waters of the Pacific Ocean passed through the gap now spanned by the Golden Gate Bridge and filled the interior valley-basins, Alcatraz and Angel Islands were small mountain peaks which were later isolated by the encroaching sea water, the ancestors of the Muwekma Ohlone and the neighboring tribal groups had established their homes within this changing landscape. The people comprising these early tribal groups gave birth, hunted, fished, harvested a great diversity of seeds, fruits and vegetables, managed large tracts of land through selected burning, married, grew old and died within the greater San Francisco Bay region.

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Over these millennia the Muwekma Ohlone tribal groups along with their neighboring linguistic cousins, inter-married and developed complex societies which anthropologists call ranked chiefdoms. Many of the complex aspects of their social, cultural, religious and ceremonial institutions have been traced back through the archaeological record to over 4500 years ago within the greater Sacramento/San Joaquin Delta and Bay Area regions, thus culturally and biologically linking this larger geographic area.

Based upon this archaeological record, it appears that sometime around 4000 years ago, these ancestral California tribal cultures developed a system of social ranking (meaning hereditary noble lineages and elites who controlled wealth, production, distribution and power) and there also evolved institutionalized religions. This complex system of social distinction was reflected in the elaborate mortuary (burial) treatment of the dead as expressed within the larger geographical area. Many of the social elites (nobility) were buried with grave wealth in the form of social and religious markers of distinction. Furthermore, many these high lineage people during the early and middle periods of time, were buried in extended positions, oriented toward the west, and placed in cemeteries that developed into large earth mounds.

38-2 cont'd.

Such was the case within the greater San Francisco Bay region, beginning approximately 4000 years ago, when people were interred in what has become commonly known as the "shellmounds". Historically, these "shellmounds" have been misinterpreted by scholars over the past 100 years as remnant "villages", "kitchen middens", "garbage dumps" and "habitation sites", however archaeological evidence suggests to the contrary, that these mounds formally served as the final resting places for the elite and distinguished members (e.g. fallen warriors) of the many ancestral Muwekma Ohlone tribal societies living around the San Francisco Bay.

In 1769, the evolution of these complex Ohlone societies, were adversely impacted and became another casualty within the international arena of European colonialism. In that year, the Bourbon Monarchy of the Hispanic Empire decided to expand its presence into Alta California. Thus began the first of a series of contacts between the Spanish colonial empire

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and the aboriginal Costanoan/Ohlone people (whom the Spaniards referred to as Coste±os or Coastal People) living within the Monterey/San Francisco Bay regions. Although the term Muwekma is used as an identifier of the modern survivors of the aboriginal people of the greater San Francisco Bay region and whose direct ancestors were missionized into Missions Dolores, San Jose and Santa Clara, Muwekma also means "The People" in the Tamien and Chochenyo Ohlone languages spoken around the San Francisco Bay *[note: collectively the Ohlone languages spoken in southern Napa, Contra Costa, Alameda, Santa Clara, Santa Cruz, San Mateo and San Francisco Counties have been classified as either Northern Costanoan or Muwekma by anthropologists and linguists*].

Late Eighteenth Century Land and Sea Exploration: Impressions of the Muwekma Ohlone People, Alcatraz and Angel Islands and the San Francisco Bay

38-2 cont'd.

During the early Spanish expeditions from Monterey into the San Francisco Bay region (1769 - 1776), the Spaniards encountered an number of Muwekma Ohlonean tribes and villages (rancherias) along the way. Accounts of these first hand encounters were kept by the priests and the military leaders of the expeditions and they provide important information in our understanding of the nature and complexity of 18th century Ohlone societies and their world-view.

In simplistic terms, it appears that the Ohlone treatment towards the presence of strangers within their territories was divided into two general considerations: strangers were considered as either enemies (and/or other powerful forces that could cause harm) or as distinguished guests. Apparently, during this formative, contact/pre-mission period, the Spaniards were not viewed as enemies by the Ohlone they encountered, but in most cases they were invited to their villages and treated as distinguished guests. An example of one such encounter occurred on April 2, 1776, near the Carquinez Straits (East Bay), when Father Font wrote the following account:

We set out from the little arroyo at seven o'clock in the morning, and passed through a village to which we were invited by some ten Indians, who came to the camp very early in the morning singing. We were welcomed by the Indians of the village, whom I

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estimated at some four hundred persons, with singular demonstrations of joy, singing and dancing.

A year earlier in 1775, the first Spanish ship, the San Carlos, circum-navigated the San Francisco Bay. On board was Captain Juan Manuel de Ayala, First Sailing Master and Map Maker, Jose de Canizares, and Father Vincente Santa Maria, who after having some preliminary contact with the Karkin (northern Ohlones), decided to go ashore and visit a village located some distance inland. Father Santa Maria left us with the following account: *There was in authority over all of these Indians one whose kingly presence marked his eminence above the rest. Our men made a landing, and when they had done so the Indian chief addressed a long speech to them*

After the feast, and while they were having a pleasant time with the Indians, our men saw a large number if heathen approaching, all armed with bows and arrows."

38-2 cont'd.

This fear obliged the sailing master to make known by signs to the Indian chieftain the misgivings they had in the presence of so many armed tribesmen. The themi (chief), understanding what was meant, at once directed the Indians to loosen their bows and put up all of their arrows, and they were prompt to obey. The number of Indians who had gathered together was itself alarming enough. There were more than four hundred of them, and all, or most of them, were of good height and well built.

Alcatraz apparently was used as a fishing station, while Angel Island was more permanently occupied by Muwekma people at the time of European contact. Both islands were mapped by the Jose de Canizares of the San Carlos. On August 12, 1775, Captain Ayala noted in his log: *The longboat was lowered and I set out in it to find a better anchoring ground for the ship. I was looking over the island that I called Angels' Island, the largest one in this harbor, and making close search for an anchoring place that handily provided water and firewood. Although I found some good ones, I was inclined to go further and look over another island, and found it quite barren and rugged and with no shelter for a ship's boats. I named it Pelican Island because of the large number of pelicans that were there.*

Alcatraz was so named Ysla de Alcatrazes (Pelicans) by

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Captain Ayala (although some believe this is actually Yerba Buena Island). On August 14, 1775, the San Carlos casts her anchor opposite a large island which they named Santa Maria de los Angels (Angel Island) in honor of the Blessed Virgin as Queen of the Angels. On this island they found two Ohlone rancherias and also evidence of religious activities. Father Vincente Santa Maria described some of these shrines: *These were slim round shafts about a yard and a half high, ornamented at the top with bunches of white feathers, and ending, to finish them off, in an arrangement of black and red-dyed feathers imitating the appearance of the sun. This last exhibit gave me the unhappy suspicion that those bunches of feathers representing the image of the sun (which in their language they call gismen [the Ohlone word for sun] must be objects of the Indian's heathen veneration*

The Post-Contact Muwekma Ohlone and their ties to the Yelamu Ohlone of San Francisco, Missions Dolores, San Jose and Santa Clara and the East Bay Rancherias: A Brief Historic Overview 1777 to 1906

38-2 cont'd.

The region comprising the City and County of San Francisco was controlled by the Yelamu tribal group of Ohlone Indians. According to the comprehensive mission record and ethnogeographic studies conducted by anthropologist Randall Milliken, it appears that the first four people from Yelamu were baptized by Father Cambon and the others were baptized by Fathers Palou and Santa Maria between 1777 - 1779. Apparently the first converts from the "rancheria de Yalam· " into Mission Dolores also had relations who lived in the neighboring rancherias (villages) of Sitlintac (located about 2.6 miles northeast of Mission Dolores), Chutchui, Amuctac, Tubsinte, and Petlenuc all located within the present boundaries of San Francisco. Sitlintac and Chutchui were located in the valley of Mission Creek. Amuctac and Tubsinte were established in the Visitation Valley area to the south. The village of Petlenuc may have been near the location of the Presidio. The Ohlone people from these as well as other villages to the south, and across the East Bay, were missionized into Mission Dolores between 1777 to 1787. According to Fathers Palou and Cambon the Ssalsones (the Ohlone tribal group located on the San Mateo Peninsula to the south) were intermarried with the Yelamu and called them Aguazios which means "Northerners".

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Based upon genealogical information derived from the Mission Dolores records, the Yelamu Ohlone people of San Francisco were intermarried with Ohlone groups to the south and across the East Bay, prior to contact with the Spaniards. For example, Fathers Palou, Cambon and Noriega over a period of time baptized the family of a Yelamu chief named Xigmacse (a.k.a. Guimas) who was identified by Palou as the "Captain of the village of this place of the Mission". Two of Xigmacse's wives, Huitanac and Uittanaca (who were sisters) were recorded by Cambon as coming "from the other shore to the east at the place known as Cosopo".

Recently some scholars have suggested that the ending "-cse" on a man's name was served as an appellation of distinction or preeminence, thus identifying that person as a chief or one of distinguished status and lineage. In another case of cross-Bay intermarriage between tribal groups involved a Yelamu woman named Tociom. Tociom had a daughter named Jojcote who according to Father Cambon was "born in the mountains to the east on the other side of the bay in the place called by the natives Halchis". The place called "Halchis" is the land of the Jalquin Ohlone Tribe.

38-2 cont'd.

It was into this complex and rapidly changing world that a young Jalquin Ohlone man named Liberato Culpecse at the age of 14 years old (born 1787) was baptized at Mission Dolores along with other members of his tribe on November 18, 1801. Seven years later in 1808 Liberato Culpecse married his first wife and she died before 1818. Presumably, after the death of his wife. Liberato was allowed to moved to the Mission San Jose region, where he met his second wife, Efrena Quennatole. Efrena who was Napian/Karquin Ohlone was baptized at Mission San Jose on January 1, 1815. She and Liberato were married on July 13, 1818 by Father Fortuny.

Liberato Culpecse and Efrena Quennatole had a son named Dionisio (Nonessa) Liberato and a daughter, Maria Efrena. Both Dionisio and Maria Efrena married other Mission San Jose Indians and they had children who later became the Elders (including the Guzmans and Marine lineages) of the historic Federally Recognized Verona Band (Muwekma) community residing at the following East Bay rancherias: San Lorenzo, Alisal, Del Mocho, Niles, Sunol, and Newark. These Elders also enrolled along with their families with

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the Bureau of Indian Affairs under the 1928 California Indian Jurisdictional Act.

The world of all of the Ohlone tribes was drastically changed within the first 25 years after contact due to the establishment of Missions San Carlos, Soledad, Santa Cruz, San Juan Bautista, Santa Clara, San Jose and Dolores (San Francisco), and with the military Presidios at Monterey and San Francisco. Of the approximately over twenty thousand Ohlonean speaking people who inhabited the San Francisco/Monterey Bay regions in 1769, less than 2000 were left by 1810.

Their numbers continually declined throughout the remaining Spanish/Mexican/Californio regimes, and the surviving Muwekma families eventually sought refuge, especially after the American conquest of California (1846-1848), on some formal land grants and especially the six East Bay rancherias located within their ancestral homelands. During the mid-19th century, as the rest of the central California Indians were displaced and, at times, hunted down, Alisal (located near Pleasanton) as well as the other rancherias, became safe-havens for the Muwekma Ohlone Indians and members from the interior tribes who had intermarried with them at the missions. The Alisal rancheria was established on a 1839 land grant belonging to a Californio named Agustin Bernal.

38-2 cont'd.

Years later, in the 1880s, the Hearst family purchased part of the rancho containing the rancheria and they permitted the 125 Muwekmas living at Alisal to remain on the land. During the early part of this century, the Muwekma Ohlone Indians (later known as the Verona Band) became Federally Recognized as a result of the Special Indian census conducted by Agent C. E. Kelsey in 1905-1906 and the ensuing Congressional appropriation bills of 1906 and 1908 addressing the purchase of homesites for landless California Indians.

Also, independently, during this period of time, Mrs. Phoebe Hearst was responsible for funding the fledgling Department of Anthropology at U.C. Berkeley. Concurrently, A. L. Kroeber, one of the early pioneering anthropologists, helped develop the Anthropology Department at Berkeley and later became known as "the Father of California Anthropology". During the early part of this century, there were approximately 20,000 Indians left in California, a devastating decline from the

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estimated population of 1.5 million people at the time of Hispano-European contact in 1769. Realizing such a state of devastation, Kroeber and his students embarked upon the task to try to "salvage" as much memory culture from the surviving communities and elders, in order to record detailed aspects about their culture before their passing.

This effort culminated in the monumental publication by Kroeber in 1925, entitled "The Handbook of California Indians". In this Bureau of American Ethnology's (Smithsonian Institution) publication, Kroeber wrote of the Costanoans (Ohlones):

The Costanoan group is extinct so far as all practical purposes are concerned. A few scattered individuals survive, whose parents were attached to the missions San Jose, San Juan Bautista and San Carlos; but they are of mixed tribal ancestry and live almost lost among other Indians or obscure Mexicans.

38-2 cont'd.

For the surviving Costanoan/Ohlone people of the 1920s, they never read of this sentence of "extinction", nor did they embrace it. Instead, the Muwekma Ohlone continued to maintain their Indian culture, although by this time completely landless, they like the other Ohlone/Costanoan tribal communities (the Amah-Mutsun from Mission San Juan Bautista) and the Esselen/Costanoans from Mission San Carlos/Carmel/ Monterey region), continued to survive as distinct Indian communities and speak their respective languages as late as the 1930s.

It is from the work of linguist-cultural anthropologist J. P. Harrington from the Bureau of American Ethnology, who worked in the Ohlone region from 1921-1939 with the last fluent elderly speakers of the Ohlone languages that we know much about the culture and changing world of the Costanoan/Ohlone people. Presently, the grandchildren of Harrington's linguistic and cultural consultants, comprise the Elders and leadership of the Muwekma Ohlone Indian Tribe of the San Francisco Bay.

On the Government side, in 1927, although landless, the Muwekma were administratively dropped or "no longer dealt with" (along with approximately 135 other Acknowledged California Indian communities) from their Federally Recognized status by L.A. Dorrington,

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Superintendent of the Bureau of Indians Affairs in Sacramento. This unilateral administrative termination was enacted contrary to BIA policy and without any notification or due process for the tribe. Although, the Muwekma Ohlone families had enrolled with the Bureau of Indian Affairs since the 1928 California Jurisdictional Act and have organized themselves according to the Bureau's directives, they still have no right to be recognized as an Indian Tribe under federal law without first being federally reaffirmed and formally Acknowledged by the Secretary of the Interior.

Indians of All Tribes: Alcatraz 1969

In the early morning hours on November 20, 1969, exactly two hundred years after the Portola/Crespi Expedition of 1769, representatives from different Indian tribes throughout the U.S. calling themselves Indians of All Tribes crossed the San Francisco Bay and claimed Alcatraz Island for the Native People of the Americas. This major event, ignited by both the indignities inflicted upon Native Americans for almost 500 years and further fanned by America's consciousness during the Viet-Nam War and Civil Rights movements of the 1960s, served notice to the dominant society that, although rendered invisible to most of America, that something was still wrong, very wrong in Indian Country.

38-2 cont'd.

The Alcatraz takeover was a major wake up call to America, to its government and to its citizens. In a publication entitled Alcatraz Is Not An Island (1972), Native American anthropologist/historian Dr. Jack Forbes from UC Davis penned the following: *In the 1870's Natchez Winnemucca, respected chief of the Pyramid Lake Paiutes, was arrested and sent as a prisoner to Alcatraz. His crime: Attempting to resist and expose the corruption of the government's agents on his reservation. Natchez did not stay on "The Rock" very long, but other Indians, guilty of the "crime" of resisting white conquest, were frequent visitors to the prison. Now in 1969 modern-day Native Americans are attempting to claim Alcatraz Island in order to both obtain facilities for educational programs and to publicize the desperate circumstances under which Indian people live..... There is little question but that the Muwekma Indian people of San Francisco and the Hulueko [Coast Miwok people] of Marin County were, in the old days, frequent visitors to all of the islands in the San Francisco Bay. …*

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Colored Reflections - The Sixties, The Muwekma Ohlone Tribe Page 10 of 12

...The Native Americans on Alcatraz are saying that they want to have a place where they can control programs which will benefit both Indians and non-Indians. Those who can see into the future will agree, I think that an Indian museum, memorial, and educational center on Alcatraz will be of great benefit and value to all California, regardless of race.

***The Muwekma Ohlone Tribe of the San Francisco Bay**: Shattering the Myth that the Ohlones were Never Federally Recognized*

Ironically, sometime either before or after the closure of Alcatraz, one of the Muwekma elders, Ernest George Thompson, Jr., became a security guard on Alcatraz. Ernest Thompson, Jr., as with his Muwekma ancestors, was baptized at Mission San Jose in 1912. His lineal ancestry has been directly traced to the Chupcan Tribe (southern Carquinez Straits to Mt. Diablo region), the Alson Ohlone Tribe of the Fremont/Alviso coastal plain , and the Seunen Ohlone Tribe of the Livermore Valley/Dublin region. When Ernest Thompson, Jr. passed away on September 17, 1984, his death certificate identified him as a Security Guard for the Alcatraz Federal Prison.

38-2 cont'd.

The Ohlone people have left a record of approximately 13,000 of human history, and today they are still trying to overcome the onus of their sentence of "extinction" placed upon them by scholars and politicians by continuing to educate the general public, academic institutions and the Federal Government. After eight years of being in the petitioning process, and after the submittal of several thousand pages of documentation, on May 24, 1996 the Bureau of Indian Affairs' Branch of Acknowledgment and Research (BAR) made a positive determination, but reluctantly acknowledged that:

Based upon the documentation provided, and the BIA's background study on Federal acknowledgment in California between 1887 and 1933, we have concluded on a preliminary basis that the Pleasanton or Verona Band of Alameda County was previous acknowledged between 1914 and 1927. The band was among the groups, identified as bands, under the jurisdiction of the Indian agency at Sacramento, California. The agency dealt with the Verona Band as a group and identified it as a distinct social and political entity.

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Colored Reflections - The Sixties, The Muwekma Ohlone Tribe Page 11 of 12

Over the past 18 years, the Muwekma have politically, spiritually and culturally revitalized themselves and formed a formal tribal government in compliance with Congressional and the Department of the Interior's criteria. Presently, the Muwekma Tribe is seeking reinstatement and reaffirmation as a Federally Acknowledged Indian Tribe. The Muwekmas have spent these past 18 years conducting research and submitted to the Branch of Acknowledgment (BAR) over several thousand pages of historical and anthropological documentation as part of the petitioning process.

As Muwekma Elders are passing, the Muwekma Tribe has yet to advance through the "Recognition Process" for complete reaffirmation of its Acknowledged status. For other tribes it has been a long and difficult ordeal as well. For example, it took the Cowlitz Tribe of Washington 22 years to go through the Recognition Process and the Samish Tribe of Washington waited 25 years, including litigation in Federal Court for 8 years, before they won their Federal Recognition. As a result of their litigation, the Federal Courts decided that the Samish Tribe were denied "Due Process" by the Department of the Interior, BIA and BAR.

38-2 cont'd.

Presently, there are approximately over 200 tribes in the United States petitioning for recognition. After coming "back from extinction", the Muwekmas now face, along with approximately 40 other California Indian Tribes, BIA bureaucratic inaction and obstruction. The Muwekmas, who have never left their ancestral homelands, have been waiting for a response from the United States Government since 1906. In 1972, as a result of the 1928 California Indian Jurisdictional Act, the U.S. Government made a token payment of $668.51 (this is with interest back to 1852) as just compensation for the illegal acquisition (theft) of California land, minerals and resources. This payment was issued to help California Indians build their future upon.

More recently, another major decision was made by the Interior Department, on March 26, 1998, Deborah Maddox, Director of the Office of Tribal Operations issued the following decision on behalf of the Department of the Interior:A review of the Muwekma submissions shows that there is sufficient evidence to review the petition on all seven mandatory criteria. The Bureau of Indian Affairs (BIA) is placing the Muwekma petition on the ready for active consideration list on

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March 26,1998.

Now the Muwekma will wait perhaps another 20 years or so in a bureaucratic limbo and holding cell, before the Branch of Acknowledgment and Research decides to review and process their petition. As a result, it is fitting that the tribal representative of the Muwekma Ohlone Tribe of the San Francisco Bay, stand this day on Alcatraz Island along with their Native American cousins, on this rock - a bleak beacon to the world - to bring attention once again to the injustices confronting not only the Muwekma, but all of the other tribes in the Western Hemisphere who hope and pray that one day they will attain some semblance of justice and obtain their due recognition once again as a Federally Acknowledged Tribe.

Aho!

38-2 cont'd.

by Alan Leventhal

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Letter 38: Da Costa, Francisco (1/11/10)

Response to Comment 38-1

Refer to Master Response 1 (SB 18) for a discussion of consultation with the Native American community under SB 18.

Response to Comment 38-2

Refer to Master Response 1 (SB 18) for a discussion of consultation with the Native American community under SB 18.

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Letter 39: City and County of San Francisco, Historic Preservation Commission (1/12/10)

Letter 39

SAN FRANCISCO
PLANNING DEPARTMENT

January 12, 2010

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Mr. Bill Wycko
Environmental Review Officer
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Dear Mr. Wycko,

On December 16, 2009, the Historic Preservation Commission (HPC) held a public hearing and took public comment on the Draft Environmental Impact Report (DEIR) for the proposed Project at Candlestick Point/Hunters Point Shipyard Phase II. The HPC continued the item to January 6, 2010. After discussion, the HPC arrived at the comments below:

- HPC does not agree with the logic of the Historic Resource Evaluation Report (HRER). Given the national significance of the Hunters Point Shipyard during the WWII era and its Post War Era significance, there are very few resources identified and associated with the site's history.

  The conclusions drawn from the HRER are inconsistent with the Context Statement. The context statement states the site is of National significance during the WWII period for its role as a Naval Shipyard and during the post war period as one of the only research facilities of its kind. The Context Statement states that these areas of importance are reflected in the built environment. Yet the HRER reaches the conclusion that few buildings are eligible for the California or National Register. While we agree with the conclusions in the Context statement regarding the site's significance, we feel the HRER does not adequately acknowledge the way the site's history is reflected in the built environment and dismisses many potential historic resources with inadequate analysis and documentation. In both the Context Statement and the HRER the significance of the architecture is not fully analyzed in terms of the history of modern architecture and the acceptance by the government of modern architecture as an appropriate style. The fact that some of this work represents some of the earliest modern work in San Francisco with glass curtain wall systems is not explored. Many of the architects are not identified, buildings are insufficiently examined, and the boundary of the Potential Historic District is too narrowly drawn. Many of the buildings are considered to be ineligible for the National Register because it is stated that the building type and architectural expression was common on military bases around the country, but there is no documentation or examination of whether these types of buildings are now as common nationally as they once might have been at the time they were built. **39-1**

  The Context Statement considered the area a significant historic district. However, the HRER does not set forth a methodology which measures existing site features (buildings, objects and structures) against the importance and value of the Hunters Point Shipyard identified in the Context Statement. Nor does the HRER provide sufficient information on the extant resources to support its conclusions about contributing/non-contributing resources nor the validity of the boundaries established for a potential historic district.

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- Given the historic significance of the site, Alternative 4 is not an adequate Preservation Alternative. There should be a preservation alternative that meets most or all of the project objectives. Alternative 4 is not sufficient as a Preservation Alternative because most of its focus is not directed to the retention of historic resources. There should be an alternative where preservation is its principle focus and other goals are secondary. This preservation alternative should attempt to achieve the development's (square footage) goals through retention and adaptive use of contributing resources. If all of the larger potentially historic buildings cannot be reused, attempts might be made to save at least a few of the larger ones and more of the smaller ones over a wider area. 39-2
- Retaining, celebrating and promoting the history of the site should be among the project objectives. In addition, the story of the site should be integrated throughout the project site as interpretation and public art. Incorporation of the site's history is important for San Francisco history, would significantly enrich the proposed new development, and would be an important marketing tool. 39-3
- The DEIR states that the Candlestick Park Stadium (proposed for demolition) is not historically significant, yet it has not been evaluated under the California Register of Historic Places (CRHR). It was found not eligible for the National Register. The CRHR is called out in CEQA as the measure for historic resource evaluations. However the HRER does not evaluate the resource against this criterion. This is a significant flaw in the document. Evaluation of the eligibility should be made not only per the National Register, but also the California Register. 39-4
- The Hazardous Waste section of the DEIR assumes demolition of all buildings, making it difficult to evaluate hazardous materials issues in the event of preservation. 39-5
- The Feasibility Study prepared by Page & Turnbull and CBRE examining the reuse of buildings 211, 231 and 253 should identify other ways to meet the project objectives. More thought and alternative potential uses should be studied for the existing buildings. The feasibility study should address and re-study and potentially re-program a larger area of the site in examining how the existing buildings could be accommodated in the project and not just this area in isolation. This could add value to the project site by keeping the existing character and adding to the market value. 39-6
- More diagrams should be provided to show what individual buildings are kept and removed for the various alternatives. The existing graphics as they relate to Cultural Resources are not very clear. 39-7

The HPC appreciates the opportunity to participate in review of this environmental document.

Sincerely,

Charles Edwin Chase, President
Historic Preservation Commission

SAN FRANCISCO
PLANNING DEPARTMENT

2

Letter 39: City and County of San Francisco, Historic Preservation Commission (1/12/10)

All of the comments provided in this letter are substantially similar to the comments provided in Letter 77; however, where this letter was submitted as a "final" letter by the Historic Preservation Commission, Letter 77 represents their "draft" letter. For that reason, full responses are provided in this letter.

Response to Comment 39-1

Draft EIR Section III.J (Cultural Resources and Paleontological Resources), pages III.J-8 through III.J-15 describes the historic context of the HPS from nineteenth century development of private shipyards, Navy involvement in the early twentieth century, the World War II period of Navy control and expansion, to the post-World War II activities of nuclear testing support and the Naval Radiological Defense Laboratory (NRDL). The Draft EIR context and analysis is based on Circa: Historic Property Development *Bayview Waterfront Project Historic Resources Evaluation: Volume II, Historic Resource Survey and Technical Report*, October 2009, as cited on p. III.J-1 ("Circa Report"). The CIRCA Report is also included as Appendix J2 (CIRCA, Historic Resources Survey, October 2009) of this C&R document.

Citing the Circa Report, Draft EIR pages III.J-21 through III.J-25 evaluate the buildings and structures at HPS. The Draft EIR notes that some structures at HPS have been previously identified as significant historic resources as part of the NRHP-eligible Hunters Point Commercial Drydock Historic District (refer to Draft EIR page III.J-21). Additionally, Drydock 4 was previously identified as individually eligible for the NRHP. On pages III.J-22 through III.J-25, the Draft states that the Circa Report identified the CRHR-eligible Hunters Point Commercial Drydock and Naval Shipyard Historic District. As stated in the Circa Report and on Draft EIR pages III.J-24 through III.J-25, the proposed Hunters Point Commercial Drydock and Naval Shipyard Historic District represents the broad history of HPS. The potential Hunters Point Commercial Drydock and Naval Shipyard Historic District is comprised of a collection of buildings, structures, and objects associated with the area's transition from early commercial drydock operation through its period of radiological research. The district encompasses a range of buildings from each of the three primary periods of significance for HPS: early drydocks, Navy use in World War II, and radiological research in the World War II and post-war periods. Related site features associated with the district include light standards, rail spurs, crane tracks, drydock perimeter fencing, bollards, and cleats.

The potential Hunters Point Commercial Drydock and Naval Shipyard Historic District encompasses a cross section of buildings, structures and objects, varying in age and function from the early commercial drydock operations (1903), through the Shipyard's function as a high tech naval ship repair and decontamination facility in World War II, and as a ship repair and radiological research facility in the post-war period (1946-1969). The industrial buildings (140, 204, 205, 207, 208, 211, 231, 224, and 253), Drydocks 2 and 3, and other related site features represent a microcosm of the historical development and context of HPS. The potential district contains the previously determined National Register eligible buildings (automatically listed as a district on the CRHR) as well as recommended contributors to an expanded, potential CRHR historic district (including Drydock 2, Drydock 3, and Buildings 140, 204, 205, 207, 208, 211, 224, 231, and 253). The proposed contributors to the CRHR-eligible district include the previously eligible NRHP district contributors plus Buildings 208, 211, 224, 231, and 253. Though the condition of the buildings ranges from good to fair, the Circa Report found that the potential CRHR

district as a whole retains a high degree of integrity of location, design, setting, workmanship, materials, association, and feeling.

A district can comprise both features that lack individual distinction and individually distinctive features that serve as focal points. While Buildings 208, 211, 224, 231, and 253 may not be individually eligible for listing on the CRHR, when combined with the historic drydocks and associated buildings, the district is a physical representation of the broad history of HPS. Draft EIR Figure III.J-3 (Potential Historic Structures), page III.J-26, illustrates views of buildings 211, 231, and 253. Figure III.J-3 has been revised in Section F (Draft EIR Revisions) to include a photograph of building 224. Draft EIR Figure III.J-2, page III.J-23, depicts the boundaries and location of structure in the CRHR-eligible district.

Among the structures identified as part of CRHR-eligible district, Circa found, as stated on Draft EIR pages III.J-9 to -10:

> The first building built by the Navy in World War II was Building 321 (1942-1945), the Inside Machine Shop. Constructed in 1942 by the San Francisco-based firm of Barret & Hilp and situated adjacent to Drydock 2, the curtain-wall building was for a brief period the only major functional shop at the Shipyard as the United States headed into the war. Building 211 was also one of the first erected by the Navy. The building was the original Shipfitters Shop and is a good representation of the typical semi-permanent, monitor-room shop building constructed throughout the Shipyard during the World War II era. Building 224, a concrete air raid/bomb shelter building built in 1944, and later used as an annex for the NRDL, is a unique representative of its type at the Shipyard. The only building within the district completed after World War II is the Optical, Electronics and Ordinance Building, Building 253, finished in 1947 and attached to the west elevation of Building 211. This concrete frame curtain-wall building, designed for the Navy by local architect Ernest J. Kump, was a highly specific repair and research facility.

Buildings 208, 211, 231, 224, and 253 thus represent important range of structures from the World War II and post-war era in terms of Navy history at HPS (Building 231), design (Building 211), uniqueness (Building 224), and a specific research and repair facility by a noted architect (Building 253).

The Circa Report evaluated other World War II– and post-war-era structures at HPS, and concluded that those structures would not meet criteria for eligibility for the CRHR or NRHP as individual resources, or as part of an historic district. The Circa Report includes individual discussions of World War II–era buildings and structures, Buildings 101, 110, 134, 214, 215, 351/351A, 400, 404, 405, 406, 407, 505, and 809, and Drydocks 5, 6, and 7 (Circa Report, pages 77–84). The Circa Report discusses the design historic associations, condition, and, if known, the architect of each of these structures. The Circa Report provides conclusions on lack of eligibility for National, California, or local historic registers. The Circa Report also describes the design, historic associations and, if known, the architect of four post-war era buildings, Building 411, 521, 707, and 709 (Circa Report, pages 84–88). The report provides conclusions as to their lack of eligibility for National, California, or local registers. In addition, the Circa Report includes Table 1 (Remaining World War II Buildings Not Found to Be Significant) and Table 2 (Remaining Post World War II Buildings Not Found to be Significant) (Circa Report, pages 91–93).

Overall, the Circa Report evaluates every structure extant at the HPS as of 2008, with regard to eligibility for National, California, and local historic registers. Information on each structure was compiled in a CDPR Primary Naval Forms (DPR 523a). The forms provide the basis for initial screening of the potential significance of each structure. As presented in the Circa Report and the Draft EIR, the Hunters Point Shipyard, while a

large site, currently includes only a limited number of structures that meet criteria for listing on the NRHP or the CRHR, and does not contain resources that would meet criteria for a larger historic district.

The Circa Report found that the extant buildings located outside of the proposed Hunters Point Commercial Drydock and Shipyard Historic District do not qualify as contributors to a larger historic district because (1) better examples of these types of buildings are found within the proposed district, within the Bay Area, and on military bases throughout the United States; (2) inclusion of these Shipyard buildings within the proposed historic district would not expand or augment the historic context or architectural value of the proposed historic district; and (3) the site does not retain enough integrity as a whole to justify an expansion of the proposed district. The Circa Report, as cited in the Draft EIR and as discussed above, includes substantial information to support those conclusions.

In addition, with regard to the "rarity" of the World War II–era military/industrial buildings at Hunters Point Shipyard, Circa conducted additional research and site visits of such buildings at other military bases in the Bay Area ("Circa Memo," also provided as Appendix J3 [CIRCA, Historic Resources Evaluation for Candlestick, April 2010] of this C&R document).[108] The Circa Memo reported on research and site visits for bases that had (1) proximity, (2) reasonably similar historic context, and (3) similar building typologies. The site visits were conducted at Mare Island Naval Shipyard, Richmond Shipyards, Alameda Naval Air Station, and Oakland Army. The Circa Memo noted that selected former military sites with similar World-War-II shipyard context were compared to identify the extent to which a "common" building typology was represented. The general building types at HPS outside the CRHR-eligible Hunters Point Commercial Drydock and Naval Shipyard Historic District once considered common with the potential to now be considered rare due to the extent of base closures and redevelopment are (1) warehousing, supply and industry support, (2) shops, shipbuilding and repair (large machine/assembly shops, wood clad shops and metal-clad shops), and (3) residential/personnel services.

The Circa Memo found that, in most cases, the HPS buildings (for example, Buildings 117, 251, 274, 400, 404, and 810) were inferior to similar buildings at other bases in regard to physical integrity and condition. Most, if not all, of the similar buildings at the other bases retain their original cladding materials and windows, among other character defining features. Many of these similar buildings types are being retained and are planned for reuse. Portions of many of these former bases have been found eligible for the NRHP or are listed as NRHP historic districts. Circa reported that Mare Island Naval Yard has a superior and more comprehensive collection of similar shop, storehouse, and residential and related building types from the World War II period, and that these buildings have a higher level of physical integrity than those at Hunters Point Shipyard. The Circa Memo includes an appendix with comparative photographs of buildings at HPS, Mare Island, Oakland Army Base, and Alameda Naval Air Station. The appendix documents the occurrence and general condition of similar buildings at those other bases.

The Circa Memo therefore concluded that the boundaries of the CRHR-eligible Hunters Point Commercial Drydock and Naval Shipyard Historic District encompass a district that is contiguous, with buildings, structures, and objects that are representative of all phases of historic development at Hunters Point Shipyard (through the period of significance) and retain a high level of integrity. The same cannot be said

[108] Circa: Historic Property Development, *Memorandum on Comparative Rarity of World-War-II Era Buildings at Hunters Point Shipyard*, April 2010 (refer to Appendix J4 [CIRCA, Draft HPS Rarity Memorandum (April 2010)]).

of the remaining portions of HPS given the extent of loss of integrity and lack of rarity compared to other intact military installations in the Bay Area.

With regard to architects associated with HPS buildings, the Circa Report includes information where available. Most structures dating from the pre-World War II, and later periods, at HPS cannot be attributed to an individual architect or firm. Many World War II–era structures are noted, as based on standard plans of the Navy Bureau of Yards and Docks:

> Though the buildings were constructed as part of a vast support facility built to assist with the activities carried out at Mare Island and at Hunters Point through 1974, simple association with historic events or trends is not enough, in and of itself, to qualify under Criterion A/1. Each property's specific association must be considered important. Since none of the buildings appear to have made particularly significant contributions to the Navy's war effort or to the operations of the NRDL during that time, they don't exhibit a level of associative significance necessary for listing on the NRHP, CRHR or for local listing. From a design standpoint, the majorities of these buildings were build using standard Bureau of Yards & Docks plans or variations thereof and are similar to other WW II-era military installations located through the Nation. While some notable architects, engineers and contractors were involved in the design and construction of a number of buildings at the shipyard, this owes more to the fact that civilian architectural contracts were scarce during the WWII-era and military contracts abundant. Even in cases where noted architectural firms were involved in the design/construction process, it was common practice to use the many standardized Bureau of Yards & Docks plans available, adapting them to specific conditions at each base. As none of the buildings appear to be distinguished examples of their type, period or method of construction, do not represent the work of a master or possess high artistic value, they do not appear to be eligible for the NRHP, CRHR or for local listing under Criterion C/3. Further, many exhibit diminished integrity due to additions, alterations and exposure to the elements.
>
> In general, the buildings do not qualify as contributors to a larger historic district because 1) better examples of these types of buildings are found within the proposed district, within the Bay Area, and on military bases through the United States; 2) inclusion of these buildings within the proposed historic district would not expand or augment the historic context or architectural value of the proposed historic district; and 3) the buildings do not retain enough integrity as a whole to justify an expansion of the proposed district. (Circa Report, pages 88-89)

Building 253, the Optical, Electronics and Ordnance Building, was, as noted on Draft EIR p. III.J-10, designed by San Francisco architect Ernest J. Kump. Building 253, identified as a contributory structure in the potential CRHR Hunters Point Commercial Drydock and Naval Shipyard Historic District is the only World War II or post-war era structure at HPS directly attributed to a specific notable architect. Ernest J. Kump, Jr. (1911–1999), achieved recognition among American modernist architects of the late 1930s and early 1940s. His work is primarily for known for educational facilities, including in the Bay Area, for example, Acalanes High School, in Lafayette, 1939–55; Encinal High School, in Alameda, 1951–52; and Foothill College, in Los Altos, 1961.

The Circa Report notes that for Building 505, the Navy Exchange/Gymnasium, "Navy records also indicate Timothy Pflueger designed the barber shop and chaplain's office portions of this otherwise standard plan building." (Building 505 was not accessible at the time of the Circa Report for review of the condition of the interior spaces attributed to Pflueger.) Timothy Pflueger was a prominent architect, but the Circa Report, page 83, concludes:

> The involvement of notable architects and engineers in the design of military buildings during wartime was not uncommon and the portions of Building 505 designed by the firm of Timothy

> Pflueger are not distinguished examples of his work. Therefore, the building does not appear to qualify for individual listing on the National, California or local registers.

Among post-war structures, for Building 411, the Shipfitters, Welders, & Boilermaker Building, Circa, pages 85–86, notes:

> Austin Willmot Earl, a San Francisco Structural Engineer designed Building 411 for the Navy and Albert Kahn & Associates Architects & Engineers, Inc. appears to have been contracted as for additional design consultation. Retained as the consulting structural engineer for a number of projects at hunters Point Shipyard, Austin W. Earl received the Civilian Merit Award for his work during World War II for the Navy's Bureau of Yards and Docks. Earl became a recognized authority on waterfront construction and was responsible for the engineering of many industrial structures at Mare Island, Hunters Point and Port Chicago. It is unclear to what extent the firm of Albert Kahn & Associates was involved in the design of this building; however, Albert Kahn himself was not involved n the design or construction for Building 411 as he died in 1942. The architectural plans are dated 1945 and the building was not completed until 1947. Barret & Hilp constructed the building.

Austin Earl was involved with engineering design for tunnels, wharves and other facilities, but Building 411 is not considered the work of a master. Therefore, the Circa Report evaluation of historic resources at HPS presented in the Draft EIR provides a sufficient basis for the identification of the significance of contributory structures and boundaries of the CRHR-eligible Hunters Point Commercial Drydock and Naval Shipyard Historic District. The Circa report appropriately evaluated other buildings and structures at HPs and provides sufficient basis for concluding that those structures would not meet criteria as individual historic resources or as contributors to a larger historic district.

Response to Comment 39-2

Refer to Response to Comment 28-1 with regard to Alternative 4 (Reduced CP-HPS Phase II Development, Historic Preservation) and Subalternative 4A (CP-HPS Phase II Development Plan with Historic Preservation) as preservation alternatives that would retain the structures in the CRHR-eligible Hunters Point Commercial Drydock and Naval Shipyard Historic District and would avoid significant adverse effects on historic resources.

Response to Comment 39-3

The Project would retain and interpret historic features of Hunters Point Shipyard, including Heritage Park (essentially the NRHP-eligible Hunters Point Commercial Drydock Historic District), as described in Draft EIR Chapter II (Project Description), Hunter Point Shipyard Piers, Drydocks and Waterside Uses, page II-23, and Section III.J, pages III.J-33 to -34. Draft EIR Section III.P (Recreation), page III.P-27 identifies other features that would reference the history of the site. Near Northside Park, the open-air African Marketplace would form an east-west promenade crossing the park, and would relate to the African-American community history in the Bayview-Hunters Point neighborhood. The Waterfront Promenade would provide evidence of the historic qualities of the industrial waterfront, which would be incorporated into tree bosques, seating areas, lawn panels, artworks, and interpretive gardens. Grasslands Ecology Park at Parcel E would contain a visitor/interpretive center. Figure III.P-2 (Proposed parks and Open Space), Draft EIR page III.P-14, illustrates the location of these Project features.

Mitigation measures MM CP-1b.1 and MM CP-1b.2 would provide for documentation of the Shipyard consistent with Historic American Building Survey (HABS)/Historic American Engineering Record

(HAER) Historical Report Guidelines, under HABS/HAER Level II and Level III standards and for interpretive displays at the Shipyard of a number and type subject to the approval of the Historic Preservation Commission.

Response to Comment 39-4

Draft EIR page III.J-21, Historic Resources—Candlestick Point, discusses Candlestick Park stadium under NRHP and CRHR criteria. On the basis of documents cited, the Draft EIR found that Candlestick Park stadium, built in 1960, would not meet NRHP or CRHR criteria as an historic resource. Draft EIR page III.J-33, Impact CP-1a: Change in Significance of Historic Architectural Resources at Candlestick Point, therefore concluded that demolition of Candlestick Park stadium with the Project would be a less than significant effect on historic resources.

Because Candlestick Park stadium will be 50 years old in 2010, an additional Historic Resource Evaluation (HRE) for Candlestick Park stadium was completed (refer to Appendix J3 [CIRCA, Historic Resources Evaluation for Candlestick, April 2010] of this C&R document).[109] The HRE reviews the history of Candlestick Park stadium, and evaluates the structure under NRHP and CRHR criteria. The NRHP criteria are summarized on Draft EIR pages III.J-27 and III.J-28:

> [E]eligible resources comprise districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and any of the following:
>
> a) Are associated with events that have made a significant contribution to the broad patterns of our history
>
> b) Are associated with the lives of persons significant in our past
>
> c) Embody the distinctive characteristics of a type, period, or method of construction, or that possess high artistic values, or that represent a significant distinguishable entity whose components may lack individual distinction
>
> d) Have yielded or may be likely to yield, information important to history or prehistory

CRHR criteria are similar, as presented on Draft EIR page III.J-29:

> In general, an historical resource is defined as any object, building, structure, site, area, place, record, or manuscript that:
>
> (a) Is historically or archaeologically significant, or is significant in the architectural, engineering, scientific, economic, agricultural, educational, social, political or cultural annals of California; and
>
> (b) Meets any of the following criteria:
>
> 1) Is associated with events that have made a significant contribution to the broad patterns of California's history and cultural heritage;
>
> 2) Is associated with the lives of persons important in our past;
>
> 3) Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of an important creative individual, or possesses high artistic values; or
>
> 4) Has yielded, or may be likely to yield, information important in prehistory or history.

[109] Circa: Historic Property Development, *Historic Resource Evaluation for Candlestick Park Sports Stadium, San Francisco, CA*, April 2010.

The HRE presents the history of development of Candlestick Park stadium as part of the expansion of Major League Baseball to the West Coast in the late 1950s, with the New York Giants moving to San Francisco and the Brooklyn Dodgers moving to Los Angeles. The newly renamed San Francisco Giants played their first two seasons at the existing Seals Stadium (since demolished). Candlestick Point stadium opened in the 1960 season. The site was owned by Charles Harney, one of San Francisco's most well known contractors, who sold the property to the City for $2.7 million. Harney was also the contractor for the stadium. The stadium and the site are owned by the San Francisco Recreation and Park Department. The original stadium was a 43,765-seat baseball park, with a two-level grandstand around the infield, and bleacher seating around the outfield. Extensive surface parking was provided around the stadium. As discussed below, the stadium has been altered since 1960 and now serves as football stadium for the San Francisco 49ers.

The HRE analyzes each of the NRHP and CRHR criteria noted above and concludes that Candlestick Park stadium meets certain of the criteria for association with events or persons, but does not possess sufficient integrity to qualify for listing on the NRHP or CRHR. The HRE also notes that Candlestick Park stadium would not appear to meet criteria as a San Francisco landmark under *Planning Code* Article 10. The HRE cites and concurs with earlier evaluations of the stadium that similarly found significant associations with events or persons, but that the property does not possess integrity as an historic resource.

Therefore, Candlestick Park stadium is not an historic resource, and the Draft EIR correctly concludes that demolition of Candlestick Park stadium with the Project would be a less than significant effect on historic resources.

For information, key findings of the HRE are summarized below:

Association with Events

Candlestick Park stadium meets criteria for association with significant events, the expansion of Major League Baseball to the West Coast in the late 1950s, While the HRE notes other events associated with the stadium, such as important baseball and football games, and the San Francisco Giants – Oakland Athletics World Series game during the October 1989 Loma Prieta earthquake, the HRE concludes that those other events would not meet NRHP and CRHR associative criteria.

Association with Persons

Candlestick Park stadium meets criteria for association with significant persons, the baseball career of Willie Mays, regarded as one the greatest baseball players of all time. Mays joined the New York Giants in 1951, and played with the San Francisco Giants at Candlestick Park from 1960 to 1972. As stated in the HRE, "he is the one player in San Francisco Giants history whose achievements could be considered to be of exceptional significance in the history of baseball. In addition, enough time has passed to accurately evaluate the significance of Mays' career, and his stature among the greatest players of all time will not diminish in the future, even as later players surpass his accomplishments."

The HRE discussed other persons associated with the stadium, including prominent baseball players such as Orlando Cepeda, Juan Marichal, Willie McCovey, Gaylord Perry, and Barry Bonds, and prominent San Francisco 49ers football players, including Joe Montana and Jerry Rice, and concluded that those persons would not meet NRHP or CRHR associative criteria.

Design/Construction

The HRE found that the structure does not meet criteria for design and construction.

John S. Bolles (1905–1983) was the architect of Candlestick Park stadium and some of the later alterations." Bolles was responsible for other buildings in the Bay Area, including residential structures, including Ping Yuen public housing in Chinatown, the Anna Waden branch public library in Bayview, and other commercial buildings in Northern California. His IBM campus in San Jose includes Building 25, found eligible for the NRHP and CRHR. Bolles considered Candlestick Park stadium his most important project. However, the HRE found that Bolles would not be considered a "master" architect. Candlestick Park stadium is not the work of a master.

Candlestick Park stadium is a transitional design between baseball parks before the 1950s and dual-use stadiums developed in the 1970s. While Candlestick Park stadium includes features such as concrete construction and a set-back grandstand that reduced impaired sightlines compared to older stadiums, the HRE found that it does not represent an example of contemporary stadium design form the 1960s and 1970s as was found in Los Angeles, Oakland, St. Louis, or New York.

The original design as a 43,765-seat baseball stadium was eventually altered to dual baseball- football use in 1971, and by 1994 had 71,000-seats. Since 2000, when the Giants opened the baseball park at China Basin, now known as AT&T Park, Candlestick Park stadium is football only. Many other modifications have compromised the integrity of the original design. Extensive alterations include (but are not limited to): an increase of the seating capacity from the original 43,765 to 58,000 in 1993 and 71,000 in 1994, major reconfiguration of the grandstand, enclosure of the baseball outfield and installation of retractable seating in right field, replacement of 30,000 original wood seats with plastic seats, eight new ticket booths, enlarged and rehabbed press box, new lights, and the replacement of bluegrass field with Astroturf. These and other alterations have resulted in the stadium's current primary football-use design.

The HRE found that the structure does not possess distinctive or unique design or construction features of those periods.

Information Value

The HRE found that demolition of Candlestick Park stadium would not have a significant effect on the information value of archaeological resources at the site. The Draft EIR found that archaeological resources expected to be found on the Candlestick Point site could have important research value and would, therefore, be legally significant under CEQA. Any potential archeological resources that are covered by existing development would remain covered and unavailable unless the site is redeveloped. Adverse effects of construction-related activities to archaeological resources at Candlestick Point would be less-than-significant through implementation of the CP-HPS Phase II ARDTP, as discussed on Draft EIR pages III.J-36 through 39.

Integrity

The HRE evaluates the integrity of Candlestick Park stadium according to NRHP and CRHR criteria. To retain integrity a property must have most of the seven aspects of integrity as defined by the NRHR. The property has been evaluated for integrity by Caltrans, the State Office of Historic Preservation, Jones &

Stokes, and Circa, all of whom have found that Candlestick Park has a significantly diminished level of integrity due to 30 years of ongoing alterations resulting in cumulative degradation of the historic significance of the property. These alterations, both major and minor, diminished the stadium's integrity of design, setting, materials, workmanship, feeling, and association.

> **Design.** The stadium has been extensively altered over the course of thirty-years since the early 1970s, especially with the enclosure of the stadium seating and removal of the baseball diamond for football use. The property does not retain integrity of design.
>
> **Setting.** The stadium is on an 81-acre site and is surrounded by a paved parking lot with a chain link fence. Landscaping is minimal and consists primarily of clusters of trees around both the north and south (main) gates; a succession of trees defines the outside border of the main access road immediately surrounding the stadium. The setting has been somewhat altered due to the modification of the stadium envelope. The property retains some integrity for setting.
>
> **Materials.** The stadium is primarily comprised of reinforced concrete and steel that has been enlarged, altered, repaired and painted over the course of 30-years. A majority of character defining elements of a baseball field (diamond field layout, bases, pitcher's mound, catcher's box, home plate, in-filed, out-field and foul lines) and stadium (score board, original seating, original press boxes, hospitality suites, concession stands, offices, entrances/exists turnstiles, ticket booths, stairwells, elevators) have been removed or significantly altered. The property does not retain integrity of materials.
>
> **Workmanship.** The stadium has been extensively altered over as noted in the HRE; therefore, it has lost much evidence of craft. The property does not retain integrity of workmanship.
>
> **Feeling.** Candlestick Park was designed and constructed as a baseball stadium. The enclosure of the stadium seating around the original outfield, reconfiguring of the seating and alteration of the diamond configuration eliminated the feeling of a baseball field. While it reflects the feeling of a stadium, it does not reflect that of a baseball stadium. The property does not retain integrity of feeling.
>
> **Association.** Candlestick Park's historic association was once that of the first Major League Baseball park on the West Coast. Its change to a dual purpose, and then to primarily a football stadium have removed the baseball association. The property's association with the introduction of Major League Baseball on the West Coast would not extend to the 1970s. By that time, there were Major League Baseball teams in Anaheim, Oakland, and San Diego, in addition to San Francisco and Los Angeles. The property's association with the career of Willie Mays would extend only to 1972, before Mays was traded to the New York Mets. Almost all of the home games that Mays played during his Candlestick Park years were in the pre-expansion stadium, with its open outfield and upper deck seating only in the infield areas. The property does not retain integrity of association.

To clarify the evaluation of Candlestick Park stadium, the following text is revised on Draft EIR page III.J-21, under Historic Resources—Candlestick Point, first paragraph, replacing sentence four, and adding footnote 251a:

> The Candlestick Point site does not contain historic resources. In 2007, Jones & Stokes completed a review of Candlestick Park stadium, built in 1960, for potential eligibility in the NRHP.[251] The evaluation determined that the stadium did not meet the criteria to qualify as an exceptional property less than 50 years old. The report noted extensive alterations since its construction, including the expansion and enclosure in 1970 and more recent modifications to convert the stadium into a football-only facility. ~~The stadium, if reviewed at the 50-year mark, would not meet criteria for listing on the NRHP or CRHR due to lack of physical integrity resulting from the extensive alterations discussed above.~~ A recent Historic Resource Evaluation (HRE) reviewed the stadium as a 50-year-old structure and the HRE concluded that, while the stadium would meet certain NRHP and CRHR criteria for association with events and persons, specifically the expansion of Major League Baseball

> to the West Coast and the career of Willie Mays with the San Francisco Giants, the stadium does not retain sufficient integrity to qualify as an historic resource under NRHP or CRHR criteria.[251a] …
>
> [251a] Circa: Historic Property Development, *Historic Resource Evaluation for Candlestick Park Stadium, San Francisco, CA*, April 2010 (refer to Appendix J3 [CIRCA, Historic Resources Evaluation for Candlestick, April 2010]).

The following text is revised on Draft EIR page III.J-33 under Impact CP-1a (Change in Significance of Historic Architectural Resources at Candlestick Point), first paragraph:

> The Project would demolish Candlestick Park stadium, and would demolish and redevelop the Alice Griffith public housing site. Neither Candlestick Park stadium, nor the Alice Griffith public housing sites are considered eligible for listing on the NRHP, CRHR, or City landmark registers. As discussed above, ~~Jones & Stokes completed a review of Candlestick Park stadium in 2007 and determined that the stadium did not meet the eligibility criteria for the NRHP~~ while the stadium would meet certain NRHP and CRHR criteria for association with events and persons, the stadium does not retain sufficient integrity to qualify as a historic resource. …

Response to Comment 39-5

Draft EIR Section III.K (Hazards and Hazardous Materials) presents complete information on existing conditions, potential hazards, remediation measures, and legal and administrative procedures that would address hazardous conditions. Section III.K concludes that all Project hazardous material impacts related to site conditions would be less than significant with implementation of mitigation measures. (Refer to Draft EIR pages III.K-53 to -109.) For many areas of HPS Phase II, remediation activities already are underway as part Navy responsibilities under CERCLA. Remediation activities for groundwater contamination would in general assume that existing buildings would be demolished prior to soil remediation. As discussed in the Draft EIR and in Response to Comment 39-1 above, removal of most buildings at HPS Phase II would not affect significant historic resources, and, therefore, remediation activities would not have an adverse effect on such resources. Section F (Draft EIR Revisions) of this document discusses Subalternative 4A (CP-HPS Phase II Development Plan with Historic Preservation), which would retain the structures in the CRHR-eligible Hunters Point Commercial Drydock and Naval Shipyard Historic District and would avoid significant adverse effects on historic resources identified in the Draft EIR. Refer also to Response to Comment 28-1.

Subalternative 4A would retain and rehabilitate identified historic buildings in the Historic District using the Secretary of the Interior Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings (Secretary's Standards). As with the Project, Subalternative 4A would also retain the buildings and structures in the potential NRHP Hunters Point Commercial Drydock District. Subalternative 4A assumes that the Navy would transfer the identified historic buildings to the Agency and would not demolish them before transfer.

As part of Subalternative 4A, the retained buildings would require abatement of existing hazardous materials such as asbestos, PCBs from electric fixtures, and lead-based paint. Those abatement activities would be a typical step in a reuse and rehabilitation plan. The Navy is responsible for identifying the required extent of soil and groundwater remediation needed through the CERCLA process, as explained in Draft EIR Section III.K. The Navy will also clear all transferred buildings of any radiological hazards. Whether remediation activities would preclude rehabilitation or reuse of any of the buildings in the identified Hunters Point Commercial Drydock and Naval Shipyard Historic District is not known at this

time. Buildings 211 and 253 have been identified as radiologically impacted buildings. The Navy will not make a determination as to whether these buildings can be cleared for reuse until at the earliest fall 2010. As noted in Draft EIR Section III.K, pages III.K-27 to -28, Basewide Historical Radiological Assessment:

> The overall conclusion of the [Historical Radiological Assessment] HRA was that although low levels of radioactive contamination exist at HPS, no imminent threat or substantial risk exists to tenants, the environment of HPS, or the local community. This conclusion has been reinforced by subsequent Finding of Suitability for Lease (FOSL) issued by the Navy for areas in Parcel B and Building 606 in Parcel D and approved by the regulatory agencies authorizing leases for various uses involving hundreds of employees, artists, and visitors in close proximity to various "impacted" sites each day. A Basewide Radiological Work Plan was subsequently prepared, describing survey and decontamination approaches to be implemented in support of radiological release of buildings and areas.

In sum, before the Navy transfers property to the Agency, it will address all radiologically impacted buildings, and will either complete all remediation or complete a plan for remediation and transfer implementation to the Agency (early transfer). The extent to which Navy remedial work or remedial plans will impact the ability to reuse the historic buildings has not been definitely determined by the Navy at this time.

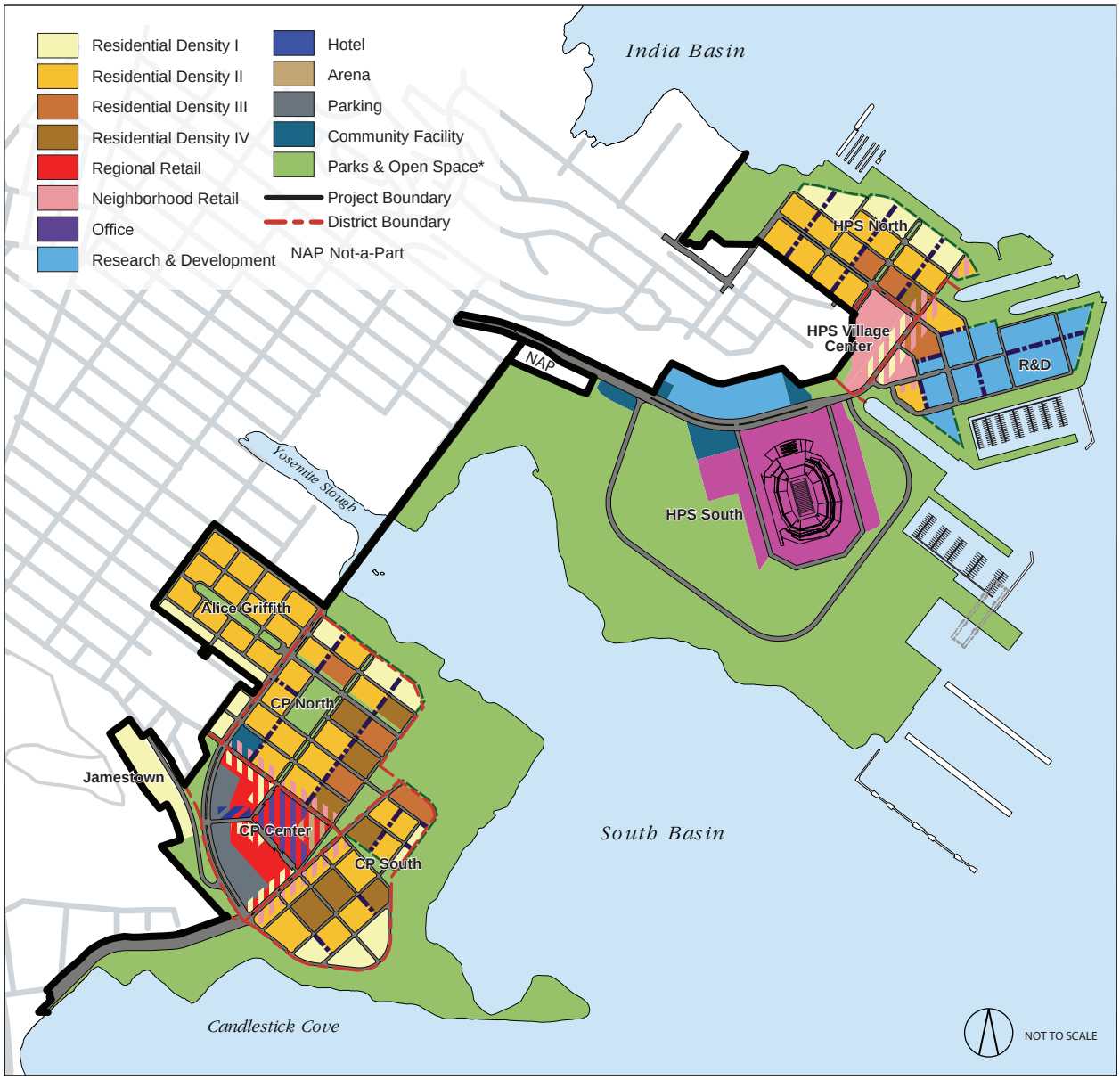
Response to Comment 39-6

Refer to Response to Comment 28-1 and Section F (Draft EIR Revisions) of this document, which discuss Subalternative 4A (CP-HPS Phase II Development Plan with Historic Preservation), which would retain the structures in the CRHR-eligible Hunters Point Commercial Drydock and Naval Shipyard Historic District. Subalternative 4A would reuse structures in the CRHR-eligible Hunters Point Commercial Drydock and Naval Shipyard Historic District with a mix of R&D and parking uses, as presented in the Page & Turnbull and CBRE feasibility studies cited in the Draft EIR (Appendices VI and V2, respectively). Subalternative 4A, as discussed in Section F, would include a reconfigured site plan and building program at HPS such that all Project uses would be accommodated.

Response to Comment 39-7

Draft EIR Figure III.J-2, page III.J-23, Potential Historic District, illustrates historic resources identified in the Draft EIR. The legend indicates the boundary of the NRHP-eligible Hunters Point Commercial Drydock Historic District, and the location of Drydocks 2 and 3, and Buildings 140, 204, 205, and 207 that are contributory to that district. Figure III.J-2 also indicates the boundary of the CRHR-eligible Hunters Point Commercial Drydock and Naval Shipyard Historic District (which encompasses the smaller NRHP district), and the locations of Buildings 208, 224, 211, 231, and 253 that are contributory to that district. Additionally, Drydock 4 was previously identified as individually eligible for the NRHP. (It should be noted that Building 208 would now be retained as part of the Project and all variants and alternatives.)

New Figure VI-3a (Subalternative 4A Land Use Plan) illustrates the site plan for Subalternative 4A (CP-HPS Phase II Development Plan with Historic Preservation Alternative), which would retain the structures in the CRHR-eligible Hunters Point Commercial Drydock and Naval Shipyard Historic District and would avoid significant adverse effects on historic resources.



SOURCE: Lennar Urban, 2010.

PBS&J 04.19.10 02056 | JCS | 10

FIGURE VI-3a

Candlestick Point — Hunters Point Shipyard Phase II EIR

SUBALTERNATIVE 4A LAND USE PLAN

Letter 40: Gould, Corrina (1/12/10)

1 of 2

Letter 40

Mr. Wycko,

I am requesting a meaningful conversation between the City of San Francisco and the original peoples about the development at Hunters Point.

Corrina Gould
10926 Edes Ave
Oakland, CA 94603
510-575-8408

Indian People Organizing for Change
10926 Edes Ave
Oakland, CA 94603
510-575-8408
shellmoundwalk@yahoo.com

January 12, 2010

Mayor Gavin Newsom, SF
City Hall Rm 200
1 Dr. Carlton B. Goodlett Pl.
San Francisco Ca 94102

Re: Planning Department Case No. 2007-0946E
Candlestick Park/Hunters Point Shipyard

REQUEST FOR IMMEDIATE MEANINGFUL CONVERSATION

Dear Mayor Newsom,

I am writing to you to ask that the City of San Francisco follow the law set out by the State of California to have a "meaningful conversation", with the original people of your city, the Ohlone, prior to development. Senate Bill 18 is intended to bring in the local American Indians to talk respectfully with the city and county planners to determine if sacred sites are or could possibly be disturbed during a project. It is the City and Counties responsibility to contact the list of people on the Native American Heritage Commissions roster if they are going to adopt or amend a general plan. As the law passed in 2005 and the general plan was amended in 2006, the Ohlone people should have been contacted at that point.

40-1

2 of 2

As an Ohlone woman that has been working on Shellmound and Sacred sites issues for over 10years, I am asking that the City of San Francisco work with my relatives in order for us to continue to treat our ancestors in a respectful manner. A Public Hearing is not "meaningful discussion". Please allow for the time allotted in the SB 18 law and bring the Ohlone people in for a meeting to discuss what the next steps should be.

40-1 cont'd.

Sincerely,

Corrina Gould, Ohlone/IPOC Organizer

Letter 40: Gould, Corrina (1/12/10)

Response to Comment 40-1

Refer to Master Response 1 (SB 18) for a discussion of consultation with the Native American community under Senate Bill 18 (SB 18).

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Letter 41: Hamman, Michael (1/12/10)

1 of 2

Letter 41

Michael Hamman, General Contractor
702 Earl Street
San Francisco, CA 94124

January 12, 2010

Mr. Stanley Muraoka
Environmental Review Officer
San Francisco Redevelopment Agency
One South Van Ness Avenue, 5th Floor
San Francisco, CA 94103

Mr. Bill Wycko
Environmental Review Officer
San Francisco Planning Department
1650 Mission Street
San Francisco, CA 94103

RE: Candlestick Point–Hunters Point Shipyard Phase II Development Plan DEIR.

Dear Mr. Muraoka and Mr. Wycko:

I am writing to comment on Section: **III J Cultural Resources**.

1. The analysis of the historical resources is inadequate because it is all based on a study that was done over twenty years ago – The Bonnie L. Baumberg, *Descriptions of Properties… 1988.* This study was referred to in subsequent documents: Louis S. Wall, Advisory *Council on Historic Preservation.* And is the basis for this DEIR.

   a. This document was not included in the available appendix and was unavailable for examination yet all the decisions as to what buildings are historic and which ones are not is based on this study. A new study should be done where the methodology can be reviewed by the community.

   b. Whatever the merits of this survey it is woefully out of date. Buildings that were only thirty years old at the time are now over fifty years old

41-1

1

2 of 2

and may indeed qualify for listing now, when they didn't then. This survey must be updated. The assumption that there are only eleven buildings of historical interest today in 2010 is completely unsubstantiated with current research.

41-1 cont'd.

2. The decision to destroy five buildings that are contributory (and necessary) to the creation of the potential *Hunters Point Commercial Dry Dock Historic District* was not analyzed. There was no discussion as to why the buildings should be destroyed. The cost of preserving and reusing these buildings was not studied, nor was it compared to the cost of replacing them. Without such study the decision to destroy them can not be justified. **There is no preservation alternative analyzed!**

41-2

3. In the event adequate research justifies destroying these buildings the proposed mitigation is completely inadequate.

   a. There is no analysis of the value of these buildings as buildings. And there is no mention of the value a Historic District might have. The preservation of each building has a value to the society at large and the creation of a Historic District has an ADDITIONAL value.

   b. There is no attempt to explain how the documentation of the buildings with photographs is sufficient to mitigate the loss of both the buildings and the potential Historic District.

   c. An appropriate mitigation for the destruction of the buildings and the potential Historic District would be to fund an endowment for the preservation of historic buildings in the Bayview. Such funding should be based on a portion of the value of that which is destroyed. Such a fee could be factored into the decision to preserve or destroy each building and an additional fee should be imposed should the number of buildings destroyed preclude the creation of the Historic District.

41-3

Sincerely,

Michael Hamman

2

Letter 41: Hamman, Michael (1/12/10)

Response to Comment 41-1

Draft EIR Section III.J (Cultural Resources and Paleontological Resources) recently evaluated all structures at Hunters Point Shipyard, as described on Draft EIR pages III.J-21 through -25, and cited in the Circa Historic Property Development, *Bayview Waterfront Plan Historic Resources Evaluation, Volume II: Draft Historic Resource Survey and Technical Report*, October 2009, on III.J-1. The reference to the Baumberg report in Draft EIR footnote 252, page III.J-21, is background information. That source did not come from the basis of conclusions about the significance of historic structures at the Shipyard.

Response to Comment 41-2

Refer to Response to Comment 39-1, for a discussion of the adequacy of the evaluation of historic resources at Hunters Point Shipyard Phase II. Refer to Responses to Comments 28-1 and 39-3, and to Section F (Draft EIR Revisions) of this document, with regard to Alternative 4 (Reduced CP-HPS Phase II Development, Historic Preservation) and Subalternative 4A (CP-HPS Phase II Development Plan with Historic Preservation) as preservation alternatives that would retain the structures in the CRHR-eligible Hunters Point Commercial Drydock and Naval Shipyard Historic District and would avoid significant adverse effects on historic resources.

Response to Comment 41-3

As noted in the comment, mitigation measure MM CP-1b.1, pages III.J-34 to -35, requiring documentation of the CRHR-eligible resources before demolition, would reduce, but not avoid, the significant effect on CRHR-eligible resources. Refer to Responses to Comments 28-1 and 39-3, and to Section F (Draft EIR Revisions) of this document, with regard to Alternative 4 (Reduced CP-HPS Phase II Development, Historic Preservation) and Subalternative 4A (CP-HPS Phase II Development Plan with Historic Preservation) as preservation alternatives that would retain the structures in the CRHR-eligible Hunters Point Commercial Drydock and Naval Shipyard Historic District and would avoid significant adverse effects on historic resources.

The comment regarding funding an endowment for preservation of historic buildings in the Bayview neighborhood as mitigation for loss of historic resources at Hunters Point Shipyard is noted. Such a funding mechanism would not fully mitigate the loss of those structures. In addition, there is no program in place to implement the funding measure proposed by the commenter, and there would be no assurance that such a program would be implemented.

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Letter 42: Californians for Renewable Energy, Inc. (1/12/10)

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Letter 42

Dear Joy Navarrete,

I wish to file additional Comments on Case 2007.0946E: Candlestick Point-Hunters Point Shipyard Phase II Development Plan Project (formerly the "Bayview Waterfront Project") Draft Environmental Impact Report.

CAlifornians for Renewable Energy, Inc. (CARE) provided comments at the San Francisco Planning Commission on December 17, 2008. During my comments I informed the Commission that I intended to bring the project EIR before the federal court.

This e-mail is to inform you that I have already done so in CARE comments on the consent decree in 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. I have attached all my pleadings and exhibits before the federal court attached to this e-mail and ask you to incorporate them with CARE's December 17, 2008 comments to the Planning Commission. **42-1**

For the record CARE strenuously objects to the Project EIR being certified while relevant matters are the subject to litigation before the US Department of Labor, and the federal court as a violation of CARE's due process rights. Additionally since the US Navy has failed to issue any Notice of Preperation of an EIS for the project this EIR violates the National Environmental Policy Act (NEPA). Exhibit 6 is an Order to Vacate just such an inadequate Decision in that case for the Peabody Black Mesa Complex located on the Hopi-Tewa and Navajo reservations in Arizona.

Respectfully,

Michael E. Boyd President

CAlifornians for Renewable Energy, Inc. (CARE)

5439 Soquel Drive

Soquel, California 95073-2659

(408) 891-9677

E-mail: michaelboyd@sbcglobal.net

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(Please note that the following documents will appear as a subfolder)

Comment on United States v Pacific Gas & Electric Company.pdf

Exhibit 1 EPA report Shipyard project minimizing dust.pdf

Exhibit 2 USEPA deny Bay View Civil Rights 9-2-09.pdf

Exhibit 3 Order 4 Hearing in Mike Boyd v USEPA OCR.pdf

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SFGate.com
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SFGate.com

EPA report: Shipyard project minimizing dust

John Coté, Chronicle Staff Writer

Tuesday, January 5, 2010

For years, critics of the plan to redevelop the Hunters Point Naval Shipyard have said the project is kicking up toxic dust and causing residents to have nosebleeds, headaches and other health problems. But a draft of a federal report obtained by The Chronicle found the project has effective safeguards in place to minimize asbestos exposure.

The report by the Environmental Protection Agency is the latest in a string that have found the project to be safe, despite lawsuits, a record fine and more than three years of heated public hearings as activists seek to halt the work.

The draft report found that monitoring procedures are effectively minimizing "dust generation and limiting asbestos exposure." The EPA also saw "no reason to suspend or stop the construction project," which calls for 10,500 homes to be built over two decades in an ambitious effort to transform the city's southeastern waterfront.

The EPA's analysis is a vindication of sorts for Mayor Gavin Newsom, who has pushed the project. Newsom was hounded on the campaign trail during his failed gubernatorial bid by followers of Nation of Islam minister Christopher Muhammad who contend the project is sickening residents. The local Nation of Islam chapter has a school nearby.

"After more than three years, Minister Christopher Muhammad has still failed to generate a single shred of reputable scientific evidence that the construction on phase one of Hunters Point shipyard was harmful to the surrounding community," said Michael Cohen, head of the mayor's economic development office. "The fact that Barack Obama's EPA has joined the long list of federal, state and local agencies that agree there is no reason to stop this project is important because of the Obama administration's strong commitment to environmental justice."

Still skeptical

Not everyone is convinced of the latest findings, saying that the project is spreading naturally occurring asbestos that is causing health problems among nearby residents. Asbestos, a fibrous mineral, is sent airborne when earth is broken and graded for construction. Long-term exposure can cause cancer.

Marie Harrison, a Bayview-Hunters Point resident and organizer with Greenaction, questioned the EPA's testing methods, especially since individual residents were not screened.

"I would love to believe that they did this, I really truly would. But if I'm going to believe anything, I've got to see it," Harrison said.

Leon Muhammad, dean at the local Nation of Islam school, refused to comment on the EPA report. Christopher Muhammad could not be reached.

The EPA's study looked at existing data from 10 monitors around the 75-acre first-phase site. The monitors work like vacuums, sucking air into a small canister, which contains a filter that is analyzed at a lab. The agency also reanalyzed 34 filters from "some of the worst-case situations" using a more detailed method.

It found that the "oversight of the project is appropriate" and that the standard local officials use actually resulted in a more conservative approach than the EPA method, the draft report said.

The city's public health chief, Mitch Katz, has repeatedly testified that the construction is safe, and the city's efforts have been backed by the state Department of Health Services and U.S. Centers for Disease Control and Prevention.

Fine and lawsuits

However, readying the site for construction hasn't come without problems.

The Bay Area Air Quality Management District fined Lennar Urban, the developer partnering with the city, $515,000 in September 2008 - the largest fine in the district's history for a dust violation - for failing to properly monitor the air, maintain stations for washing dust off vehicles and contain dust from roadways out of the worksite.

According to air district officials, there was missing data from May through July 2006 after one of Lennar's consultants failed to properly calibrate monitoring equipment.

But the air district maintains that there was no evidence "of any kind of definitive health hazard," said spokeswoman Lisa Fasano.

Two former Lennar employees also sued the company in March 2007, alleging the company violated state law by retaliating against them for raising questions about the

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dust problems at the construction site. They also claim that they were victims of racial discrimination.

The lawsuit was settled out of court in January 2008 after Lennar failed to get it dismissed, records show. Representatives on both sides declined to comment on the amount.

A second lawsuit, filed in June on behalf of more than a dozen children who live or go to school in the neighborhood, contends Lennar "on many occasions" failed to stop work despite asbestos levels far exceeding the cut-off threshold. A trial is set for July.

Sam Singer, a Lennar spokesman, called the lawsuit "without merit."

E-mail John Coté at jcote@sfchronicle.com.

http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/01/05/MNS91BDFIJ.DTL

This article appeared on page **A - 1** of the San Francisco Chronicle

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 2 2009

OFFICE OF
CIVIL RIGHTS

Return Receipt Requested

In Reply Refer to:
EPA File No. 16R-07-R9

Certified Mail #7004-1160-0002-3622-5201
Lynne Brown, Vice-President
Californians for Renewable Energy (CARE)
24 Harbor Rd
San Francisco, CA 94124

Certified Mail #7004-1160-0002-3622-7120
Michael E. Boyd, President
Californians for Renewable Energy (CARE)
5439 Soquel Drive
Soquel, CA 95073

Re: Rejection of Administrative Complaint

Dear Mr. Brown and Mr. Boyd:

The U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) received the August 6, 2007, allegations that you requested be added to an earlier administrative complaint filed by Mr. Brown in 2004. Your 2007 complaint alleges that the Bay Area Air Quality Management District (BAAQMD) violated Title VI of the Civil Rights Act of 1964, as amended (Title VI), 42 U.S.C. § 2000d *et seq.* and EPA's nondiscrimination regulations found at 40 C.F.R. Part 7. The 2004 complaint contained allegations concerning the City and County of San Francisco and the San Francisco Redevelopment Agency. Since the 2007 allegations occurred some time after the filing of the initial 2004 complaint and the allegations pertain to a different recipient, a new EPA File Number, 16R-07-R9, was assigned to the 2007 allegations. After careful review, OCR is rejecting this administrative complaint.

Pursuant to EPA's nondiscrimination regulations, OCR conducts a preliminary review of discrimination complaints to determine acceptance, rejection, or referral. 40 C.F.R. § 7.120(d)(1). To be accepted for investigation, a complaint must meet the jurisdictional requirements described in EPA's nondiscrimination regulations. First, it must be in writing. Second, it must describe an alleged discriminatory act that, if true, would violate EPA's nondiscrimination regulations (*i.e.*, an alleged discriminatory act based on race, color, national

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origin, sex, or disability). Third, it must be filed within 180 days of the alleged discriminatory act. Finally, the complaint must be filed against an applicant for, or recipient of, EPA assistance that allegedly committed the discriminatory act. (A copy of EPA's nondiscrimination regulations is enclosed for your convenience.)

OCR's jurisdictional review of the allegations in your complaint is discussed below.

Allegation I

BAAQMD failed to follow the California Environmental Quality Act (CEQA) public hearing procedures in reviewing and approving the Asbestos Dust Control Plan for construction activities on Parcel A of the former Hunters Point shipyard.

BAAQMD approved the Asbestos Dust Mitigation Plan prepared by the developer of the former Hunters Point shipyard on October 7, 2005. As stated earlier, a complaint must be filed within 180 days of the alleged discriminatory act. This event occurred almost two years prior to the filing of your complaint on August 6, 2007. Although you filed a complaint with BAAQMD in 2005 about this issue, EPA's regulations state that the filing of a grievance with the recipient does not satisfy the requirement that complaints be filed within 180 days of the alleged discriminatory act. 40 C.F.R §7.120(b)(2). Therefore, since this allegation does not meet the timeliness requirement in EPA's nondiscrimination regulations, OCR cannot accept this allegation for investigation.

Allegation II

BAAQMD failed to protect the health and welfare of the workers at the former Hunters Point shipyard from exposure to asbestos dust.

Worker safety, including asbestos worksite monitoring procedures and exposure controls, are regulated by the Occupational Safety and Health Administration (OSHA). OSHA may delegate its enforcement authority to states. Concerns about worker safety in this context should be directed to OSHA or to the California Division of Occupational Safety and Health. This allegation does not describe an alleged discriminatory act, that if true, would violate EPA's nondiscrimination regulations. It, therefore, does not meet the jurisdictional requirements in EPA's nondiscrimination regulations and OCR cannot accept it for investigation.

Allegation III

BAAQMD failed to protect the health and welfare of the community surrounding the former Hunters Point shipyard from exposure to asbestos dust.

The final allegation examined concerns the health and welfare of the community surrounding the former Hunters Point shipyard. Your complaint states that "action limits" have been "exceeded on a repeated basis." In a letter dated June 30, 2009, OCR sought clarification about this allegation because it does not describe the specific alleged discriminatory acts committed by BAAQMD. EPA's nondiscrimination regulations require that complaints describe

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an alleged discriminatory act, that if true, would violate EPA's nondiscrimination regulations. 40 C.F.R. § 7.120(b)(1). Additionally, complaints must be filed within 180 days of the alleged discriminatory act(s). 40 C.F.R. § 7.120(b)(2). Therefore, in its clarification letter, OCR requested a description of the "specific action(s) you believe that BAAQMD did or did not do that 'failed to protect' nearby residents."

OCR received your clarification response on July 29, 2009. After carefully reviewing your submission, OCR has determined that it cannot accept the third allegation in your complaint for investigation. While your response includes a variety of information, it does not describe an alleged discriminatory act committed by BAAQMD within 180 days prior to the submission of your complaint.

If you have any questions, please contact Loren Hall of OCR's External Compliance Program by telephone at (202) 343-9675, by e-mail at hall.loren@epa.gov, or by mail at the U.S. EPA, Office of Civil Rights (Mail Code 1201A), 1200 Pennsylvania Avenue NW, Washington, DC 20460.

Sincerely,

Karen D. Higginbotham
Director

Enclosure

cc: Bridget Coyle
EPA Region 9

Stephen G. Pressman, Associate General Counsel
Civil Rights and Finance Law Office (MC 2399A)

Jack Broadbent
Air Pollution Control Officer
Bay Area Air Quality Management District

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U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 15 December 2009

CASE NO. 2009-SDW-00005

In the Matter of:

MICHAEL E. BOYD,

Complainant,

vs.

U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA),

Respondent.

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, COMPLAINANT'S MOTION TO AMEND HIS COMPLAINT, COMPLAINANT'S REQUEST FOR SUMMARY JUDGMENT, AND COMPLAINANT'S REQUEST FOR REMAND

This matter arises under the whistleblower protection provisions (collectively "whistleblower provisions") of the following statutes:

- The Safe Drinking Water Act of 1974 (SDWA), 42 U.S.C. § 300j-9(i);
- The Federal Water Pollution Control Act of 1972 (FWPCA), 33 U.S.C. § 1367;
- The Toxic Substances Control Act of 1976 (TSCA), 15 U.S.C. § 2622;
- The Solid Waste Disposal Act of 1976 (SWDA), 42 U.S.C. § 6971;
- The Clean Air Act of 1977 (CAA), 42 U.S.C. § 7622; and
- The Comprehensive Environmental Response, Compensation & Liability Act of 1980 (CERCLA), 42 U.S.C. § 9610.

On June 8, 2009, I ordered discovery and briefing on the threshold issues of timeliness, Complainant's status as an employee, and the sufficiency of the allegations in the complaint. The schedule was amended by an order dated June 19, 2009.

On August 14, 2009, I issued an Order Denying Respondent's Motion to Dismiss and Denying Complainant's Motion to Amend his Complaint (Aug. 14, 2009 Order). Respondent's motion asserted that because Complainant is neither an employee of respondent, as all the whistleblower provisions require, or a representative of employees, as three of the whistleblower provisions require, Complainant is not protected by any of the whistleblower provisions. Complainant's opposition argued that Title VI of the Civil Rights Act of 1964 (Civil Rights Act), the Occupational Safety and Health Act (OSH Act) of 1970, and CERCLA provide that OALJ

has jurisdiction over Claimant's whistleblower claims. I denied Respondent's motion to dismiss, which I construed as a motion for summary decision, because Respondent did not meet its burden to demonstrate the absence of a triable issue of material fact and that it is entitled to judgment as a matter of law. Aug. 14, 2009 Order, pp. 5-6 (citing Fed. R. Civ. P. 56, 29 C.F.R. § 18.40(d)). Respondent failed to address significant aspects of how the term "employee" is understood within the environmental whistleblower statutes under which this matter arises. Aug. 14, 2009 Order, pp. 5-6. Thus, it could not demonstrate its entitlement to summary decision. I also treated Complainant's claims of protection under the Civil Rights Act and the OSH Act as a motion to amend his complaint, which I denied because neither statute provides for hearings before the OALJ. Aug. 14, 2009 Order, p. 6.

On August 31, 2009, Respondent filed a Motion for Summary Judgment (Resp. Motion). On September, 16, 2009 Complainant filed a timely response opposing Respondent's motion (Comp. Opp.). Respondent's motion argues that Claimant has failed to state a claim upon which relief can be granted because Claimant does not qualify as an "employee" within the meaning of the whistleblower statutes. Resp. Motion, pp. 5-6. Complainant argues that Respondent directed one of its grantees to terminate its employment of Complainant. Comp. Opp., p. 4. In so doing, Complainant argues, Respondent acted in the "capacity of an employer," which renders Complainant an "employee" entitled to whistleblower protection. *Id.* at 1.

Complainant adds that Respondent is "liable under 42 U.S.C. § 7413(c)(3) of the [Clean Air Act] for its [a]ctions." *Id.* at 5. He explains that Respondent's violations include "delaying and sitting on Title VI complaints [and] missing their statutory deadlines for accepting and investigating these administrative complaints . . . ." *Id.*

Complainant also argues that he should be granted summary judgment and this matter should be remanded to the Occupational Safety and Health Administration (OSHA) because Respondent has allegedly failed to provide timely responses to interrogatories. *Id.* at 10.

ANALYSIS

The employee protection provisions of the various environmental statutes prohibit an employer from taking adverse employment action against an employee because the employee has engaged in protected activity. *See, e.g., Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, 1988-SWD-00002, Slip op. at 15 (ARB Feb. 28, 2003). Each of the six whistleblower provisions under which Complainant filed his original complaint protects "employees." 42 U.S.C. § 300j-9(i)(1); 33 U.S.C. § 1367(a); 15 U.S.C. § 2622(a); 42 U.S.C. § 6971(a); 42 U.S.C. § 7622(a); 42 U.S.C. § 9610(a). In addition, the FWPCA, the SWDA, and CERCLA extend their whistleblower protections to "authorized representatives of employees." 33 U.S.C. § 1367(a); 42 U.S.C. § 6971(a); 42 U.S.C. § 9610(a). Thus, if Complainant is neither an "employee" nor a "representative of employees" within the meanings of the statutes, he is not covered by the whistleblower provisions and has failed to state a claim under which relief can be granted.

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I. RESPONDENT'S MOTION FOR SUMMARY DECISION

Respondent argues that "even under the broadest interpretation . . . the facts [here] do not permit [Complainant] to qualify as an *employee* under the whistleblower protection provisions of the environmental statutes."[1] Resp. Aug. 31, 2009 Motion, p. 5. Therefore, Respondent argues, Complainant's case should be dismissed for failure to state a claim upon which relief can be granted. *Id.* at 6.

Complainant argues that he is protected by the whistleblower provisions as an employee. He maintains that Respondent directed his employer, the Community First Coalition (CFC), to terminate Complainant's employment in retaliation for Complainant's distribution of information regarding the alleged presence of asbestos dust in the Bay View Hunters Point community in San Francisco, California. Comp. Opp., p. 4.

I find that there remain genuine issues of material fact as to whether Complainant meets the whistleblower provisions' definition of "employee" and "representative of employees." Respondent's motion does not discuss whether Complainant meets the definition of "representative of employees." Additionally, it fails to establish that there is no genuine issue of material fact on the question that it as at the core of whether Complainant is an "employee": the extent of Respondent's control over Complainant's employment.

A. Standard for Summary Decision

An administrative law judge may grant summary decision when a moving party demonstrates that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. 29 C.F.R. § 18.40(d). The moving party bears the initial burden of showing that there is no genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). By moving for summary decision, a party asserts that based on the present record and without the need for further exploration of the facts and conceding all unfavorable inferences in favor of the non-moving party, there is no genuine issue of material fact to be decided and the moving party is entitled to a decision as a matter of law. Fed. R. Civ. P. 56, 29 C.F.R. § 18.40(d). When a motion is properly supported, the nonmoving party must go beyond the pleadings to overcome the motion. He may not merely rest upon allegations, but must set out specific facts showing a genuine issue for trial. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

Respondent, as the moving party, bears the burden of showing (1) that there is no genuine issue of material fact as to whether Complainant is an "employee" or "representative of employees" as understood under the whistleblower provisions, and (2) as a matter of law, Respondent is entitled to judgment that Complainant is neither an "employee" nor a "representative of employees." *See* 42 U.S.C. § 300j-9(i)(1); 33 U.S.C. § 1367(a); 15 U.S.C. § 2622(a); 42 U.S.C. § 6971(a); 42 U.S.C. § 7622(a); 42 U.S.C. § 9610(a); 29 C.F.R. § 18.40(d); *Celotex*, 477 U.S. at 325. Respondent has failed to meet this burden.

[1] Emphasis in original.

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B. Respondent's Entitlement to Summary Decision

Employees of contractors of a respondent are protected by a whistleblower provision when the respondent has acted "in the capacity of an employer." *Stephenson v. Nat'l Aeronautics & Space Adm.*, ARB No. 96-080, ALJ No. 1994-TSC-5, Dec. & Ord. of Rem., slip. op. at 3 (ARB Feb. 13, 1997); *see also Hill v. Tenn. Valley Auth.*, ALJ No. 87-ERA-23,24, Dec. & Ord. of Remand, slip op. at 1-2 (Sec'y May 24, 1989) (disagreeing with an administrative law judge's conclusion that the Energy Reorganization Act's whistleblower protection clearly requires an employer-employee relationship). In ***Stephenson v. Nat'l Aeronautics & Space Adm.***, the ARB explained that:

> An employer that *acts* in the capacity of an employer with regard to a particular employee may be subject to liability under the environmental whistleblower provisions, notwithstanding the fact that that employer does not directly compensate or immediately supervise the employee. A parent company or contracting agency acts in the capacity of an employer by establishing, modifying, or otherwise interfering with an employee of a subordinate company regarding the employee's compensation, terms, conditions or privileges of employment. For example, the president of a parent company who hires, fires or disciplines an employee of one of its subsidiaries may be deemed an "employer" for purposes of the whistleblower provisions. A contracting agency which exercises similar control over the employees of its contractors or subcontractors may be a covered employer.

Dec. & Ord. of Remand, slip. op. at 3.

Respondent argues that it "exercises no control over technical assistance grant recipients' employment of expert outside consultants or internal personnel." Resp. Motion, p.2. Respondent further states that it "exercised no dominion over CFC or Complainant, and whatever decision the grantee made concerning Complainant's retention as a consultant was within the grantee's exclusive control." *Id.* at 3.

Respondent's motion was accompanied by a declaration by Ms. Jacqueline Lane (Lane Dec.), an EPA project officer who was responsible for overseeing the Hunters Point Naval Shipyard Superfund site Technical Assistance Grant (TAG). Lane Dec., p. 1. Ms. Lane's declaration explains that Respondent funded a grant to the Community First Coalition (CFC) to allow "the grantee to acquire independent technical advice in connection with the Hunters Point . . . Superfund site." *Id.* Ms. Lane further explains that CFC contracted with a company called Environmental Mitigation Unlimited (EMU) to serve as technical advisor to CFC. *Id.* According to Ms. Lane, EMU was a "non-profit public benefit association of Clifton J. Smith and Michael E. Boyd, Associates." *Id.* She further states that CFC terminated the contract with EMU because EMU failed to fulfill the terms of its technical assistance contract. *Id.*

Ms. Lane's declaration states that Respondent "does not dictate or even involve itself in the grantee's selection or retention of its employees or contractors/independent consultants." Lane Dec., p. 1. She adds that "the contracting, payment, and termination of contracts under the grant agreement is the sole responsibility of the [grantee]." *Id.* at 2. Ms. Lane further declares

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that Respondent took no action regarding Complainant's work as a technical consultant to CFC and did not provide any advice to CFC regarding Complainant's retention, termination, or terms of employment. *Id.* at 2.

According to Complainant, Respondent directed his termination in retaliation for "providing the . . . Bay View Hunters Point San Francisco community information regarding the disturbance of asbestos dust . . . ." Comp. Opp., p. 4. A declaration by Lynne Brown, CFC Co-Chair, avers that Complainant "completed the May 15, 2005 newsletter including co-authoring the article titled Serpentine Soils in Shipyards Possible Source of Naturally Occurring Asbestos . . . ." Comp. Opp., Ex. 9, p. 59. Complainant's opposition includes the text of what appears to be an electronic mail message dated May 16, 2005, from Ms. Lane of the EPA apparently to Maurice Campbell of CFC. *Id.* at 3, Ex. 2, pp. 15, 20. The message states that the CFC newsletter "is supposed to talk to the community about Shipyard cleanup issues." *Id.* It then questions whether there was ever a problem with asbestos on the base property and anticipates that the issue "will be brought up at the next RAB [Restoration Advisory Board] meeting." *Id*; *see also* Comp. Opp., Ex. 2, p. 14.

Complainant's opposition is also accompanied by the minutes of a July 28, 2005 Restoration Advisory Board meeting. Comp. Opp., Ex. 3. They record that Mr. Campbell, a member of CFC and the RAB, stated that a document, which Complainant asserts is his newsletter, would be "reviewed by the CFC and then sent to Jackie Lane at the EPA; then it is submitted so the TAG contractor can be paid." *Id.* at 24.

Respondent's reply does not dispute that the document discussed in the RAB minutes is the newsletter containing an article prepared by Complainant related to asbestos. *See* Resp. Reply, pp. 2-3. Respondent argues that the intent of Ms. Lane's May 16, 2005, electronic mail message was to explain the "general limitation on CFC's expenditure of TAG grant funds" and to instruct "CFC as to what nature of work product EPA had committed itself to fund through the TAG grant." *Id.* at 2-3.

Respondent has not met its burden to show that there is no genuine issue of material fact regarding its control over Complainant's employment with CFC. As Respondent's Reply states, "it was incumbent upon Ms. Lane to ensure that Agency's grant funds were spent in furtherance of the purposes of the grant." Resp. Reply, p. 2. An obvious corollary is that activities not in furtherance of the purposes of the grant are not funded. Thus, Respondent appears to have the power of the purse strings over CFC's execution of the technical assistance grant. The discretion to pay or not pay a grantee represents some degree of control over the grantee's employment of contractors. Whether Respondent exercised enough control to act in the capacity of an employer is unclear, which is precisely the point. Further fact-finding on this issue is required. When additional fact-finding is required, summary decision should not be granted. Therefore, Respondent's motion for summary decision is **DENIED**.

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II. COMPLAINANT'S MOTION TO AMEND COMPLAINT

In his Opposition, Complainant asserts that Respondent has engaged in a pattern of failing to accept and investigate "Title VI" complaints, including one filed by Complainant. Comp. Opp., p. 5. Therefore, Complainant asserts, Respondent is "liable under 42 U.S.C. § 741(c)(3) of the [Clean Air Act]." *Id.* As Complainant did not previously claim protection under this statute, I treat Complainant's assertion of Respondent's liability under 42 U.S.C. § 741(c)(3) as a motion to amend Complainant's complaint.

The Office of Administrative Law Judges (OALJ) does not have jurisdiction to adjudicate complaints arising under 42 U.S.C. § 741(c)(3). That provision provides for criminal punishment of persons convicted of violating certain provisions of the Clean Air Act. It does not provide for a hearing before an administrative law judge. As I do not have jurisdiction to adjudicate alleged violations of 42 U.S.C. § 741(c)(3), Complainant's motion to amend his complaint is hereby **DENIED**.

III. COMPLAINANT'S REQUEST FOR SUMMARY JUDGMENT AND REMAND

Complainant argues that "Summary Judgment should be issued for Complainant" and this matter remanded to OSHA because Respondent failed to respond to interrogatories propounded by Complainant on June 24, 2009. Comp. Opp., p. 10. According to Complainant he propounded interrogatories to Respondent and OSHA on June 24, 2009. *Id.* On July 14, 2009, an order issued staying discovery on the threshold issues pending a decision on Respondent's motion for dismissal, which was denied on August 14, 2009. Complainant asserts that the thirty days to respond to the interrogatories elapsed on August 25, 2009 without response.

The OALJ Rules of Practice and procedure authorize an administrative law judge to impose discovery sanctions when a party fails to comply with an order regarding discovery. 29 C.F.R. § 18.6(d)(2). While granting summary judgment is not among the sanctions authorized, an ALJ may order that an issue is established adversely to a non-complying party. 29 C.F.R. § 18.6(d)(2)(ii). A necessary pre-requisite for an order imposing discovery sanctions is that the party to be sanctioned must be in non-compliance with an order. 29 C.F.R. § 18.6(d)(2). Nothing in the record, however, indicates that Complainant filed a motion seeking an order to compel responses to his interrogatories. Absent a party's non-compliance with an order, a request for discovery sanctions is premature. Therefore, Complainant's request for summary judgment, which I treat as a request for discovery sanctions, is **DENIED**.

In addition, Complainant has failed to articulate a reason for remanding this matter to OSHA. Therefore, Complainant's request for remand to OSHA is hereby **DENIED**.

ORDER

Respondent's motion for summary decision is **DENIED**.

Complainant's motion to amend his complaint is **DENIED**.

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Complainant's request for summary judgment is treated as a request for discovery sanctions and is **DENIED**.

Complainant's request that this matter be remanded to the Occupational Safety and Health Administration is **DENIED**.

The parties are directed to participate in a **telephone status conference call on Tuesday, December 22, 2009 at 11:00 a.m. Pacific Standard Time**. The topics to be covered will include:

1) The location and length of the trial;
2) The date of the trial;
3) The date for a meeting of the parties to develop a discovery plan, of the type described in Standard 1 of the ABA Civil Discovery standards,[2] which will permit the trial to begin on the date scheduled;
4) Whether alterations to the rules for service of documents should be made to permit service by facsimile or by e-mail attachments in WordPerfect or MS-Word format, and whether the time for responding to motions and discovery requests should be shortened;
5) Whether the meeting to develop the plan shall be in person, by telephone, conducted through electronic correspondence, or in some other manner;
6) Whether the initial disclosures required by Rule 26(a)(1), Federal Rules of Civil Procedure, shall be made before, or at the meeting of the parties to develop the discovery plan,
7) The dates for serving Pre-Trial Statements, described in the accompanying draft pre-trial order; filings fully conforming to that order ultimately entered are essential;
8) Whether an appointment of a settlement judge, under the procedure set out in 29 C.F.R. § 18.9 (e)(1), would be useful and should be made.

ANNE BEYTIN TORKINGTON
Administrative Law Judge

[2] http://www.abanet.org/litigation/discoverystandards/

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SERVICE SHEET

Case Name: **BOYD_MICHAEL_v_US_ENVIRONMENTAL_PRO_**

Case Number: **2009SDW00005**

Document Title: **Order Denying Resp's Mtn for Summary Judgment, Compl's Mtn to Amend His Complaint, etc.**

I hereby certify that a copy of the above-referenced document was sent to the following this 15th day of December, 2009:

Vivian Chan

VIVIAN CHAN
LEGAL ASSISTANT

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 30 2009

OFFICE OF
CIVIL RIGHTS

Return Receipt Requested
Certified Mail #7004-2510-0004-2241-5599

In Reply Refer To
EPA File No.13R-04-R9

Mr. Michael Boyd
Californians For Renewable Energy
5439 Soquel Drive
Soquel, CA 95073

Re: Request for Extension

Dear Mr. Boyd:

The U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) received your e-mail requesting a second (2nd) extension on December 21, 2009. You specifically requested that OCR reconsider extending the response period until after the ALJ has issued her final ruling on the attached Order for Hearings. Although OCR appreciates your request, we cannot grant you an extension related to the above-mentioned hearing. However, OCR will grant you a extension for an additional 10 days. Therefore, please provide a response to OCR by February 1, 2010.

If you have any questions, or encounter any difficulty in gathering this information, please feel free to contact Ericka Farrell, the Case Manager for this investigation, at (202) 343-9224 or via e-mail at Farrell.ericka@epa.gov. Thank you in advance for your cooperation and attention to this matter.

Sincerely,

Helena Wooden-Aguilar
Acting Assistant Director
External Compliance and Complaints Program

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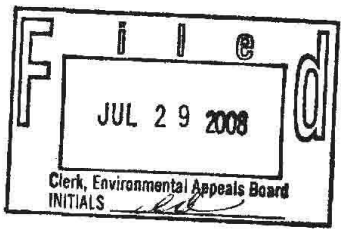

(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the Environmental Administrative Decisions (E.A.D.). Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, of any typographical or other formal errors, in order that corrections may be made before publication.

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Russell City Energy Center	)	PSD Appeal No. 08-01
Permit No. 15487	)	

[Decided July 29, 2008]

REMAND ORDER

Before Environmental Appeals Judges Edward E. Reich, Charles J. Sheehan, and Anna L. Wolgast.

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IN RE RUSSELL CITY ENERGY CENTER

PSD Appeal No. 08-01

REMAND ORDER

Decided July 29, 2008

Syllabus

Petitioner Rob Simpson ("Mr. Simpson") petitioned the Environmental Appeals Board ("Board") to review a federal Prevention of Significant Deterioration ("PSD") permit ("Permit") issued by the Bay Area Air Quality Management District ("the District") to Russell City Energy Center ("RCEC"), on November 1, 2007, for operation of a 600-megawatt natural gas-fired facility. The District processes PSD permit applications under the Clean Air Act ("CAA") and issues permits under the federal PSD program, pursuant to a delegation agreement with the U.S. Environmental Protection Agency.

The PSD proceedings that are the subject of this case are embedded in a larger California "certification" or licensing process for power plants conducted by the California Energy Commission ("CEC"), which is responsible for the siting of most power plants in the state. Pursuant to procedures for coordination of District and CEC proceedings, the District delegated to CEC the bulk of its 40 C.F.R. part 124 notice and outreach responsibilities with respect to the draft PSD permit for RCEC.

In his Petition, Mr. Simpson challenges issuance of the Permit as clearly erroneous on both procedural and substantive grounds. Among the procedural grounds for challenging the permit, Mr. Simpson contends that the District, in issuing the draft permit and Permit, failed to carry out certain forms of public notice, and to notify specific entities entitled to notice as required by 40 C.F.R. § 124.10. On substantive grounds, Mr. Simpson challenges the Permit as not complying with Best Available Control Technology ("BACT") as well as numerous other federal and state law requirements.

In response, the District seeks summary dismissal of the Petition on the basis that Mr. Simpson failed to meet jurisdictional thresholds for Board review, including standing, preservation of issues for review, and timeliness. The District argues further that any alleged failure to comply strictly with the regulatory requirements was harmless since Mr. Simpson would not have participated in the PSD proceedings in any event.

Mr. Simpson counters that the District's failure to comply with part 124 notice requirements thwarted his ability to participate in these proceedings and thus satisfy jurisdictional thresholds.

Held: The Board remands the Permit so that the District can renotice the draft permit in accordance with the notice provisions of 40 C.F.R. § 124.10.

(1) Mr. Simpson may raise his notice claims for Board consideration despite Mr. Simpson's "failure" to meet the ordinary threshold for standing under 40 C.F.R. § 124.19(a), which limits standing to those who participate in a permit proceeding by filing comments on the draft permit or participating in a public hearing on a draft permit. Denying Board consideration of fundamental notice claims would deny parties the opportunity to vindicate before the Board potentially meritorious claims of notice violations and preclude the Board from remedying the harm to participation rights resulting from lack of notice. Such denial would be contrary to the CAA statutory directive emphasizing the importance of public participation in PSD permitting and section 124.10's expansive provision of notice and participation rights to the public.

(2) Mr. Simpson has not demonstrated that his affiliation with the Hayward Area Planning Association ("HAPA") entitled him to particularized notice of the draft permit because HAPA, as a private organization, does not qualify as a "comprehensive regional land use planning agency" entitled to such notice during PSD permitting pursuant to section 124.10(c)(1)(vii) and, even if it were, that does not mean Mr. Simpson was entitled to such notice.

(3) While the Board generally will not consider notice allegations in a petition where the sole deficiency alleged is failure to give notice to a particular person other than the petitioner, it nevertheless regards it as appropriate to consider claims of failure of notice to other persons within the scope of allegations of fundamental defects in the integrity of the notice process as a whole that may be prejudicial to the notice rights of the petitioner and others.

(4) While a delegated state agency may redelegate notice and comment functions to another state agency to the extent the federal delegation so permits, in all cases it is incumbent upon the delegated state agency to ensure strict compliance with federal PSD requirements.

(5) Mr. Simpson has demonstrated that the District, in redelegating outreach to CEC, failed to ensure compliance with the notice and outreach obligations of the PSD regulations, thereby narrowing the scope of public notice to which Mr. Simpson and other members of the public were entitled. In particular, the District failed to ensure compliance with the specific obligation at section 124.10(c)(1)(ix) to inform the public of the opportunity to be placed on a "mailing

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list" for notification of permitting actions through "periodic publication in the public press and in such publications as Regional and State funded newsletters, environmental bulletins, or State Law Journals."

(6) The District's almost complete reliance upon CEC's certification-related outreach procedures to satisfy the District's notice obligations regarding the draft permit resulted in a fundamentally flawed notice process. By "piggybacking" upon the CEC's outreach, the District failed to exercise sufficient supervision over the CEC to ensure that the latter adapted its outreach activities to meet specific section 124.10 mandates. The inadequacy of the notice lists used by the CEC, the handling of public comments by the CEC, and the conduct of a public workshop by CEC with likely District participation during the PSD comment period at which air quality issues were discussed but no record of public comments made all demonstrate that the CEC merely folded the PSD notice proceeding into its ongoing process without attempting to ensure that the part 124 requirements for public participation were met.

(7) Contrary to the District's statements, the District's notice omissions do not constitute "harmless error." Such omissions affected more persons than Mr. Simpson, and even as to Mr. Simpson, the District's assumption that, even with the proper notice, he would not have participated, is purely speculative.

(8) 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. Because the District's renoticing of the draft permit will allow Mr. Simpson and other members of the public the opportunity to submit comments on PSD-related issues during the comment period, the Board refrains at this time from opining on such issues raised by Mr. Simpson in his appeal.

(9) Several of the issues raised in Mr. Simpson's Petition concern matters of California or federal law that are not governed by PSD regulations and, as such, are beyond the Board's jurisdiction during the PSD review process. The Board will not consider these issues if raised following remand.

Before Environmental Appeals Judges Edward E. Reich, Charles J. Sheehan, and Anna L. Wolgast.

Opinion of the Board by Judge Reich:

I. *INTRODUCTION*

On January 3, 2008, Mr. Rob Simpson filed a petition for review ("Petition or Pet.") challenging a federal Prevention of Significant Deterioration ("PSD") permit issued by the Bay Area Air Quality Management District ("the District")[1] to Russell City Energy Center ("RCEC") on November 1, 2007, for operation of a 600-megawatt (MW) natural gas-fired facility. Mr. Simpson, who resides in the City of Hayward, located in Alameda County (within the District's boundaries), opposes issuance of the permit on several grounds, including the alleged failure by the District to provide adequate public notice of the permit as well as the District's allegedly inadequate Best Available Control Technology determination, and several California state issues.

Upon review of the parties' briefs and the information obtained by the Board during a teleconference hearing held on April 3, 2008, we remand the Final Permit Decision ("Permit") to the District because we find that the District, in issuing its decision, did not comply with the public notice provisions in the 40 C.F.R. part 124 rules that govern this proceeding. In particular, the District redelegated a substantial portion of its public notice obligations to another state agency, the California

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[1] The District is one of thirty-five California air districts charged with regulating stationary sources of air pollution in the state. *See* Cal. Health & Safety Code §§ 40000, 40200; http://www.arb.ca.gov/drdb/dismap.htm. The U.S. EPA delegated authority to the District to administer the federal PSD program in 2006. *See* U.S. EPA-[District], Agreement for Limited Delegation of Authority to Issue and Modify Prevention of Significant Deterioration Permits Subject to 40 C.F.R. [§] 52.21, Jan. 24, 2006. The permits that the District issues pursuant to that delegation are considered federal permits subject to federal permitting procedures, including the potential for review by the Environmental Appeals Board under 40 C.F.R. § 124.19. *See In re Christian County Generation, LLC,* PSD Appeal No. 07-01, slip op. at 2-3 n.1 (EAB Jan. 28, 2008), 13 E.A.D. ___; *In re RockGen Energy Ctr.,* 8 E.A.D. 536, 537 n.1 (EAB 1999); *In re SEI Birchwood, Inc.,* 5 E.A.D. 25, 26 (EAB 1994). Among the various issues raised in his Petition, Mr. Simpson contends that the Permit is not within the scope of the U.S. EPA's delegation to the District. *See infra* Part III.

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Energy Commission, but failed to ensure that the latter adhered to the mandatory requirements of 40 C.F.R. part 124.

II. *BACKGROUND*

A. *Legal and Regulatory Background*

1. *Delegated Federal PSD Proceedings and the Relationship to California Energy Commission Proceedings*

Congress enacted the PSD provisions of the Clean Air Act ("CAA") in 1977 for the purpose of, among other things, "insu[ring] that economic growth will occur in a manner consistent with the preservation of existing clean air resources." CAA § 160(3), 42 U.S.C. § 7470(3). The statute requires preconstruction approval in the form of a PSD permit before anyone may build a new major stationary source or make a major modification to an existing source[2] if the source is located in either an "attainment" or "unclassifiable" area with respect to federal air quality standards called "national ambient air quality standards" ("NAAQS").[3] *See* CAA §§ 107, 161, 165, 42 U.S.C. §§ 7407, 7471,

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[2] The PSD provisions that are the subject of the instant appeal are part of the CAA's New Source Review ("NSR") program, which requires that persons planning a new major emitting facility or a new major modification to a major emitting facility obtain an air pollution permit before commencing construction. In addition to the PSD provisions, explained *infra*, the NSR program includes separate "nonattainment" provisions for facilities located in areas that are classified as being in nonattainment with the EPA's national Ambient Air Quality Standards. *See infra;* CAA §§ 171-193, 42 U.S.C. §§ 7501-7515. These nonattainment provisions are not relevant to the instant case.

[3] *See* CAA §§ 107, 160-169B, 42 U.S.C. §§ 7407, 7470-7492. NAAQS are "maximum concentration ceilings" for pollutants, "measured in terms of the total concentration of a pollutant in the atmosphere." *See* U.S. EPA Office of Air Quality Standards, *New Source Review Workshop Manual* at C.3 (Draft Oct. 1990). The EPA has established NAAQS on a pollutant-by-pollutant basis at levels the EPA has determined are requisite to protect public health and welfare. *See* CAA § 109, 42 U.S.C. § 7409. NAAQS are in effect for the following six air contaminants (known as "criteria (continued...)

7475. EPA designates an area as "attainment" with respect to a given NAAQS if the concentration of the relevant pollutant in the ambient air within the area meets the limits prescribed in the applicable NAAQS. CAA § 107(d)(1)(A), 42 U.S.C. § 7407(d)(1)(A). A "nonattainment" area is one with ambient concentrations of a criteria pollutant that do not meet the requirements of the applicable NAAQS. *Id.* Areas "that cannot be classified on the basis of available information as meeting or not meeting the [NAAQS]" are designated as "unclassifiable" areas. *Id.*

The PSD Regulations provide, among other things, that the proposed facility be required to meet a "best available control technology" ("BACT")[4] emissions limit for each pollutant subject to regulation under the Clean Air Act that the source would have the potential to emit in significant amounts. CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4); *see also* 40 C.F.R. § 52.21(b)(5).

As previously noted, the District processes PSD permit applications and issues permits under the federal PSD program, pursuant to a delegation agreement with the U.S. EPA. The District's regulations,

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[3](...continued)
pollutants"): sulfur oxides (measured as sulfur dioxide ("SO_2")), particulate matter ("PM"), carbon monoxide ("CO"), ozone (measured as volatile organic compounds ("VOCs")), nitrogen dioxide ("NO_2") (measured as NO_x), and lead. 40 C.F.R. § 50.4-.12.

[4] BACT is defined by the CAA, in relevant part, as follows:

> The term "best available control technology" means an emissions limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, 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 such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of such pollutant.

CAA § 169(3), 42 U.S.C. § 7479(3); *see also* 40 C.F.R. § 52.21(b)(12).

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among other things, prescribe the federal and State of California standards that new and modified sources of air pollution in the District must meet in order to obtain an "authority to construct" from the District. *See* Bay Area Air Quality Management District Regulation ("DR") New Source Review Regulation 2 Rule 2, 2-2-100 to 2-2-608 (Amended June 15, 2005), *available at* http://www.baaqmd.gov/dst/regulations/rg0202.pdf.

In addition to the substantive provisions for EPA-issued PSD permits, found primarily at 40 C.F.R. § 52.21, PSD permits are subject to the procedural requirements of Part 124 of Title 40 of the Code of Federal Regulations (Procedures for Decisionmaking), which apply to most EPA-issued permits. *See* 40 C.F.R. pt. 124.[5] These requirements also apply to permits issued by state or local governments pursuant to a delegation of federal authority, as is the case here.

Among other things, Part 124 prescribes procedures for permit applications, preparing draft permits, and issuing final permits, as well as filing petitions for review of final permit decisions. *Id.* Also, of particular relevance to this proceeding, part 124 contains provisions for public notice of and public participation in EPA permitting actions. *See* 40 C.F.R. § 124.10 (Public notice of permit actions and public comment period); *id.* § 124.11 (Public comments and requests for public hearings); *id.* § 124.12 (Public hearings).[6]

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[5] Part 124 sets forth procedures that affect permit decisions issued under the PSD program, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k; the National Pollution Discharge Elimination System ("NPDES") program under the Clean Water Act, 33 U.S.C. § 1342; and the Underground Injection Control program under the Safe Drinking Water Act, 42 U.S.C. § 300h to 300h-7. 40 C.F.R. § 124.1(a).

[6] The requirement for EPA to provide a public comment period when issuing a draft permit is the primary vehicle for public participation under Part 124. Section 124.10 states that "[p]ublic notice of the preparation of a draft permit * * * shall allow at least 30 days for public comment." 40 C.F.R. § 124.10(b). Part 124 further provides that "any interested person may submit written comments on the draft permit * * * and may request a public hearing, if no public hearing has already been scheduled." *Id.* § 124.11.
(continued...)

As explained by the parties in their briefs and amplified upon in the April 3, 2008 teleconference hearing held by the Board,[7] the PSD proceedings that are the subject of the instant case are embedded in a larger California certification process for power plants prescribed by California law. Pursuant to California's Warren-Alquist State Energy Resources Conservation and Development Act ("Warren-Alquist Act"), *see* Cal. Pub. Res. Code §§ 25000 *et seq.* the California Energy Commission ("CEC") has exclusive jurisdiction to "certify" or license the siting of all thermal power plants of 50 MW or greater (such as the proposed RCEC), *see id.* §§ 25119, 25120, 25502. In certifying thermal energy projects, the CEC has a broad mandate, which is to "ensure that any sites and related facilities certified provide a reliable supply of electrical energy at a level consistent with the need for such energy, and in a manner consistent with public health and safety, promotion of the general welfare, and protection of environmental quality." Cal. Code Regs. tit. 20, § 1741.

The Warren-Alquist Act and its implementing regulations prescribe the CEC certification procedures, including the required content of the applications for certification submitted for proposed energy projects, the issuance of proposed and final certification decisions, preparation by CEC staff of reports assessing the environmental impact of the proposed power plants, as well as provisions

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[6](...continued)
In addition, EPA is required to hold a public hearing "whenever [it] * * * finds, on the basis of requests, a significant degree of public interest in a draft permit(s)." *Id.* § 124.12(a)(1). EPA also has the discretion to hold a hearing whenever "a hearing might clarify one or more issues involved in the permit decision." *Id.* § 124.12(a)(2).

[7] On April 3, 2008, the Board convened a teleconference hearing attended by representatives of the District, the California Energy Commission, petitioner Rob Simpson, and permittee RCEC to discuss factual matters in this case. The primary objective of the teleconference hearing was to clarify the interplay between the delegated federal PSD proceedings and the California Energy Commission proceedings.

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for public notice and participation during the certification process.[8] *See* Cal. Pub. Res. Code §§ 25500-25543; *see also* Cal. Code Regs. tit. 20, §§ 1703-1709.8, 1741-1770, 2027.

Pursuant to its broad mandate, the CEC must make a specific finding that a proposed facility conforms with relevant federal and local law. *See* Cal. Pub. Res. Code § 25523(d)(1). As the Warren-Alquist Act states, "the [CEC] may not certify a facility * * * when it finds * * * that the facility does not conform with any applicable federal, local, or regional standards, ordinances, or laws" and "[CEC] may not make a finding in conflict with applicable federal law or regulation." *Id.* § 25525. As such, the certification process serves as a procedural umbrella under which the CEC coordinates and consults with multiple agencies in charge of enforcing relevant laws and standards to ensure that a facility, as proposed, will satisfy such mandates. *See* Cal. Code Regs. tit. 20, § 1744.

With respect to CEC's conformity finding, the Warren-Alquist Act imposes, as a condition for certification, that the local air pollution control officer of the relevant air quality district (in this case, the District) makes a specific determination that the proposed power facility complies with state and federal air quality requirements, including NSR.

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[8] The CEC certification process provides the following forms of public participation and notice: holding of hearings on the application for CEC certification (Cal. Code Regs. tit. 20 §§ 1748, 1754); convening workshops to discuss an application for certification (Cal. Code Regs. tit. 20, § 1709.5); holding "informational presentations and site visits" on an application for CEC certification with notice of such mailed to "adjacent landowners" (*id.* §1709.7); mailing notice of an initial public hearing fourteen (14) days prior to the first such hearing to the "applicant, intervenors, and to all persons who have requested notice in writing," (*id.* § 1710); the right to intervene as a party in the certification proceedings; (*id.* § 1712); mailing a "summary of notice or application" for certification to public libraries in communities near the proposed sites and to "any persons who requests such mailing or delivery, and to all parties to the proceeding" and publishing the summary "in a newspaper of general circulation in each county in which a site and related facility * * * are proposed to be located" (*id.* § 1713); and providing notice of an application for certification to relevant local, regional, state, federal, and Tribal agencies (*id.* § 1714).

See id. tit. 20, § 1744.5. In particular, the Warren-Alquist Act's implementing regulations provide that "[t]he local air pollution control officer shall conduct, for the [CEC's] certification process, a determination of compliance review of the application [for certification] in order to determine whether the proposed facility meets the requirements of the applicable [NSR] rule and all other applicable district regulations. If the proposed facility complies, the determination shall specify the conditions, including BACT and other mitigation measures, that are necessary for compliance." *Id.*

The District process for permitting power plants is integrated with the CEC's certification process to support the latter's conformity findings, as reflected in the District's regulations specific to power plant permitting. *See* DR, Power Plants Regulation 2 Rule 3 §§ 2-3-100 to 2-3-405, *available at* http://www.baaqmd.gov/dst/regulations/rg0202.pdf. These regulations state that "[w]ithin 180 days of [the District's] accepting an [application for certification] as complete [for purposes of compliance review], the [District Air Pollution Control Officer] shall conduct a * * * review [of the application] and make a "preliminary decision" as to "whether the proposed power plant meets the requirements of District regulations." *Id.* § 2-3-403. If the preliminary decision is affirmative, the District's regulations provide that the District issue a preliminary determination of compliance ("PDOC") with District regulations, including "specific BACT requirements and a description of mitigation measures to be required." *Id.* The District's regulations further require that "[w]ithin 240 days of the [District's] acceptance of an [application for certification] as complete," the District must issue a final Determination of Compliance ("FDOC") or otherwise inform the CEC that the FDOC cannot be issued. *Id.* § 2-3-405.[9]

[9] CEC's statements during the teleconference hearing make clear that CEC's role in determining legal conformity with respect to federal PSD issues is a ministerial one. In response to the question of whether the CEC has authority to "change what was in the FDOC as it would impact PSD requirements," Mr. Ratliff, CEC's representative, responded that the CEC "would have to yield to the District" on PSD conditions because the "District stands in the role of EPA." Transcript of April 3, 2008 Teleconference (continued...)

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The District's issuance of an authority to construct ("ATC") for a power plant is predicated upon the District issuing a FDOC and ensuring that the CEC's certification incorporates the conditions contained in the FDOC. *See id.* 2-3-301. As explained by the District's counsel, the District's ordinary practice is to issue a PSD permit together with an ATC after CEC certification. District Response to Petition for Review at 4.

2. *Notice and Comment Provisions in 40 C.F.R. part 124.10*

The parties devote considerable attention in their briefs to the provisions in 40 C.F.R. § 124.10, which instruct EPA (and its delegates) how to provide notice of permitting actions such as draft permits (including public comment periods and any public hearings), and final permits. *See* 40 C.F.R. § 124.10(a). Section 124.10 provides instruction on both the method and content of notice.

With regard to the method of notice, the section 124.10 regulations require that EPA notify by mail designated governmental agencies and officials. *See* § 124.10(c). More particularly, notice is required to be given to the following governmental agencies and officials:

> [A]ffected State and local air pollution control agencies, the chief executives of the city and county where the major stationary source or major modification would be located, any comprehensive regional land use planning agency and any State, Federal Land Manager, or Indian Governing Body whose lands may be affected by emissions from the regulated activity[.]

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[9](...continued)
Hearing at 14. Accordingly, Mr. Ratliff further explained that the CEC "could not overwrite or change the nature" of a District-issued permit regarding PSD issues because these are "determined by the [District] acting for * * * EPA." *Id.* at 17.

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40 C.F.R. § 124.10(c)(1)(vii).

As to general outreach efforts, 40 C.F.R. § 124.10 directs the EPA to proactively assemble a "mailing list" of persons to whom PSD notices should be sent. *See* 40 C.F.R. § 124.10(c)(1)(ix). The mailing list must be developed by:

> (A) Including those who request in writing to be on the list;
>
> (B) Soliciting persons for "area lists" from participants in past permit proceedings in that area; and
>
> (C) Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as Regional and State funded newsletters, environmental bulletins, or State law journals.

40 C.F.R. § 124.10(c)(1)(ix).[10]

[10] The part 124 rules, moreover, prescribe the particular content of public notice of permitting actions. For example, the rules require a "brief description of the comment procedures required by [sections] 124.11 and 124.12 and the time and place of any hearing that will be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled) and other procedures by which the public may participate in the final permit decision." 40 C.F.R. § 124.10(d)(1)(v). Part 124 further requires that the EPA or its delegate provide the "[n]ame, address and telephone number of a person from whom interested persons may obtain further information, including copies of the draft permit or draft general permit, as the case may be, statement of basis or fact sheet, and the application[.]" *See* 40 C.F.R. § 124.10(d)(1)(iv). As discussed below, *see infra* Part III, Mr. Simpson challenges the adequacy of the content of the notice in addition to arguing that notice was not provided to everyone entitled to notice.

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B. *Factual and Procedural Background*

The PSD permitting procedures at the heart of this dispute were triggered by RCEC's application to the CEC, on November 17, 2006, to amend the CEC's original 2002 certification[11] of RCEC's proposal to build a 600-MW natural gas-fired, combined cycle power plant in Hayward, California. *See* Declaration of J. Mike Monasmith ("Monasmith Decl.") ¶ 2, Att. A. According to the District Air Quality Engineer who oversaw the RCEC's PSD permitting, the District, after conducting an air quality analysis, issued its PDOC/draft PSD permit, notice of which it published in the Oakland Tribune on April 12, 2007. Declaration of Wyman Lee, P.E. ("Lee Decl.") ¶ 2. In the notice, the District established a thirty-day public comment period ending on May 12, 2007. Lee Decl. ¶ 3.

According to the District, the District mailed out copies of the notice of the PDOC/draft PSD permit issuance, along with the draft permit itself, to the CEC, EPA Region 9, project applicant RCEC, the Point Reyes National Seashore, and four local air quality regulatory agencies bordering the District's jurisdiction. *Id.* ¶ 2.[12] Otherwise, the District essentially delegated the bulk of its outreach efforts to CEC, as

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[11] RCEC originally filed for certification by the CEC in early or mid-2001, and was initially certified by the CEC on Sept. 11, 2002, pursuant to the Warren-Alquist Act, *see supra.* During the initial CEC certification process, which also incorporated the District permitting, the District issued a PDOC/Draft PSD Permit to RCEC in November 2001. However, the District did not proceed to issue a final PSD permit because RCEC withdrew plans to construct the project in the spring of 2003. *See* Letter from Gerardo C. Rios, Chief, Permits Office, U.S. EPA Region 9, to Ryan Olah, Chief Endangered Species Division, U.S. Fish and Wildlife Service (Jun. 11, 2007). The amended CEC certification and PSD permitting were required because RCEC afterwards proposed relocating the project 1,500 feet to the north of its original location. *See* Final PSD Permit, Application No. 15487 ("Final Permit") at 3.

[12] The District's Air Quality Engineer identified the following four neighboring air quality regulatory agencies as having received notice of the draft PSD Permit/PDOC: Sacramento Metropolitan, San Joaquin Valley, Yolo-Solano, and Monterey Bay. Lee Decl. ¶ 2.

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recounted by District and CEC officials. These officials assert that the District's mailing of the PDOC/draft PSD permit and accompanying notice caused copies of these materials to be sent "to all persons included on [CEC's] service list for the proceedings" based on the officials' understanding that CEC's "practice" was to mail copies of all material filed in its docket to those on CEC's "service list." Lee Decl. ¶ 2; Monasmith Decl. ¶¶ 3,4. Apparently, no documentation of this mailing exists, *see* Transcript of April 3, 2008 Teleconference Hearing ("Teleconf. Hr'g") at 25, though the District cites the Declaration of J. Mike Monasmith, a CEC siting officer in the present matter, to the effect that he was "informed and believed" that such notice was given "per the normal procedures" of CEC staff. Monasmith Decl. ¶ 4.

In a declaration filed in this proceeding and during the teleconference hearing, Mr. Richard Ratliff of the CEC described CEC's outreach activities in the parallel CEC certification proceedings. In particular, Mr. Ratliff stated that CEC had compiled three lists of agencies and persons for purposes of outreach. These lists consisted of an "interested agency" list of "30 regional, state, and federal agencies"; a "Property Owner" list of "130 individuals and business[es] that own property adjacent to or near the site of proposed [RCEC]"; and a "General List" of "140 other people, businesses, and other entities to whom the Energy Commission sent information." *See* Declaration of Richard C. Ratliff ("Ratliff Decl.") ¶ 2. Mr. Ratliff described the third "general list" as "comprised of those agencies and persons who had participated in the earlier proceeding and had not requested to have their names removed * * * and comprised of other people who had expressed interest or had attended any event or commented in writing on the project." *See* Teleconf. Hr'g at 27.

The District received only one comment during the public comment period on the draft PSD permit (from the applicant RCEC) and one letter from CEC after the PSD comment period closed. Lee Decl. ¶¶

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4, 5. The District did not hold a public hearing for the RCEC PSD facility.[13]

With regard to the parallel CEC certification process, the CEC did not receive written comments regarding air quality issues or hold hearings during the time frame of the PDOC/draft PSD comment period. *See* Monasmith Decl. ¶ 7. A CEC official noted, however, that the CEC docket received public comments on air quality issues outside the time frame of the PSD comment period. *See id.*; Monasmith Decl. (Ex. A). The record does not indicate whether any of these comments related to PSD issues. During the teleconference hearing, Mr. Ratliff indicated that the CEC staff "don't really attempt to determine whether these are PSD comments or not." Teleconf. Hr'g at 14.

Also, on April 25, 2007, during the PSD comment period which ran from April 12 to May 12, the CEC held a public workshop, during which various issues related to the RCEC project, including air quality, were discussed. *See* Teleconf. Hr'g at 20-22. It appears likely that the District was represented during this workshop. *Id.* at 19-20.

On June 19, 2007, the District issued an Amended FDOC for RCEC. Lee Decl. ¶ 6. The CEC certified RCEC on September 26, 2007. Monasmith Decl. at 2. On Nov. 1, 2007, the District issued its Permit/ATC to RCEC.[14] On the same date, the District mailed notice of the Permit, along with the Permit itself, to the CEC, Region 9, RCEC, the

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[13] 40 C.F.R. part 124 directs a permit issuer to hold a hearing only when it "finds, on the basis of requests, a significant degree of public interest in a draft permit(s)." 40 C.F.R. § 124.12(a). There is no record of the District having made such a finding in this case, and Mr. Simpson has not alleged that the District should have held a hearing based on the degree of public interest in this proceeding. *See In re Sunoco Partners Mktg. & Terminals, L.P.*, UIC Appeal No. 05-01, at 12 (EAB June 1, 2006) (Order Denying Review in Part and Remanding in Part) (holding that the EPA's decision to conduct a public hearing is "largely discretionary"); *accord In re Avery Lake Property Owners Assoc.*, 4 E.A.D. 251, 252 (EAB 1992).

[14] As explained by the District's Air Quality Engineer, the Permit also serves as the ATC under California Law. *See* Lee Decl.

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Point Reyes National Seashore, and the four neighboring air quality management districts noted above. Lee Decl. ¶ 7. On December 7, 2007, the District published notice of the issuance of the Permit in the Oakland Tribune. Id. ¶ 9.

On January 3, 2008, Mr. Simpson filed a petition for review challenging the issuance of the Permit for RCEC. In his Petition, Mr. Simpson challenges issuance of the draft permit and Permit on the basis that the District failed to provide adequate notice of the issuance of the draft permit and Permit in accordance with 40 C.F.R. part 124 and failed to satisfy BACT and other federal and state requirements. *See* Pet. at 1-5. At the Board's request, the District, on January 18, 2008, filed a response to the Petition. The District sought summary dismissal of the Petition on the grounds that Mr. Simpson failed to meet jurisdictional thresholds for Board review, including standing, preservation of issues for review, and timeliness. *See* Response to Petition for Review Requesting Summary Dismissal ("District's Response").

With the Board's leave, Mr. Simpson, on February 11, 2008, filed a brief opposing the District's request for summary dismissal of the Petition, in which he further developed his arguments. *See* Opposition to Request for Summary Disposal ("Pet'r Opposition"). As requested by the Board, the District, on March 7, 2008, filed a response to Mr. Simpson's opposition brief. *See* Response to [Pet'r Opposition]. ("District's Response to Opposition").

On April 3, 2008, the Board held the above-mentioned teleconference hearing at which Mr. Simpson and counsel for the District, CEC, and RCEC participated.[15] At the teleconference hearing, the Board granted leave to Mr. Simpson to submit the brief that Mr. Simpson had filed with the Board on March 31, 2008, as well as to

[15] At the teleconference hearing, the Board obtained information from the participants on CEC's and the District's public notice and outreach activities in this proceeding pursuant to 40 C.F.R. §124.10 as well as Mr. Simpson's participation in these activities.

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the District to file a responsive brief submitted by the District on April 3, 2008. *See* Teleconf. Hr'g at 7-8; Opening Statement of Rob Simpson; [District's] Response to Petitioner's "Opening Statement."[16]

III. *SUMMARY OF MR. SIMPSON'S APPEAL AND THE DISTRICT'S RESPONSE*

As noted previously, in his Petition and subsequent briefs, Mr. Simpson challenges the Permit on the basis of improper notice under 40 C.F.R. part 124, BACT issues, and other issues of federal and state law. Following is a summary of Mr. Simpson's objections to the Permit, divided into notice and non-notice issues:

> **Notice Issues (40 C.F.R. § 124.10 and California state law):**
>
> (1) The District failed to provide adequate notice of the issuance of the draft PSD permit and public comment period by not carrying out certain forms of notice and contacting specific entities entitled to notice;
>
> (2) The content of the notice of the draft permit was deficient in that the notice did not disclose the identity of the applicant, facility location, procedures for requesting a hearing, the phone number of the contact person, and the amount of PSD increment consumed; and
>
> (3) The District's publication of notice of the issuance of the Permit in the *Oakland Tribune* was inadequate

[16] Although Mr. Simpson had not sought the Board's permission to file his "Opening Statement," the Board nevertheless admitted Mr. Simpson's "Opening Statement" and the District's response brief because the two briefs touched upon matters for which the Board sought clarification during the teleconference hearing. Teleconf. Hr'g at 7-8.

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because the *Oakland Tribune* is not a newspaper of general circulation "within the District" as required by Cal. Code Regs. tit. 20 § 1713(c).

Non-notice Issues:

(1) The District's BACT analysis is erroneous because the District failed to adopt a demonstrated technology, "OpFlex," that was recommended by CEC staff;

(2) The Emission Reduction Credits ("ERCs") in the Permit are not sufficient to offset the RCEC's emissions of NOx and Precursor Organic Compounds;

(3) The Permit incorporated major changes in the use of ERCs from an already approved project, the East Altamont Energy Center, without appropriate opportunity for public comment;

(4) The District failed to consider important environmental justice issues in issuing the Permit;

(5) EPA failed to consider "impacts of air, noise, light and water pollution" when seeking an informal opinion from the FWS;

(6) The District failed to consider RCEC's generation of greenhouse gases;

(7) The District failed to discuss cumulative impacts, including a nearby highway, and the nearby Eastshore Energy Center Proposal;

(8) The District failed to include "acrolein" in its "Toxic Air Contaminant (TAC) Health Risk Screening"; and

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> (9) The District lacked authority to issue the Permit because the Permit issuance is outside the scope of its delegation agreement with the EPA.

See Pet. at 2-6; Pet'r Opposition at 1-21.[17]

In response, the District avers that Simpson failed to demonstrate that he satisfied the threshold requirements for standing and other jurisdictional thresholds prerequisite to granting review of his petition. *See* District's Response at 10-20. The District states further, that, "[t]o the extent that the Environmental Appeals Board does not dismiss the Petition summarily because of the threshold defects outlines above, it should at least strike portions of the Petition raising non-PSD issues outside of the Board's jurisdiction." *Id.* at 19.[18]

IV. *DISCUSSION*

A. *Threshold Procedural Requirements for Board Review*

The parties' arguments on appeal revolve initially around the significance of certain threshold conditions that 40 C.F.R. part 124 imposes on parties seeking Board review. One threshold requirement is contained in the following provision:

> [W]ithin 30 days after a * * * PSD final permit decision * * * has been issued * * * , *any person who filed comments on that draft permit or participated in the public hearing* may petition the Environmental Appeals Board to review any condition of the permit decision.

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[17] Because the Board is remanding the Permit on procedural grounds, the Board's decision will not address most of the above-listed substantive arguments raised in Mr. Simpson's Petition. *See infra* Part IV.B.3.

[18] Consistent with the Board's procedures, the District did not file a response addressing the nonprocedural issues raised by Mr. Simpson pending disposition of the response seeking summary disposition.

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40 C.F.R. § 124.19(a) (emphasis added).

The Board has described meeting this procedural threshold for Board jurisdiction as demonstrating "standing" to petition for review. *See, e.g., In re Knauf Fiber Glass, GMBH,* 9 E.A.D. 1, 5 (EAB 2000); *In re Sutter Power Plant,* 8 E.A.D. 680, 686 (EAB 1999).[19] In effect, section 124.19(a) confers an automatic standing entitlement on all those who participate during the public comment period, thereby making such persons "proper" petitioners before the Board.[20]

Also, the regulations governing PSD permitting provide that the petition for review shall include "a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations." 40 C.F.R. § 124.19(a). The regulations include the following requirement for raising issues during the public comment period:

> All persons, including applicants, who believe any condition of a draft permit is inappropriate * * * must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing) * * *.

40 C.F.R. § 124.13. In applying these regulations, the Board has routinely denied review where the issue "was reasonably ascertainable but was not raised during the comment period on the draft permit." *In*

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[19] As noted above, petitioners seeking Board review of a PSD permit must also meet the threshold timeliness requirement of filing petitions for review within "30 days after a * * * PSD final permit decision * * * has been issued." 40 C.F.R. § 124.19(a).

[20] "'Standing to sue' means that party has sufficient stake in an otherwise justifiable controversy to obtain judicial resolution of that controversy" and "focuses on the question of whether the litigant is the proper party to fight the lawsuit, not whether the issue itself is justiciable." Black's Law Dictionary 1405 (6th Ed. 1990) (citations omitted).

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re Christian County Generation, LLC, PSD Appeal No. 07-01, slip op. at 12 (EAB Jan. 28, 2008), 13 E.A.D. ___; *In re Shell Offshore, Inc.,* OCS Appeal Nos. 07-01 & 02, slip op. at 52-53 (EAB Sept. 14, 2007), 13 E.A.D. ___; *In re Kendall New Century Develop.,* 11 E.A.D. 40, 55 (EAB 2003).

With respect to these foregoing threshold procedural requirements, the District asserts, in seeking summary dismissal of Mr. Simpson's appeal, that "the Petition must be summarily dismissed because it does not satisfy the threshold requirements for [EAB] review in that (i) the Petitioner lacks standing; (ii) the issues raised in the Petition were not preserved for review; and (iii) the Petition is untimely." District's Response at 1. Mr. Simpson counters that to the extent that he failed to meet threshold requirements for Board review, it was because the District's failure to comply with notice requirements under 40 C.F.R. § 124.10 prevented Mr. Simpson from commenting on the draft PSD Permit. Pet'r Opposition at 1. As Mr. Simpson contends, "[i]t is disingenuous of the District to violate public notice requirements and then argue that my appeal is precluded as a result." *Id.* at 2.

B. *The Framework for the Board's Analysis*

1. *The Importance of the Notice Provisions of the Regulations*

Mr. Simpson's appeal raises before the Board the issue of whether a permitting authority's failure to comply with notice obligations can be so substantial that it precludes the public participation upon which procedural "standing" is based. Thus, Mr. Simpson seeks to direct the Board's attention from the question of whether he complied with the procedural threshold requirements at § 124.19 to the antecedent one of whether the District complied with its initial outreach and notice obligations at 40 C.F.R. § 124.10. Inherent in Mr. Simpson's argument is the proposition that the District's notice and outreach under § 124.10 were so defective that these defects "rippled through" the permitting process, handicapping the participation necessary for standing and, by consequence, precluding satisfaction of the other procedural thresholds

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for Board review, such as preserving issues for review and the timely filing of a petition for review. *See* 40 C.F.R. § 124.19(a).

In theory, it is not difficult for the Board to accept the pivotal role of initial notice depicted by Mr. Simpson and examine this issue as the starting point for our analysis. Initial outreach and notice activities under § 124.10 are clearly intended to generate the public participation upon which standing to challenge permit decisions is predicated. *See In re MCN Oil & Gas Co.,* UIC Appeal No. 02-03, at 11 (EAB Sept. 4, 2002) (Order Denying Review) ("Standing to appeal a final permit determination is limited under [40 C.F.R. §] 124.19 to those persons who *participated* in the permit process leading up to the permit decision * * *.") (emphasis added). Obviously, a person who does not receive notice of a draft permit (and is otherwise unaware of its issuance) will not be able to participate to the extent of filing comments on the draft permit, and thereby satisfy the procedural threshold imposed by section 124.19(a), entitling that person to standing before the Board. If a person is entitled to such notice, failure to receive it is clearly prejudicial. For that reason, part 124 contains very specific requirements in section 124.10 as to whom notice must be given and as to the contents of the notice.

The Board has consistently acted to ensure that permitting authorities rigorously adhere to procedural requirements that facilitate public participation and input during EPA permitting. *See In re Weber, #4-8,* 11 E.A.D. 241, 245 (EAB 2003); *In re Rockgen Energy Center,* 8 E.A.D. 536, 557 (EAB 1999). In *Weber* and *Rockgen,* while the public had been properly notified via § 124.10, we nonetheless remanded final permits to the respective permitting agencies for an equally critical procedural reason. In those cases, the agencies failed to comply with the requirement that "[a]t the time a final permit decision is issued," the permitting authority must issue a "response to comments" document responding to "all significant comments" received during the public comment period, *see* 40 C.F.R. § 124.17, as well as to make public comments and the EPA's response thereto part of the administrative record upon which a final permit decision is based. *See* 40 C.F.R.

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§ 124.18(a),(b)(1); *see, e.g., Weber, # 4-8,* 11 E.A.D. at 245; *Rockgen,* 8 E.A.D. at 557; *see also In re Antochem N. Am., Inc.,* 3 E.A.D. 498-99 (Adm'r 1991).[21] In remanding in *Weber,* we explained that the purpose of 40 C.F.R. § 124.17 requirement to issue a response to comments document at the time of permit issuance was to ensure that the permitting authority "have the benefit of the comments and the response thereto to inform his or her permit decision." *Weber*, 11 E.A.D. at 245; *see also Rockgen,* 8 E.A.D. at 557 (explaining that adherence to 40 C.F.R. § 124.17 was necessary to give "thoughtful and full consideration to all public comments before making the final permit determination.").

Also, in *Rockgen,* we described a remand as necessary to validate a key statutory objective of the Clean Air Act's PSD program, namely to "assure that any decision to permit increased air pollution * * * is made only after consideration of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process." *See Rockgen,* 8 E.A.D. at 557 (*quoting* CAA § 160(5), 42 U.S.C. § 7470(5)). In *Rockgen,* recognizing the CAA's stress on the central role of public participation in PSD permitting and the need for Board intervention to safeguard that role, we observed the following:

> The failure of [the permitting authority] to comply fully with the public participation requirements of the [PSD] regulations implementing this statutory requirement, combined with a reasonable perception from the record that [the permitting authority] may not in fact have given consideration to the public's comments

[21] Part 124 provides, in relevant part, that the "administrative record for any final permit shall consist of the administrative record for the draft permit and * * * [a]ll comments received during the public comment period provided under [40 C.F.R.] § 124.10 [and] * * *[t]he response to comments required by [40 C.F.R.] § 124.17." 40 C.F.R. § 124.18(b)(1), (4).

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> beforehand, undermines the statutory objective and should be rectified.

Rockgen, 8 E.A.D. at 557; *see also Antochem N. Am.*, 1 E.A.D. at 498.

In remanding in *Weber, supra,* we rejected the Region's argument that the subject procedural errors were a merely "bureaucratic in nature." *Weber*, 11 E.A.D. at 245. Characterizing these violations of § 124.17 violations as "neither harmless, inconsequential, nor trivial," we noted that accepting Region 5's arguments to the contrary would "short circuit the permit process." *Id.* In the above procedural cases, the Board acknowledged that remanding the proceedings to correct the subject procedural violations might not result in any alteration of the final permit decisions. *See Rockgen,* 8 E.A.D. at 557; *Weber,* 11 E.A.D. at 246. Instead, we viewed the Board's remedial intervention as necessary to safeguard the integrity of EPA's procedural regime for assuring public participation in Agency permitting. *See id.*

This concern for protecting the integrity of EPA's public participation procedures, as expressed in *Weber* and *Rockgen*, forms the context for considering the District's repeated suggestions in its briefs that any supposed violation of § 124.10 by it was essentially "harmless." Clearly, any violation of § 124.10 that would deny the public its rightful opportunity to comment and therefore have its views considered by the permitting agency could cause a "harm" or "prejudice" similar to that which prompted our corrective action in *Weber* and *Rockgen.* This is clear since initial notice of permitting actions –along with soliciting public comments, incorporating comments and EPA responses thereto in the administrative record, and providing proper notice of final permitting actions – constitute a set of related procedures that together support the statutory directive to foster effective public participation in PSD permitting. *See* CAA § 160(5), 42 U.S.C. § 7470(5). The only difference between the allegations in the instant case and *Weber* and *Rockgen* is that the violations alleged in this case – initial notice of permitting actions – occurred at an earlier stage of this chain of procedures. Yet the resulting harm or "short circuiting" of the permitting

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process in this case would be similar. As we noted in *Weber* and *Rockgen,* the essence of the alleged "harm" from the procedural violation is not simply its potential impact on the final permit decision, but rather the deprivation of the public's opportunity to have its views considered by the permitting agency. *See* §124.17.

2. *Whether the Board Can Consider Mr. Simpson's Claims*

Analyzing Mr. Simpson's claim of defective notice and request for remand poses the initial question of whether the Board has the power to adjudicate Mr. Simpson's claim despite his not being able to qualify for the standing entitlement set forth at § 124.19(a), *supra.* Thus, the Board must determine whether Mr. Simpson is nevertheless a "proper" litigant before the Board– i.e. whether Mr. Simpson indeed has "standing" to claim exercise of the Board's jurisdiction, making him eligible for a ruling on the merits and access to the Board's remedial powers. *See Weiner v. Bank of King of Prussia*, 358 F.Supp. 684, 695 (E.D. Pa.. 1973) ("Standing is a jurisdictional issue which concerns power of * * * courts to hear and decide cases * * * [and] does not concern the ultimate merits of substantive claims involved in the action.").

We note initially a certain circularity in addressing Mr. Simpson's claim of defective notice. If, despite Mr Simpson's claims, all the procedural requirements of part 124 were complied with, then Mr. Simpson would not have standing to have his Petition considered. However, as discussed below, if the procedural requirements were not fully complied with, then it is possible that Mr. Simpson's Petition warrants consideration even though, under normal circumstances, failure to participate in the proceedings below would lead to denial of a petition on standing grounds.

But there is no way to know if part 124 requirements were met without considering the Petition at least to that extent. Indeed, it would be incongruous for the Board to categorically deny standing, and possibility of redress, to a petitioner who presents facts purporting to

show that EPA (or one of its delegates) has violated § 124.10 and thereby prejudiced the petitioner's participation rights. Denying standing outright in such cases would deny parties the opportunity to vindicate before the Board potentially meritorious claims of notice violations under part 124 and would be at odds with the Board's obligation to "decide each matter before it in accordance with applicable statutes and regulations." *See* 40 C.F.R. § 1.25(e)(1). Furthermore, conferring standing in a restrictive manner would be at odds with clear Congressional direction for "informed public participation," *see* CAA § 160(5), 42 U.S.C. § 7470(5), and § 124.10's expansive provision of notice and participation rights to members of the public. This is illustrated by the requirement for permitting agencies to implement general outreach by compiling mailing lists of persons interested in permitting actions, *see* 40 C.F.R. § 124.10(c)(1)(ix)(A)-(C), and the statement elsewhere in part 124 that "*any* interested person may submit written comments on the draft permit." *Id.* § 124.11 (emphasis added).

For the reasons stated above, we conclude that Mr. Simpson's claim of inadequate notice warrants consideration by the Board. As such, we must determine whether the District indeed violated 40 C.F.R. § 124.10 in issuing the Permit. Accordingly, the Board must examine whether Mr. Simpson meets part 124's demanding standard for Board review of PSD final permit decisions, which here requires Mr. Simpson to demonstrate that a condition of the Permit[22] is based upon "a finding of fact or conclusion of law which is clearly erroneous" or "an exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review." *See* 40 C.F.R. § 124.19.

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[22] As applied to the notice violation, the allegation of error is considered to be the Permit in its entirety. *See In re Chem. Waste Mgmt. of Ind.*, 6 E.A.D. 66, 76 (EAB 1995) (holding that the Board, in accordance with its review powers under 40 C.F.R. § 124.19, is "authorize[d] * * * to review any condition of a permit decision (or as here, the permit decision in its entirety.).")

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3. *The Board's Conclusion That Public Notice Was Inadequate and the Permit Must Be Remanded*

Based upon our review of the arguments and facts presented by the parties in their briefs and at the teleconference hearing, as summarized below, we determine that Mr. Simpson has demonstrated that the District clearly erred by issuing the Permit without providing adequate notice of the issuance of the draft permit and opportunity to comment as required by § 124.10. To redress this harm, the appropriate remedy is to remand the Permit so that a draft permit can be "renoticed" pursuant to § 124.10. Because issuance of the draft permit will reopen the public comment period and allow new opportunity for filing public comment, the Board, for reasons of judicial economy, refrains from opining on the substantive arguments raised in Mr. Simpson's appeal, except to the limited extent noted below.[23]

C. *Summary of the Parties' Arguments Regarding Public Notice of the Draft PSD Permit*

In his three briefs and a declaration filed with the Board, Mr. Simpson claims that the District failed to accord him and others not before the Board adequate notice of the Draft Permit in accordance with 40 C.F.R. part 124.10.

First, Mr. Simpson states that the District did not comply with the specific methods prescribed in part 124 for public outreach and notice of PSD permitting activities. For example, Mr. Simpson alleges that in his capacity as an "appointed" representative of the "Hayward Area Planning Association" ("HAPA"), he should have received notice

[23] Because we determine that the District's initial outreach of the RCEC draft permit was defective and thus justifies a remand, we need not consider the parties' dispute over the content of the notice of the draft permit and whether Mr. Simpson received adequate notice of issuance of the Permit. Similarly, the Board need not consider whether Mr. Simpson filed his Petition in a timely manner because failure to provide the legally required notice also prejudices the ability to file a timely petition for review.

of the RCEC permitting since HAPA is a "comprehensive regional land use agency" for the Hayward area, and as such is entitled to notice of permitting actions in accordance with part 124. *See* Pet'r Opposition at 3 (citing 40 C.F.R. § 124.10(c)(1)(vii)); Simpson Decl. at 1. Moreover, Mr. Simpson maintains that the District contravened the same provision by not providing notice to a local county government body, the Alameda County Board of Supervisors. *Id.* In support of this claim, Mr. Simpson has attached the declaration of Gail Steele, of the Alameda County Board of Supervisors, District 2, who represents that she did not receive notice of the District's process with regard to RCEC and Eastshore Energy Center.[24] *See* Declaration of Gail Steele ("Steele Decl.").

Moreover, Mr. Simpson contends that the District, contrary to the requirements in 40 C.F.R. § 124.10(c)(1)(ix), failed to "solicit persons for 'area lists' from participants in past permit proceedings in [the] area" as part of its outreach effort. *Id.* Mr. Simpson explains that many persons who participated in prior permitting proceedings did not receive notice of the RCEC draft permit. In particular, he identifies "Communities for a Better Environment" as an entity that participated in the "original application [for RCEC]" but did not receive notice of the draft RCEC permit at issue here. Pet'r Opposition at 3. In support of this contention, Mr. Simpson attaches a declaration by Shana Lazerow, attorney with Communities for a Better Environment ("CBE"). Declaration of Shana Lazerow ("Lazerow Decl."). In her declaration, Ms. Lazerow relates that in 2001, at the time of the original RCEC PSD permitting procedures, *see supra* note 11, a CBE colleague sent an e-mail to the District expressing CBE's interest in obtaining a copy of the PDOC for the RCEC proposal when issued. *See id.* Attached to the

[24] The proposed Eastshore Energy Center ("Eastshore"), located in Alameda County, near RCEC, obtained a PDOC and then a FDOC from the District although it apparently did not qualify as a "major source" of pollutants subject to PSD permitting. *See* Pet'r Opposition (Ex. 3). In addition, Eastshore's permitting appears to have overlapped, in part, with that for the proposed RCEC. *See* Teleconf. Hr'g at 33. However, in a curious contrast with RCEC, which received only one comment during its comment period, *see supra*, Eastshore generated "approximately 605 comments," according to the District's Air Quality Engineer. Pet'r Opposition (Ex. 3).

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declaration is a copy of an e-mail dated September 14, 2001, requesting the original PDOC. *Id.*

Mr. Simpson also faults the District for limiting press notice of the draft permit to "one notice in the English newspaper," *see* Pet. at 3, and also claims that the District violated its own regulations by failing to provide notice of the draft permit in a newspaper of "general circulation within the District." Pet'r Opposition at 8. In particular, Mr. Simpson asserts that the *Oakland Tribune* only serves as a newspaper of general circulation "within the City of Oakland and within the County of Alameda" but does not cover the entire District, "which is comprised of seven counties and portions of two additional counties." *Id.* Mr. Simpson further states that "notice in a newspaper of general circulation must be interpreted to mean newspapers of general circulation covering the District." *Id.*

Mr. Simpson, in his Opening Statement filed just before the teleconference hearing, also contends that during the comment period for the RCEC draft permit, CEC and the District conducted a workshop on April 25, 2007, but that neither entity recorded the comments made by the public. Opening Statement at 2. Simpson faults the CEC for not recording the comments despite what he says was the public's belief that "this was a hearing and [the public] made 'comments' believing that they would be considered." *Id.*

Based on this catalogue of alleged violations of § 124.10, Mr. Simpson asserts that the violations resulted in his and the community's inability to participate in the RCEC permitting process. As Mr. Simpson states, "the District is tasked with providing accurate information to the public so that it may participate in a meaningful manner." Pet'r Opposition at 5. He contends that the District's deficiencies in providing notice of PSD permitting actions "thwarted" the notice regulation's purpose of abetting public participation and ensuring "meaningful" public participation and "open government." *Id.* On this topic, the thirteen declarants' statements (including Mr. Simpson's) attached to Mr. Simpson's opposition memo all

represent that, had the declarants received notice of the RCEC PSD permit proceedings, they would have participated in the public comment period. *See* Pet'r Opposition (attached declarations).

In response to Mr. Simpson's arguments, the District emphasizes the CEC outreach efforts upon which the District admittedly "piggybacked" were so thorough and extensive that the CEC's outreach was essentially equivalent to what the District would have provided on its own. *See* District's Response to Opposition at 3-4, 5 n.4, *supra* Part II.B. On this point, the District recounts CEC's compiling of three mailing lists during the RCEC certification process and notes that even after the close of the comment period, CEC "h[e]ld extensive hearings and received a number of letters from the public on air quality issues." District Response at 7; *see* District's Response to Pet'r Opposition at 3-4. When asked by the Board during the teleconference hearing whether the District generated its own lists and provided those to the CEC, the District explained that it did not develop its own lists or provide input to CEC's list but rather relied on the CEC not only for physical mailing but also for determining the scope of outreach activities. Teleconf. Hr'g at 29.

The District uses CEC's allegedly comprehensive outreach process as a way to discount any "injury or harm" Mr. Simpson may have suffered and to discount the significance of any variance from the part 124 rules. In particular, the District claims that CEC's outreach was so extensive that even if CEC's notice had failed technically to comply with 40 C.F.R. § 124.10, any difference between CEC's efforts and what was required by § 124.10 was too trivial to have resulted in prejudice to Mr. Simpson. The District explains that since Mr. Simpson only responded to CEC's extensive outreach very late in the permitting process, Mr. Simpson's lack of participation can be taken as barometer of his fundamental lack of interest in the PSD permitting process. The District suggests that even if the District had performed the outreach itself in full compliance with 40 C.F.R. § 124.10, it would have accomplished the same result as CEC. *See* District's Response to Pet'r Opposition at 5 n.4, 6-7. Such was Mr. Simpson's lack of response,

asserts the District, that Mr. Simpson would not have participated in the RCEC proceedings in a manner sufficient to give him standing "no matter what level of notice was given." District's Response to Pet'r Opposition at 8. The District also maintains that even if it did not achieve technical compliance "in every detail" with these notice requirements, it nevertheless "substantially complied," and furthermore, "such minor defects cannot have prejudiced [Mr. Simpson] such as to excuse his failure to participate." District's Response to Pet'r Opposition at 6; Teleconf. Hr'g at 28.

The District also offers as an example of Mr. Simpson's alleged indifference his lack of participation in an April 25, 2007 workshop (which took place during the PSD comment period) carried out by CEC. As the District states, "[Mr. Simpson's] lack of participation * * * is simply further evidence" of the fact that [Mr. Simpson's] concerns about this project have developed only at the very end of the permitting process, and as a result [he] was not in a position to have commented on the draft PSD permit last summer even if the District had done everything as he claims it should have done." [District's] Response to Petitioner's "Opening Statement" at 2-3.

In the District's view, the examples above confirm that Mr. Simpson cannot demonstrate that he was "prejudiced" by any ostensible lack of notice by the District. District Response to Opposition at 7. Quoting the Board's decision in *In re J&L Speciality Prods. Corp.*, 5 E.A.D. 31, 79 (EAB 1994), the District avers that "because petitioner has failed to demonstrate how the Region's alleged technical violations of 124.10 affected these proceedings, or that it was in any way prejudiced by these alleged violations, we conclude that such violations, even if they occurred, were harmless, and do not invalidate the permit issuance." District Response to Opposition at 8 (quoting *J&L Specialty Prods.*, 5 E.A.D. at 79).

From another perspective, the District argues that CEC's outreach efforts were essentially identical to § 124.10 notice mandates. In other words, the District suggests that CEC's outreach efforts so

coincided with § 124.10 that Mr. Simpson's failure to be included in the scope of CEC's outreach meant that Mr. Simpson was not qualified for notice under § 124.10 in the first place. As the District explains, since CEC compiled its lists of contacts "as part of comprehensive public outreach * * * undertaken for [RCEC]," Mr. Simpson's non-appearance on the CEC's outreach lists proves that Mr. Simpson "cannot be someone who was entitled to direct mail notice under 40 C.F.R. § 124.10(c)." District Response to Pet'r Opposition at 3, 5.

Finally, the District disputes Mr. Simpson's contention that his affiliation with HAPA entitled him to notice of the draft permit. On this point, the District avers that the declaration of HAPA's own president, Sherman Lewis, submitted with Mr. Simpson's opposition memo, indicates that HAPA is not a government agency such as would be entitled to notice under § 124.10(c)(1)(vii), but rather a private citizens organization. *See* District's Response to Pet'r Opposition at 3 n.2; Pet'r Opposition (Ex. 25) (Declaration of Sherman Lewis).[25]

D. *The Board's Analysis of Mr. Simpson's Allegations of Inadequate Notice*

In addressing Mr. Simpson's notice-based claims under 40 C.F.R. § 124.10 below, we observe that his claims consist both of allegations that the District failed to provide him with notice to which he was specifically entitled and allegations that the District failed to give particularized notice to third persons not before the Board (*e.g.*, CBE). In previous cases involving § 124.10, the Board has held that petitioners cannot ordinarily raise for Board consideration claims of the latter type. *See J&L Specialty Prods.*, 5 E.A.D. at 79 (stating that "absent any alleged harm to [petitioner], we fail to see how [petitioner] has standing

[25] The District also rejects Mr. Simpson's argument that a HAPA attorney's participation in a CEC proceeding entitled Mr. Simpson to notice in the PSD proceeding. The District maintains that HAPA's attorney never claimed to represent Mr. Simpson during the CEC proceeding. District's Response to Pet'r Opposition at 3 n.2. During the teleconference hearing, Mr. Simpson acknowledged that he had filed the Petition on his own behalf, not as a representative of HAPA. *See infra* note 26.

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to complain about someone else allegedly not being mailed notice of the draft permit"); *accord MCN Oil & Gas Co.*, UIC Appeal No. 02-03, at 11 (EAB Sept. 4, 2002) (Order Denying Review). While these cases indicate that the Board generally will not consider notice allegations where the sole deficiency is failure to give notice to a particular person other than the petitioner, we nevertheless regard it as appropriate to consider claims of failure of notice to other persons within the scope of allegations of fundamental defects in the integrity of the notice process as a whole that may be prejudicial to the notice rights of the petitioner and others and thus may require Board remedy.

In the Board's view, based upon a preponderance of evidence in the record, Mr. Simpson has demonstrated that the District clearly erred in issuing the Permit without fully complying with the initial notice provisions for draft permits in 40 C.F.R. § 124.10. In this respect, Mr. Simpson has shown that the District failed to provide adequate notice of the RCEC draft permit to which he, as a member of the general public, was entitled. Moreover, Mr. Simpson has produced additional evidence, substantiated by information adduced by the Board at the teleconference hearing, showing that the District's system for providing public notice of the draft permit was fundamentally flawed and excluded far more members of the public than just Mr. Simpson. As we describe below, the evidence in the record demonstrates that these defects were substantial and thus warrant remand and renoticing of the Permit.

1. *Whether Mr. Simpson Has Proven that He Was Entitled to Receive, But Did Not Receive, Particularized Notice*

To evaluate allegations of lack of notice to Mr. Simpson himself, we first inquire whether Mr. Simpson was entitled to notice as being among those types of entities entitled to particularized notice under section 124.10. The Board concludes that Mr. Simpson was not entitled to notice on this basis. Mr. Simpson claims a right to receive notice as the "appointed representative" of HAPA, which he asserts is a "comprehensive regional land use planning agency" entitled to notice under 40 C.F.R. § 124.10(c)(1)(vii). We reject this assertion. First, we

agree with the District that as indicated in the declaration filed by HAPA's own president, HAPA is not an "agency" with governing authority, but rather a private citizens group and thus does not qualify as a "comprehensive regional land use agency." *See supra* Part IV.C.[26] Second, even if HAPA were entitled to notice, that does not mean that Mr. Simpson was personally entitled to notice.[27]

2. *Whether Mr. Simpson Has Proven that the District Failed to Assure Compliance With Notice Requirements of Part 124*

With regard to its general notice and outreach obligations, the District emphasizes that it satisfied such requirements by relying upon the ostensibly "comprehensive" nature of the CEC's outreach. Indeed, the Board recognizes the extensive outreach that CEC conducted as part of the certification process for the proposed RCEC and does not doubt the sincerity of the CEC's efforts. Furthermore, we note that a delegated state agency, such as the District, may redelegate PSD public notice and outreach to another state agency to the extent the federal delegation so allows.

The Board, however, concludes that the District fell conspicuously short of its general outreach obligations by failing to adhere to the provision requiring a permitting agency to compile "mailing lists" of persons potentially interested in receiving information about permitting activities. *See* 40 C.F.R.§ 124.10(c)(1)(ix). In this regard, Mr. Simpson has persuaded us that the District did not comply with the obligation to "notify [] the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as Regional and State funded newsletters,

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[26] As the District correctly observes, the declaration of HAPA's president, submitted with Mr. Simpson's opposition memo, indicates that HAPA is a private citizens organization. *See* District's Response to Pet'r Opposition at 3 n.2; Pet'r Opposition (Exh. 25).

[27] We note that Mr. Simpson filed the Petition in his own name and not on behalf of HAPA. Teleconf. Hr'g at 37-38.

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environmental bulletins, or State Law Journals." Pet'r Opposition at 3 (quoting 40 C.F.R. § 124.10(c)(1)(ix)(C)). The District's notice of the draft permit and public comment period in a single publication in the *Oakland Tribune,* undertaken to satisfy State requirements, *see* Pet. at 3; Pet'r Opposition (Exh. 1), does not, in our view, satisfy the requirement that a permitting authority solicit interest and participation in permitting activities among members of the public via *periodic* publication in *multiple* print media. *See* 40 C.F.R. § 124.10(c)(1)(ix)(C). In fact, during the teleconference hearing, the District's representative admitted that he was not aware of "anything the District or the CEC has explicitly done in an attempt to comply" with this requirement. Teleconf. Hr'g at 31-32.[28] By falling short of this requirement, we find that the District narrowed the scope of public notice to which Mr. Simpson and other members of the public were entitled under part 124.

In a larger sense, statements by the District's and CEC's representatives illuminate the fact that complying with section 124.10's specific notice mandates was not the object of the CEC's outreach strategy for the RCEC draft permit. Indeed, the three CEC-generated outreach "lists" upon which the District piggybacked were not tailored in any way to criteria for proper notice of PSD permitting specified at section 124.10, but rather were designed to support the CEC's parallel

[28] Significantly, the Board notes that the three CEC lists upon which the District relied for the bulk of its outreach efforts do not reflect that the District complied with its obligation to actively solicit *new* participation in the PSD permitting process via publication in print media. *See supra* Part II.B. As described by CEC's counsel, the three lists consisted of interested agencies, adjacent residents and businesses, and agencies and persons who had participated in *previous* proceedings and persons who had expressed interest in or commented on the RCEC project. *See supra id.* In sum, the composition of those lists does not indicate that CEC carried out on the District's behalf the requirement to broadly inform the general public of the "opportunity" to be notified of permitting actions through "periodic" publication in multiple print media. *See* 40 C.F.R. § 124.10(c)(1)(ix)(C).

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certification process. *See supra* Part II.B.[29] As the District's counsel acknowledged at the teleconference hearing, these CEC outreach efforts did not provide a "perfect match" with section 124.10. Teleconf. Hr'g at 30. In fact, the District conceded that its own reliance on the CEC's outreach was so great that the District had no role in shaping the content of the CEC's mailing lists. *See id.* at 28. As the District's counsel summarized, "[w]e don't provide a list[;] we rely on the outreach the [CEC] does." *Id.* at 29. What the District appears to have done is turn over the public notice and outreach activities to the CEC without making any effort to assure that the CEC made any necessary modifications to its procedures to reflect the requirements of part 124.

Additional evidence offered by Mr. Simpson regarding the District's notice to third persons fortifies our view that the District's reliance upon CEC's certification procedures resulted in a flawed notice process. For example, it appears that CEC's outreach efforts did not satisfy the obligation to "inform the chief executive[] of the * * * county where the major stationary source is located" with respect to the RCEC project. *See supra* Part IV.C.; 40 C.F.R. § 124.10(c)(1)(vii); Pet. for Review at 2. In this regard, the District has not disputed the assertion by Gail Steele, of the Alameda County Board of Supervisors (whose jurisdiction includes Hayward), that she did not receive notice of the PSD permitting for the RCEC project. *See* Steele Dec l.

Moreover, the District has not disputed the statement of Shana Lazerow of CBE that she did not receive notice of the draft PSD Permit for RCEC even though CBE had requested from the District material related to the original RCEC PSD permitting in 2001. *See* Lazerow Decl. This reflects that the District had created no mechanism for relaying to the CEC the names of persons in the locality who had

[29] During the teleconference hearing, CEC's representative made clear that CEC's certification process, not section 124.10 requirements, determined the scope of public outreach for the draft permit. *See* Teleconf. Hr'g at 28. As he explained, CEC developed its outreach "lists" (on which the District relied) "for our own [certification] proceeding." *Id.* at 28.

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participated in past PSD proceedings in order to ensure compliance with the requirement that permitting authorities develop "area lists," for notification purposes, of such persons. *See* 40 C.F.R. § 124.10(c)(1)(ix)(B). In sum, the foregoing examples confirm the District's failure to institute a system of accountability whereby CEC, in implementing public notice of the draft permit, would have to adapt its own outreach lists to section 124.10 mandates. *See, e.g.,* Teleconf. Hr'g at 28-29.

Another issue that raises serious doubts about the adequacy of the District's procedures for public participation in this case is the District's role with respect to a CEC-conducted public workshop regarding the proposed RCEC. As noted previously, the workshop, in which the District apparently participated, was held on April 25, 2007, during the public comment period for the draft permit, and air quality issues appeared on the agenda. *See supra* Part II.B; Opening Statement of Rob Simpson at 2. During the teleconference hearing, CEC's counsel stated his "belief" that the District was present at the workshop along with members of the public. *See* Teleconf. Hr'g at 21. As noted previously, Mr. Simpson represents that the "public attended this workshop believing that this was a hearing and made 'comments' believing that they would be considered." Opening Statement of Rob Simpson at 2. While there is no independent verification of this representation, it is certainly plausible. In any event, the fact that the workshop occurred during the time frame of the draft permit comment period with likely District participation and that no recording was made of any public comments (including air quality issues) raises legitimate concerns about whether the District showed sufficient diligence in addressing public input into the permitting process for RCEC.

This is just one illustration of the nature of the confusion between the District PSD and broader CEC processes. In response to questions during the teleconference hearing, the CEC representative indicated that the public was entitled to comment, during the CEC process, on any air quality issues, including those covered by the PSD permit. However, he noted that the CEC was powerless to make any

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changes to the permit based on these public comments. Adding further confusion, in response to a question about how the CEC staff handles comments that relate to PSD, the CEC representative went on to state that "our staff frequently comments on things without trying to discriminate between things that are PSD and non-PSD" and "[w]e don't really attempt to determine * * * whether these are PSD comments or not." Teleconf. Hr'g at 12-18. This reinforces the fact that the CEC merely folded the PSD notice proceeding into its ongoing process without an attempt to ensure that the part 124 requirements, including public input requirements, were met.

In sum, despite the significant scope of CEC's outreach for the proposed RCEC, the evidence in the record supports Mr. Simpson's allegations that these efforts fell significantly short of section 124.10's requirements in numerous important respects. Most significantly, by relying almost completely on the CEC to determine the scope of public outreach regarding the draft permit, the District, as EPA's delegate, failed to provide the necessary oversight of CEC's outreach to ensure that it conformed with section 124.10. The District's complacent compliance approach is encapsulated in the District's stated assumption that "because [CEC's] outreach efforts [were] so broad * * * all interested parties would be swept up" in that process. Teleconf. Hr'g at 32. Indeed, the record shows that in the absence of District supervision, the CEC simply carried out its own certification-related outreach process without adjusting it in any way to satisfy section 124.10's specific notice requirements.

Furthermore, contrary to the District's statements, one cannot dismiss the District's omissions in this regard as "harmless error." First, the kind of deficiencies we noted potentially affected more persons than Mr. Simpson. Second, even as to Mr. Simpson, the District's assumption that, even with the proper notice, he would not have participated is purely speculative. Moreover, given the pivotal importance to Congress of providing adequate initial notice within EPA's public participation regime under 40 C.F.R. part 124, *see supra* Part IV.B., we regard it as inappropriate to impose upon Mr. Simpson the burden of showing actual

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prejudice as the result of the District's notice violations here. *See, e.g., In re Dist. of Columbia Water and Sewer Auth.*, NPDES Appeal Nos. 05-02, 07-10, 07-11, and 07-12, slip op. at 67-68 (EAB Mar. 19, 2008), 13 E.A.D. ___ (refusing to impose upon petitioner the burden of showing prejudice where the Region, in issuing an NPDES permit, failed to provide adequate notice and opportunity to comment pursuant to part 124).

In order to correct serious and fundamental deficiencies in the District's public notice of the draft permit and to remedy the resulting harm to the PSD program's public participation process, the Board finds it necessary to remand the Permit to the District to ensure that the District fully complies with the public notice and comment provisions of section 124.10.[30] On remand, the District must scrupulously adhere to all relevant requirements in section 124.10 concerning the initial notice of draft PSD permits (including development of mailing lists), as well as the proper content of such notice. *See* 40 C.F.R. § 124.10(d). Because the Board's remand will allow Mr. Simpson and other members of the public the opportunity to submit comments to the District on PSD-related issues during the new comment period, the Board refrains at this time from opining on such issues raised by Mr. Simpson in his appeal.

E. *Non-PSD Issues*

Because the purpose of this remand order is to remedy the District's flawed public notice of the draft permit and thus allow the public to fully exercise its public participation rights under part 124, the Board has no intention of circumscribing the range of PSD-related issues the public may raise on remand. However, in order to promote administrative efficiency and prevent unnecessary expense of legal

[30] As noted above, while a delegated state agency may redelegate notice and comment functions to another state agency to the extent the federal delegation so permits, which in this case could include a delegation to the CEC, in all cases it is incumbent upon the delegated state agency to ensure strict compliance with federal PSD requirements.

resources, the Board considers it advisable to alert potential parties of several issues raised in Mr. Simpson's appeal that are clearly beyond the Board's jurisdiction. As we have stated, "[t]he Board will deny review of issues that are not governed by the PSD regulations because it lacks jurisdiction over them." *See In re Sutter Power Plant,* 8 E.A.D. 680, 688 (EAB 1999); *see also Zion Energy, L.L.C.,* 9 E.A.D. 701, 706 (EAB 2001).[31] Among such issues raised by Mr. Simpson, the following come to our attention:

(1) Contemporaneous Emissions Reduction Credits ("ERCs")

Mr. Simpson's allegations regarding the proposed RCEC's employment of "contemporaneous [ERCs]" to offset its emissions of NOx and precursor organic compounds ("POCs"), *see* Pet. at 1-2; Pet'r Opposition at 11-12; *supra* Part III, are outside the Board's jurisdiction because they emanate from State of California requirements, not the PSD regulations. As the District correctly observes, the ERCs are a product of District regulation 2-2-302, and thus a California state law, not a federal PSD requirement. *See* District Response at 14-15, 20; *In re Sutter Power Plant*, 8 E.A.D. at 690 (denying review of petitioner's objection to use of ERCs on grounds that requirement to offset emissions with ERCs was not a federal PSD mandate).

(2) Endangered Species Act Concurrence

The Board does not have jurisdiction over Mr. Simpson's arguments challenging the adequacy of FWS's concurrence with Region 9, following informal consultations between the two entities, that the proposed RCEC would not adversely effect any federal listed species under the administration of the FWS. *See* Pet'r Opposition at 16-20, (Ex. 20); *supra* Part II.B. The Board has previously declined to entertain

[31] As the Board has held, "[t]he PSD review process is not an open forum for consideration of every environmental aspect of a proposed project, or even every issue that bears on air quality." *See In re Knauf Fiber Glass,* 8 E.A.D. 121, 126-27 (EAB 1999)

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substantive challenges to FWS actions pursuant to the ESA in keeping with the Board's longstanding principle of declining to hear substantive challenges to earlier, predicate determinations that are separately appealable under other statutes. *See Indeck-Elwood, LLC,* PSD Appeal No. 03-04, slip op. at 118-19 & nn.162-63 (EAB Sept. 27, 2006), 13 E.A.D. ___ (holding that the Board did not have jurisdiction over the petitioner's challenge to FWS's concurrence decision given the availability of judicial review through the Administrative Procedure Act).

(3) Various Non-PSD Statutes

Mr. Simpson's allegations that the District violated provisions of the Clean Water Act (including NPDES program), ESA, Migratory Bird Treaty Act, and Coastal Zone Management Act, as well as their implementing regulations, are outside the scope of this proceeding, as the allegations do not address violations of the CAA's PSD program. *See* Pet'r Opposition at 19-20.

(4) Toxic Air Contaminant Health Screening

Mr. Simpson's allegation regarding the District's alleged failure to include "Acrolein" as part of the District's "Toxic Air Contaminant health risk screening," *see* Pet. at 3, clearly refers to a California rather than a federal PSD requirement, and consequently is not reviewable by the Board.

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V. *CONCLUSION*

The Permit for RCEC is hereby remanded to the District. The District is directed to reopen the public comment period on the draft permit, providing public notice fully consistent with the requirements of 40 C.F.R. § 124.10.[32]

So ordered.

[32] The District is free, of course, to make any modifications to the draft permit it deems appropriate prior to noticing it for public comment.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Remand Order in the matter of *Russell City Energy Center*, PSD Appeal No.08-01, were sent to the following persons in the matter indicated:

By Certified U.S. Mail,
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January 5, 2010

ORDER

In re Black Mesa Complex Permit Revision	)	DV 2009-1-PR thru DV 2009-8-PR
	)	
	)	
	)	Significant Permit Revision
	)	Permit No. AZ-0001D

NUTUMYA'S NEPA MOTION GRANTED
(Docket No. DV 2009-4-PR)
OSM DECISION VACATED
OTHER PENDING MOTIONS DENIED AS MOOT
OTHER REQUESTS FOR REVIEW DISMISSED AS MOOT
(Docket Nos. DV 2009-1-PR, DV 2009-2-PR, DV 2009-3-PR, DV 2009-5-PR, DV 2009-6-PR, DV 2009-7-PR, DV 2009-8-PR)
HEARING CANCELLED

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I. Introduction

This matter involves the consolidated requests for review originally filed by ten applicants. They seek review of a revised permit allowing Peabody Western Coal Company (Peabody) to operate its Black Mesa and Kayenta mines jointly under a single permit. The mines are located in the northeastern corner of Arizona.

After an initial round of motions two applicants were dismissed and eight now remain. Additionally three parties were added as intervenor-respondents. The following tables summarize the identity of the current parties:

Applicants

Name	Docket No.	Abbreviation
Californians for Renewable Energy	DV 2009-1-PR	CARE
Victor Masayesva, Jr.	DV 2009-2-PR	Masayesva
Black Mesa Water Coalition, *et al.*	DV 2009-3-PR	BMWC
Kendall Nutumya, *et al.*	DV 2009-4-PR	Nutumya
The Forgotten People, Coal Mine Canyon Chapter, Tonalea Chapter, and Leupp Chapter	DV 2009-5-PR thru DV 2009-8-PR	Forgotten People

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DV 2009-1-PR thru DV 2009-8-PR

Respondent and Intervenor-respondents

Name	Abbreviation
Office of Surface Mining Reclamation and Enforcement	OSM
Peabody Western Coal Company	Peabody
Salt River Project Agricultural Improvement and Power Project	Salt River
Hopi Tribe	Hopi Tribe
Navajo Nation	Navajo Nation

The applicants have alleged that the permit should be vacated because OSM has violated several statutes including:

Name	Citation	Abbreviation
Surface Mining Control and Reclamation Act of 1977	30 U.S.C. §§ 1201-1309b (2006)	SMCRA
National Environmental Policy Act	42 U.S.C. §§ 4321-47 (2006)	NEPA
Endangered Species Act	16 U.S.C. §§ 1531-44 (2006)	FSA
American Indian Religious Freedom Act	42 U.S.C. § 1996 (2006)	AIRFA
Religious Freedom Restoration Act of 1993	42 U.S.C. §§ 2000bb thru 2000bb-4) (2006)	RFRA
Clean Water Act	33 U.S.C. §§ 1251 1387 (2006)	CWA

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This matter is now before me on nineteen motions for dismissal or summary decision. The following table provides a summary:

Moving Party	Title	Abbreviated Title	Opposing Party
OSM	Respondent's Motion for Dismissal of Claims Raised Under the American Indian Religious Freedom Act	OSM's AIRFA Motion Against Nutumya	Nutumya 2009-4-PR
OSM	Motion for Summary Decision in DV 2009-1-PR on American Indian Religious Freedom Act Claim	OSM's AIRFA Motion Against CARE	CARE 2009-1-PR
OSM	Respondent's Motion for Dismissal of Claims Raised Under the Religious Freedom Restoration Act	OSM's RFRA Motion Against Nutumya	Nutumya 2009-4-PR
OSM	Respondent's Motion for Dismissal of Claims Raised Under the Religious Freedom Restoration Act	OSM's RFRA Motion Against BMWC	BMWC 2009-3-PR
OSM Peabody	Respondent's Motion for Dismissal of Claims Raised Under the Clean Water Act	OSM's CWA Motion	Masayesva 2009-2-PR
OSM	Motion for Summary Decision in DV 2009-5-PR Through DV 2009-8-PR on Claim that OSM Failed to Consider the Legal Status of Existing Mining Authorizations	OSM's Mining Authorization Motion	Forgotten People 2009-5-PR 2009-6-PR 2009-7-PR 2009-8-PR

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Moving Party	Title	Abbreviated Title	Opposing Party
OSM Peabody	Motion for Summary Decision in DV 2009-5 Through 2009-PR on Claim Related to Greenhouse Gas Emissions	OSM's Greehouse Gas Motion Against the Forgotten People	Forgotten People 2009-5-PR 2009-6-PR 2009-7-PR 2009-8-PR
OSM	Motion for Summary Decision in DV 2009-5-PR Through DV 2009-8-PR on Claim That OSM Failed to Provide for Meaningful Public Review and Comment	OSM's Public Review Motion	Forgotten People 2009-5-PR 2009-6-PR 2009-7-PR 2009-8-PR
OSM	Respondent's Motion for Dismissal of Public Participation Claims	OSM's Public Participation Motion	BMWC 2009-3
OSM Peabody	Respondent's Motion for Dismissal of Third-Party Contractor Claim	OSM's Third-Party Contractor Motion	BMWC 2009-3-PR
OSM	Motion for Summary Decision in DV 2009-1-PR on National Environmental Policy Act Claims	OSM's NEPA Motion	CARE 2009-1-PR
OSM Peabody	Motion for Summary Decision in DV 2009-1-PR on the Claim that the Subject Permit Does Not Consider Greenhouse Gas Emissions as Regulated Pollutants	OSM's Greenhouse Gas Motion Against CARE	CARE 2009-1-PR

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DV 2009-1-PR thru DV 2009-8-PR

Moving Party	Title	Abbreviated Title	Opposing Party
Peabody	Motion for Summary Decision: Material Damage to the Navajo Aquifer	Peabody's Navajo Aquifer Motion	BMWC 2009-3-PR Nutumya 2009-4-PR Forgotten People 2009-5-PR 2009-6-PR 2009-7-PR 2009-8-PR
Hopi Tribe	Hopi Tribe's Motion for Summary Decision on Claims Related to Alleged Political Instability within Hopi Tribal Government	Hopi Tribe's Political Instability Motion	BMWC 2009-3-PR Nutumya 2009-4-PR Forgotten People 2009-5-PR 2009-6-PR 2009-7-PR 2009-8-PR
Nutumya	Motion for Summary Decision that the Record of Decision Does Not Fully Consider SMCRA § 510(a) for Black Mesa Resources	Nutumya's Section 510(a) Motion	OSM 2009-4-PR
Nutumya	Motion for Summary Disposition Based on OSM's Violations of the National Environmental Policy Act	Nutumya's NEPA Motion	OSM 2009-4-PR

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DV 2009-1-PR thru DV 2009-8-PR

Moving Party	Title	Abbreviated Title	Opposing Party
BMWC	Black Mesa Coalition, *et al.* Motion for Summary Decision for Failure to Process Peabody's Permit as Required by the Surface Mining Control and Reclamation Act ("SMCRA")	BMWC's SMCRA Processing Motion	OSM 2009-3-PR
BMWC	Black Mesa Water Coalition, *et al.* Motion for Summary Decision for Failure to Comply with the National Environmental Policy Act in Connection with the Black Mesa Project	BMWC's NEPA Motion	OSM 2009-3-PR
BMWC	Black Mesa Water Coalition, *et al.* Motion for Summary Decision for Failure to Comply with the Endangered Species Act in Connection with the Black Mesa Project	BMWC's ESA Motion	OSM 2009-3-PR

I have decided to grant Nutumya's NEPA Motion because it demonstrates that OSM violated NEPA by not preparing a supplemental draft environmental impact statement (EIS) when Peabody changed the proposed action. As a result the Final EIS did not consider a reasonable range of alternatives, described the wrong affected environment baseline, and did not achieve the informed decision-making and meaningful public comment required by NEPA. Because the Final EIS does not satisfy NEPA, the decision must be vacated and remanded to OSM for further action. Vacating the OSM decision necessarily renders the other motions moot or unnecessary to decide.

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The following sections will first describe the background necessary to understand the significance of Nutumya's motion, then state the burden and standard of proof, and conclude by analyzing the merits of the motion.

II. Background

A. Mine Operations

Peabody has operated the Kayenta and Black Mesa mines as two separate surface coal mining operations on Indian lands since the early 1970's. The Kayenta mining operation has supplied coal to the Navajo Generating Station, near Page, Arizona, since 1973. The coal is transported to the station via an 83-mile-long rail line.

The Black Mesa mining operation supplied coal to the separate Mohave Generating Station, near Laughlin, Nevada, from 1970 until December 2005, when the power plant suspended operations. The coal was transported to this generating station via a 273-mile-long coal-slurry pipeline.

According to OSM, SMCRA provides for a two-phase program to regulate surface coal mining operations on Indian lands: an initial regulatory program and a permanent regulatory program. The permanent program contains more comprehensive performance and reclamation standards than the initial program. The two mines operated under the initial program until 1990 when Peabody applied for a permanent program permit covering both operations.

OSM issued a permanent program permit for only the Kayenta mining operation and has subsequently renewed the permit in 1995, 2000, and 2005. Under the existing permit Peabody is authorized to mine coal through 2026.

At the direction of the Secretary of the Interior, OSM administratively delayed its decision on the Black Mesa mining operation because of concerns by the Hopi Tribe and the Navajo Nation regarding use of Navajo-aquifer (N-aquifer) water for coal-slurry purposes. Because of this administrative delay, Peabody mined coal at the Black Mesa operation under the initial regulatory program until December 2005 when the Mohave Generating Station ceased operations.

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From 1970 to December 2005, the Black Mesa and Kayenta mining operations used N-aquifer water at a rate of 4,400 acre-feet per year for coal-slurry, mine-related, and domestic purposes. Starting in 2006, after the Mohave Generating Station suspended operations, the combined mines have used considerably less water, about 1,200 acre-feet per year.

Before the Mohave Generating Station suspended operations, the combined mines produced 13.3 million tons of coal per year (4.8 from Black Mesa and 8.5 from Kayenta). When the Mohave Generating Station went off-line, production reduced to 8.5 million tons from just the Kayenta mining operation.

A.R. 1-02-01-000004 thru -000006 (Record of Decision); Final EIS at ES-3, 2-1 n.1, 2-6 thru 2-7.

B. The Revised Permit and the Draft EIS

Peabody first submitted a permit revision application in February 2004, which sought to revise its existing permanent permit for the Kayenta operations to add the Black Mesa operations under the permanent regulatory program and form the "Black Mesa Complex." It also sought approval of several other projects:

- a new coal-wash plant and associated coal-waste disposal facility; and
- construction, use, and maintenance of a new haul road between mine areas on the southern ends of Peabody's coal leases;
- rebuilding of the 273-mile-long coal-slurry pipeline to the Mohave Generating Station; and
- a new aquifer water-supply system, including a 108-mile long pipeline to convey the water to the mine complex.

As required by the NEPA regulations, OSM published in the Federal Register a notice of intent to prepare an EIS for the Black Mesa Project. OSM then conducted scoping meetings during January and February 2005. OSM advertised these meetings in local newspapers and on local radio stations and received 351 written submissions and recorded 237 speakers.

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OSM then issued a Draft EIS in November 2006 and held meetings in northern Arizona and southeast Nevada during January 2007 to receive comments. The Draft EIS identified three alternatives:

A: approve Peabody's application with the construction projects;

B: approve a combined permanent permit for the Kayenta and Black Mesa operations but without the constructions projects and with no coal mining from the Black Mesa operations; and,

C: disapprove Peabody's application, leaving the operations in the status quo.

OSM identified Alternative A as its preferred alternative.

Subsequent to the Draft EIS, and before OSM issued the Final EIS, Peabody revised its application to remove the plans and activities that supported the Mohave Generating Station (i.e., production of coal at the Black Mesa mining operation, construction of a new coal wash plant, construction of a new haul road, rebuilding the coal-slurry pipeline, and development of a new aquifer water-supply system). Peabody also proposed reducing the amount of N-aquifer water usage to 1,236 acre-feet per year. Peabody made these revisions because the Mohave Generation Station suspended operations in December 2005 and it believed that the power plant would not likely reopen as a coal-fired facility.

Peabody's revised application added the 18,857-acre initial program area for the Black Mesa mining operation, including surface facilities and coal reserves, to the 44,073 acres in the existing permanent program area for the Kayenta mining operation, bringing the total acres of the permanent program permit area to 62,930 acres. The permit area would no longer distinguish between the Kayenta mining operation and the Black Mesa mining operation and OSM would consider them as one operation, known as the Black Mesa Complex. The revised application did not change the existing mining methods or the average annual coal production rate of 8.5 million tons for the Kayenta mining operation. The permit would continue to be renewable at 5-year intervals but would not authorize mining of unmined coal reserves in the Black Mesa mining operation area.

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OSM announced in the Federal Register that it had changed its preferred alternative from Alterative A, Peabody's original proposal, to Alterative B, Peabody's current proposal, and reopened the comment period on the Draft EIS to allow persons to comment on the change. It did not conduct any additional scoping meetings to supplement the scoping of the original proposal. It only extended the comment period for the Draft EIS. OSM then issued the Final EIS on November 7, 2008, and approved Peabody's revised application on December 22, 2008.

A.R. 1-02-01-000004 thru -000006 (Record of Decision); Final EIS at 2-1 n.1.

C. The Final EIS

1. Purpose and Need

The Final EIS stated that the project's purpose and need was to continue supplying coal from the Kayenta mining operation to the Navajo Generating Station, to revise the life-of mine (LOM) operation and reclamation plans for the permitted Kayenta mining operation, and to incorporate the initial program surface facilities and coal-resource areas of the adjacent Black Mesa mining operation.

> This environmental impact statement (EIS) is being prepared in compliance with the National Environmental Policy Act (NEPA) in order to analyze and disclose the probable effects of the Black Mesa Project in northern Arizona. The purpose of and need for the Black Mesa Project is to continue the supply of coal from Peabody Western Coal Company's (Peabody's) Kayenta mining operation to the Navajo Generating Station near Page, Arizona (Map 1-1). The action proposed by Peabody is to revise the life-of-mine (LOM) operation and reclamation plans for its permitted Kayenta mining operation and, as a part of this revision, to incorporate into these plans the initial program area surface facilities and coal-resource areas of its adjacent Black Mesa mining operations, which previously supplied coal to the Mohave Generating Station in Laughlin, Nevada. This EIS collectively refers to

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> the area occupied by the Kayenta mining operation and Black Mesa mining operation as the Black Mesa Complex.

Final EIS at 1-1.

It also pointed out that the purpose and need had changed from the Draft EIS, when the purpose had been to supply coal from the Black Mesa operation to the Mohave Generating Station and approve several projects including a rebuilt coal-slurry pipeline. It further explained that because coal mining from Black Mesa for the Mohave Generating Station was still possible, but unlikely, the Final EIS would continue to analyze its effects.

> Since the Draft EIS was published in November 2006, the purpose of and need for the Black Mesa Project to supply coal to the Mohave Generating Station no longer exists. With this change, Peabody amended its permit revision application, thus causing the change in the statement of purpose and need and reducing the scope of the proposed action. Some of Peabody's LOM revisions and three of the four original proposed actions are no longer proposed.
>
> > • As a part of its LOM revisions, Peabody no longer proposes a new coal-haul road, construction of a new coal-washing facility, coal production from the Black Mesa mining operation for the Mohave Generating Station, and water for slurry transportation of coal and coal washing.
> >
> > • Black Mesa Pipeline, Inc. (BMPI) no longer proposes to continue to operate the Black Mesa coal-slurry preparation plant.
> >
> > • BMPI also no longer proposes to reconstruct the 273-mile-long coal-delivery slurry pipeline from the Black Mesa mining operation to the Mohave Generating Station.
> >
> > • The co-owners of the Mohave Generating Station no longer propose to construct a new water-supply system, including a

> 108-mile-long water-supply pipeline and a well field near Leupp, Arizona, to obtain water from the Coconino aquifer (C aquifer) and to convey the water to the Black Mesa Complex for use in the coal slurry and other mine-related purposes.
>
> Although these actions are no longer proposed and not part of the preferred alternative, they still could occur under certain circumstances. Alternative A addresses supplying coal to the Mohave Generating Station, which remains permitted for operation. Even though operation was suspended in December 2005, it has not been decommissioned. Although it appears that implementing Alternative A is unlikely, Peabody wishes to proceed in revising its permit to incorporate the surface facilities in the initial program area and coal-resource areas of its adjacent Black Mesa mining operation; that is, Alternative B. Because Alternative A is still possible, albeit unlikely, this EIS continues to analyze its effects.

Id. at 1-1 thru 1-2.

2. Alternatives

The Final EIS identified the same three alternatives as did the draft:

A: approve Peabody's former application with the construction projects;

B: approve Peabody's current application for a combined permanent permit for the Kayenta and Black Mesa operations without the construction projects and with no coal mining from the Black Mesa operations; and,

C: disapprove Peabody's application, leaving the operations in the status quo.

The following sections provide additional detail.

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a. Alterative A - Approval of the 2004 LOM Revision and All Components Associated with Coal Supply to the Mohave Generating Station

Under Alternative A, OSM would:

(1) Approve Peabody's LOM permit revision for the Black Mesa Mine Complex (Black Mesa and Kayenta mining operations), including:

- Mining of coal to supply the Mohave Generating Station;
- A new coal-wash plant and associated coal-waste disposal; and
- Construction, use, and maintenance of a new haul road between mine areas on the southern ends of Peabody's coal leases.

(2) Approve BMPI's existing coal-slurry preparation plant and rebuilding the 273-mile-long coal-slurry pipeline to the Mohave Generating Station; and

(3) Approve a new aquifer water-supply system, including a 108-mile-long pipeline to convey the water to the mine complex.

Final EIS at 2-8 (Figure 2-1).

b. Alternative B - Approval of the 2008 LOM Revision (Preferred Alternative)

Under Alternative B, OSM would approve Peabody's LOM permit revision, including incorporation of the Black Mesa mining operation surface facilities and coal deposits into the Kayenta mining operation permit area. This alternative would result in:

- Continued coal mining at the Kayenta mining operation to supply coal to the Navajo Generating Station;
- No coal mining at the Black Mesa mining operation to supply the Mohave Generating Station;
- No construction, use, and maintenance of a new haul road between mine areas on the southern ends of Peabody's coal leases;

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- No reconstruction of the coal-slurry pipeline; and
- No construction of the C aquifer water-supply system.

Id.

c. Alternative C - Disapproval of the LOM Revision (No Action Alternative)

Under Alternative C, OSM would disapprove Peabody's life-of-mine permit revision. This alternative would mean:

- No coal mining at the Black Mesa mining operation to supply the Mohave Generating Station;
- Continued coal mining at the Kayenta mining operation to supply coal to the Navajo Generating Station;
- No incorporation of Black Mesa mining operation surface facilities and coal deposits into the Kayenta mining operation permit area;
- No construction, use, and maintenance of a new haul road between mine areas on the southern ends of Peabody's coal leases;
- No reconstruction of the coal-slurry pipeline; and
- No proposed construction of the C aquifer water-supply system.

Id.

d. Alternatives Considered but Eliminated from Detailed Study

The Final EIS also described fourteen other alternatives, or groups of alternatives, that OSM considered but eliminated from detailed analysis because they were not technically or economically feasible, or did not meet the purpose and need for the project. These included using other water sources, a water-return pipeline, alternative coal delivery methods, no coal-washing facility, no mining, a new customer for the Black Mesa coal, and mining where no sacred springs or sites exist. Final EIS at 2-36 thru 2-50.

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3. Affected Environment

The Final EIS identified 18 elements of the environment that the proposed alternatives could affect. These included such elements as soil resources, water resources, climate, air quality, fish and wildlife, cultural resources, environmental justice, and Indian trust assets. The document described the existing conditions for each in 165 pages. Final EIS Ch. 3.

4. Environmental Consequences

The Final EIS concluded by describing the effects that each of the three alternative actions could have on each of the 18 affected environmental elements. It also analyzed mitigation measures and cumulative effects. Final EIS Ch. 4.

With this background information the following section will review the burden and standard of proof for Nutumya's allegations.

III. Analysis

A. Burden and Standard of Proof

1. Summary Decision

Departmental regulations provide that an administrative law judge may grant a motion for summary decision if there are no disputed material facts and if the moving party is entitled to a decision as a matter of law:

> (c) An administrative law judge may grant a motion under this section if the record, including the pleadings, depositions, answers to interrogatories, admissions and affidavits, show that –
>
> (1) There is no disputed issue as to any material fact; and

(2) The moving party is entitled to summary decision as a matter of law.

43 C.F.R. § 4.1125.

These regulations do not exactly duplicate Rule 56 of the Federal Rules of Civil Procedure, which provides for summary judgments in federal courts. Nevertheless the regulation and the rule are sufficiently analogous for constructions of Rule 56 to provide useful guidance when interpreting 43 C.F.R. § 4.1125. *Daniel Bros. Coal Co.*, 2 IBSMA 45, 53-54 (1980). Under Rule 56, a court may grant summary judgment when the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catreet*, 477 U.S. 317, 322-24 (1986).

The nonmoving party may not rest on mere allegations or denials but must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The judge may not weigh the evidence but may only determine whether a genuine factual dispute exists. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Since neither Nutumya nor OSM has claimed that an issue of material fact exists, and I have found none in the record, I may decide Nutumya's motion on the issues of law it presents.

2. NEPA

Interior Board of Land Appeals precedent holds that "the adequacy of an EIS under section 102(2)(C) of NEPA must be judged by whether it constituted a 'detailed statement' that took a 'hard look' at all of the potential significant environmental consequences of the proposed action and reasonable alternatives thereto, considering all relevant matters of environmental concern." *E.g., Forest Guardians*, 170 IBLA 80, 95 (2006). When exercising statutory authority and undertaking a major federal action having a significant impact on the human environment, an agency must ensure through the NEPA process that it is fully informed of the environmental consequences of its proposed actions. *See id.* "In deciding whether an EIS promotes

informed decisionmaking, it is well settled that a 'rule of reason' will be employed." *Id.* The Board has described the "rule of reason" in the following manner:

> [A]n EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decisionmaker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between the alternatives.

Id. (quoting *County of Suffolk v. Sec'y of Interior*, 562 F.2d 1368, 1375 (2d Cir. 1977)).

In other words, an EIS must contain "a 'reasonably thorough discussion of the significant aspects of the probable environmental consequence' of the proposed action and alternatives thereto." *Id.* (quoting *Cal. v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)).

An appellant must carry its burden to demonstrate by a preponderance of the evidence and with objective proof that the agency failed to adequately consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by Section 102(2)(C) of NEPA. *Western Exploration Inc.*, 169 IBLA 388, 399 (2006). A mere difference of opinion provides no basis for reversal. *E.g., Underwood Livestock, Inc.*, 165 IBLA 128, 133 (2005).

3. SMCRA

Under the Departmental regulations applicable to proceedings reviewing the approval of an application for permit revision, the applicant bears the burden to present a prima facie case and the ultimate burden of persuasion.

> (d) In a proceeding to review the approval or disapproval of an application for a permit revision . . .
> . . .

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> (2) If any other person [i.e., a person other than the permit applicant] is seeking review, that person shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the application fails in some manner to comply with the applicable requirements of the Act and the regulations.

43 C.F.R. § 4.1366(d)(2).

Having reviewed the burden and standard of proof, I will next address the merits of Nutumya's arguments.

B. NEPA Compliance

1. Nutumya's NEPA Motion

Nutumya's NEPA Motion argues that the Final EIS violated NEPA for three reasons.

- It did not consider a reasonable range of alternatives to the proposed action.
- It did not describe the proper affected (i.e., baseline) environment.
- It did not achieve informed decision-making and meaningful public comment.

OSM and Peabody have both filed memoranda in opposition to the motion. The following analysis will first address the threshold issues raised by OSM and Peabody and then will consider the merits of Nutumya's motion.

2. The Threshold Objections to Nutumya's Motion Do Not Require Denial

a. Standing

Peabody argues that the Nutumya applicants lack standing to challenge NEPA adequacy because they have not demonstrated an injury in fact that is traceable to

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OSM's decision. Peabody Opposition to Nutumya NEPA Motion 4-5. Peabody has previously filed a motion to dismiss the Natumya applicants for lack of standing. My March 20, 2009, order on that motion dismissed some 42 of the original 82 applicants. I found that the remaining 40 applicants could petition for review because they are persons "having an interest which is or may be adversely affected" within the meaning of 30 C.F.R. § 700.5. Because the standards for determining who may request review of an OSM decision differ from the standards for judicial standing cited by Peabody, I do not find reason to change my prior conclusion. Therefore I conclude that the Nutumya applicants have sufficient interest to challenge NEPA compliance in this proceeding.

b. List of Undisputed Facts

Peabody next argues that Nutumya failed to provide a list of undisputed facts to support their NEPA allegations. Peabody Opposition to Nutumya NEPA Motion 5-6. Peabody cites no authority requiring such a list and I am aware of none. While such a list may be helpful in presenting a motion for summary decision, the failure to provide a list does not present a ground for denying Nutumya's motion.

c. New Alleged Errors Raised in Nutumya's Motion

Finally OSM, supported by Peabody, argues that Nutumya should be prohibited from arguing (1) that the Final EIS described an improper affected, or baseline, environment or (2) that the Final EIS failed to promote informed decision-making and meaningful public comment, because Nutumya failed to make these claims in its original application for review. OSM Opposition to Nutumya NEPA Motion 16-17; Peabody Opposition to Nutumya NEPA Motion 9. Regulations require a request for review to provide an "explanation of each specific alleged error . . . , including reference to the statutory and regulatory provisions allegedly violated." 43 C.F.R. § 4.1363(a)(2). Any amendments require a motion to be filed with the administrative law judge. *Id.* § 4.1363(c).

Nutumya's request for review does not explicitly state that OSM erred by describing an improper baseline environment. But it does allege throughout several pages that the Final EIS did not comply with NEPA. And in one place Nutumya alleges that "OSM changed little of the language from the Draft EIS to the Final EIS."

Nutumya Request for Review 15. From this statement one can find the genesis of the argument Nutumya now makes: OSM failed to correctly describe the baseline environment because it did not change the description between the time of the Draft and the Final EIS.

Similarly Nutumya's request for review does not explicitly state that the Final EIS failed to promote informed decision-making and meaningful public comment. But this argument can be fairly implied from Nutumya's general allegations that the Final EIS did not comply with NEPA. Nutumya Request for Review 8-12. Therefore I find that Nutumya's request for review alleged NEPA violations sufficient to include the grounds it now relies on for its motion for summary decision.

Moreover neither OSM nor Peabody have shown that they are prejudiced by responding to these arguments. And indeed they have responded to each. OSM Opposition to Nutumya NEPA Motion 17-23; Peabody Opposition to Nutumya NEPA Motion 9-14. Therefore I conclude that Nutumya may rely on these arguments in its motion.

Having considered the threshold issues, I will next address the merits of Nutumya's motion.

3. The Substantially Changed Proposed Action Required a Supplemental Draft EIS or a New NEPA Process

By any measure, substantial changes relevant to environmental concerns occurred to the Black Mesa Project between the time OSM issued its Draft EIS and the time it issued the Final EIS. Peabody changed its application from a permit to operate two mines supplying two generating plants to one mine supplying one generating plant. Coal production reduced from 13.3 million tons to 8.5 million tons per year and water usage dropped from 4,400 acre-feet to 1,200 acre-feet per year. And Peabody eliminated four construction projects: a coal-wash plant, a haul road, a coal-slurry pipeline, and a new aquifer water supply system.

Given this substantial change, Council on Environmental Quality (CEQ) regulations required OSM to at least prepare a supplemental draft EIS.

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> [E]nvironmental impact statements shall be prepared in two stages and may be supplemented.
>
> (a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. . . .
>
> (b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. . . .
>
> (c) Agencies:
>
> (1) Shall prepare supplements to either draft or final environmental impact statements if:
>
> (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns;
>
> (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

40 C.F.R. § 1502.9 (emphasis added).

Instead of preparing a supplemental draft EIS, OSM kept the same alternatives for the Final EIS, but changed only the preferred alternative from A (approve a combined permanent program permit for the two mines and two generating plants, with four construction projects) to B (approve a combined permanent program permit for two mine areas but only one operating mine and one generating plant, with no construction projects). The change in the proposed action was both substantial and relevant to environmental concerns. At a minimum, the new proposed action would change the impacts on water resources, soils, vegetation, wildlife, and cultural resources. According to the CEQ regulations, OSM should have prepared and circulated at least a supplemental draft EIS.

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A supplemental draft EIS would have allowed OSM to develop and analyze a new set of alternatives to satisfy the changed purpose and need. Instead OSM kept the old alternatives. One of these, Alternative A, could never satisfy the new purpose and need and was no longer feasible because Peabody no longer proposed it or desired to pay for it. Further a supplemental draft EIS would have permitted the public to comment and perhaps suggest additional alternatives.

Because the change was so substantial, OSM may also have considered whether to terminate the NEPA compliance process on Peabody's original application and start anew on Peabody's latest revised application. Since the impacts of the revised application appear to be substantially less than the original application, OSM possibly could even have concluded (by preparing an environmental assessment) that the new proposed action did not significantly affect the environment. Therefore it might have satisfied its NEPA obligations by issuing a finding of no significant impact (FONSI).

The Interior Board of Land Appeals has considered the CEQ regulation requiring supplemental EISs on several occasions. But the cases have applied the second prong of the regulation, requiring supplementation for new circumstances or information, rather than the first prong, requiring supplementation for a new proposed action.

In *William E. Love*, 151 IBLA 309 (2000), the Board considered the situation where the government agency had developed and approved a new alternative for a coal bed methane project that it had not analyzed in the draft EIS. It developed the new alternative in response to public comments on the draft. The CEQ's guidelines contained in its "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," specified that a supplemental draft EIS was not required if the new alternative falls "qualitatively within the spectrum of alternatives that were discussed in the draft." 46 Fed. Reg. 18,026, 18,035 (Mar. 23, 1981) (Answer to Question 29b: "How must an agency respond to a comment on a draft EIS that raises a new alternative not previously considered in the draft EIS?"). Relying on this guideline, the Board found that the new alternative lay within the range of alternatives considered in the draft EIS and thus a supplement was not required. *Id.* at 320-21.

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Applying this reasoning to the Black Mesa Draft EIS could lead to the conclusion that a supplement was not required because the Final EIS adopted an alternative that was not only within the range of alternatives it previously considered but was indeed identical to an alternative considered in the draft. But in *Love* the proposed action had not changed as it did for the Black Mesa Project. And the CEQ guidelines the Board relied upon dealt with new alternatives and not with a new proposed action. Further the alternatives considered in *Love* did not include one that, as with the Black Mesa Alternative A, did not even satisfy the stated purpose and need. Therefore the *Love* decision does not require acceptance of OSM's Final EIS here.

In another decision, *In re Stratton Hog Timber Sale*, 160 IBLA 329 (2004), the Board considered the situation where the agency had prepared a report that supplemented a prior EA. Relying on the supplemental report, the agency reduced the timber sale considered in the EA by 20 percent. The Board, citing *Love*, inferred that "a 20 percent reduction in the scope of the project and thereby a 20 percent reduction in the scope of the potential impacts should [not] compel another NEPA document." *Id.* at 335 (emphasis in original).

Similar to *Love*, application of this reasoning to the Black Mesa Draft EIS could lead to a conclusion that the new proposed action did not require a supplemental draft EIS because the preferred alternative in the Final EIS (Alternative B - one mine, one generating plant) significantly reduced the impacts from those of the preferred alternative in the Draft EIS (Alternative A - two mines, two generating plants, and four construction projects). But a comparison of one proposed action to the other makes the wrong comparison.

The new proposed action must be compared to the present environmental conditions. In many situations, such as that in *Stratton Hog*, a new proposed action does not also involve new environmental conditions. Thus a new proposed action will usually affect the same environment as did the former proposed action. But in the Black Mesa situation, the new proposed action also involved new environmental conditions because the Mohave Generating Station and the coal-slurry pipeline no longer operated. The comparison here should be made between the new proposed action and the new environmental conditions. Therefore the *Stratton Hog* decision does not require accepting OSM's Final EIS here.

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The Supreme Court addressed supplemental EISs in *Marsh v. Or. Natural Res. Council*, 490 U.S. 360 (1989), where it considered whether an agency must prepare a supplemental EIS when new information came to light after initial approval of a project. The Court acknowledged that

> an agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.

Id. at 373.

The Court ultimately concluded that the agency properly decided that the new information did not require a supplemental EIS. Significantly, for purposes of the present analysis, the Court did not address under what circumstances a change in the proposed agency action may require a supplemental EIS.

In *Alaska Wilderness Recreation and Tourism Assoc. v. Morrison*, 67 F.3d 723 (9th Cir. 1995), the court considered whether a government agency needed to supplement previously approved EISs when a 50-year timber sales contract terminated early because a pulp mill had closed. Those EISs had only considered alternatives that met the requirements of the 50-year contract. The court held that cancellation of the 50-year contract required the agency to prepare supplemental EISs.

> While we cannot predict what impact the elimination of the [50-year] contract will have on the Forest Service's ultimate land use decisions, clearly it affects the range of alternatives to be considered. Because consideration of alternatives is "the heart of the environmental impact statement," 40 C.F.R. § 1502.14, we hold that the cancellation of the [50-year] contract, which opened for consideration alternatives which could not be freely reviewed when the [50-year] contract was in force, is an event requiring serious and detailed evaluation by the Forest Service.

Id. at 730.

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While *Alaska Wilderness* does not precisely parallel the Black Mesa situation, it teaches important lessons. In *Alaska Wilderness* the 50-year contract had limited the alternatives the agency had originally considered. When that contract terminated, NEPA required the agency to consider a new range of alternatives. *Id.* at 731. Similarly Peabody's original permit application had defined the range of alternatives considered in the Draft EIS. When Peabody changed its application, the transformation of the proposed action required OSM to consider a new range of alternatives.

Of similar import is *Natural Res. Def. Council v. U. S. Forest Serv.*, 421 F.3d 797 (9th Cir. 2005). There the government agency had developed alternatives for a revised forest plan based on admittedly incorrect market demand scenarios. The court held the agency violated NEPA because a purpose of the plan was to meet market demand and the agency failed to examine alternatives that satisfied the new market demand scenarios. Similarly OSM violated NEPA here when it failed to examine alternatives that would satisfy Peabody's new permit application.

4. The Final EIS Did Not Consider a Reasonable Range of Alternatives

Since OSM did not prepare a supplemental draft EIS, the Final EIS failed to analyze a reasonable range of alternatives to the new proposed action. Instead the Final EIS analyzed the same three alternatives the Draft EIS had analyzed for the original proposal. As a result the Final EIS considered one alternative that could never satisfy the new purpose and need (Alternative A), one alternative that did satisfy the purpose and need (Alternative B), and the no action alternative (Alternative C).

Alternative A emerged from the scoping for the Draft EIS as the alternative that would satisfy the original purpose and need. It combined all operations for the two mines and two generating plants under a single permanent program permit, and authorized four construction projects including reconstruction of a coal-slurry pipeline. This alternative could not possibly satisfy the revised purpose and need, which only sought a permit for operation of one mine to supply one generating plant. NEPA requires an analysis of alternatives to the proposed action that would satisfy

the purpose and need for action. Since alternative A does not meet this definition it cannot qualify as a valid alternative.

OSM justified including alternative A in the Final EIS because it is "still possible, albeit unlikely."

> Although these actions [Alternative A] are no longer proposed and not part of the preferred alternative, they still could occur under certain circumstances. Alternative A addresses supplying coal to the Mohave Generating Station, which remains permitted for operation. Although operation of the Mohave Generating Station was suspended in December 2005, it has not been decommissioned. Although it appears that implementing Alternative A is unlikely, Peabody wishes to proceed in revising its permit to incorporate the surface facilities and coal-resource areas in the initial program area of its adjacent Black Mesa mining operation; that is, Alternative B. Because Alternative A is still possible, albeit unlikely, this EIS continues to analyze its effects.

Final EIS at ES-2 (emphasis added).

I do not find this justification reasonable because NEPA does not require analysis of possible but unlikely alternatives. Indeed the courts and the Board have consistently emphasized that alternatives must "accomplish the intended purpose, [be] technically and economically feasible, and yet have a lesser impact. 40 C.F.R. § 1500.2(e)." *Sierra Club Uncompahgre Group*, 152 IBLA 371, 378 (2000). *See Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1180-81 (9th Cir. 1990); *City of Aurora v. Hunt*, 749 F.2d 1457, 1466-67 (10th Cir. 1984); *Defenders of Wildlife*, 152 IBLA 1, 9 (2000); *Larry Thompson*, 151 IBLA 208, 219-20 (1999). Peabody no longer wants to implement this action and it clearly has more environmental impacts than the proposed action. Thus it does not satisfy the definition of a reasonable alternative. While OSM enjoys discretion in choosing the alternatives to analyze, it must make a reasonable choice and I do not find the justification it articulated for choosing Alternative A to be reasonable here.

Eliminating Alternative A leaves only the proposed action (Alternative B) and the no action alternative (Alternative C) as viable alternatives. The courts have

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5. The Final EIS Improperly Described the Affected (Baseline) Environment

When the proposed action changed, the affected environment also changed. Mining from the Black Mesa operation stopped in December 2005 when the Mohave Generating Station stopped producing electricity. OSM prepared the Draft EIS the following year in November 2006 when Peabody expected coal and electric production would resume and thus the Draft EIS described the affected environment in its Chapter 3 assuming that both mines and both generating plants would operate.

By the time the proposed action changed in July 2008, OSM and Peabody had concluded that the Mohave Generating Station would not likely resume production. At the time OSM issued the Final EIS in November 2008, the affected environment no longer included the effects from the Black Mesa coal mining operation, the Mohave Generating Station, or the coal-slurry pipeline.

Yet the Final EIS continued to describe the affected environment as if these operations continued. For example it continued to describe the vegetation, wildlife, and land uses along the route of the coal-slurry pipeline. Final EIS at 3-63 thru 3-67 (vegetation), 3-74 thru 3-78 (fish and wildlife), 3-88 thru 3-93 (land uses). And it described water withdrawal from the aquifers (Final EIS at 3-40) and air monitoring data for the years before 2005 (*Id.* at 3-53 (Table 3-13), 3-55 (Table 3-55)) when both mines operated. According to Nutumya, this description provided a skewed baseline against which to analyze the environmental impacts of the proposed action and alternatives. Natumya NEPA Motion 32-35. Because OSM described the baseline when both mines and both generating stations operated, the baseline would necessarily have higher impacts than when only one mine and generating station operated. A comparison of this high baseline (when both mines operated) to the anticipated impacts from the proposed action and alternatives (when only one mine operated) would necessary yield less impact.

Further by continuing to describe the affected environment as if the Black Mesa and Mohave operations continued, the Final EIS created the impression that just the Kayenta and Navajo operations would have much less impact. For example the Executive Summary for the Final EIS described the anticipated consequences of

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Alternative B (the proposed action) by comparing it to the environment that existed when the Black Mesa and Mohave operations continued.

> It is anticipated that, under Alternative B, approximately 6,942 acres would be disturbed by mining from 2010 through 2026. The impacts are characterized similarly to those of Alternative A, for an area reduced in size (i.e., about 6,942 acres would be mined [5,467 acres fewer than Alternative A]. . . . The areas in which vegetation would be disturbed would be reduced, ... Fewer cultural resource and traditional cultural resources would be affected. . . . With the reduction in mining, there would be fewer coal-haul roads constructed.

Final EIS at ES-17 (emphasis added).

OSM should have made the comparisons to the environment that existed after Black Mesa and Mohave ceased operation, not while the Black Mesa and Mohave operations continued (as described in Alternative A). By describing the affected or baseline environment as if the Black Mesa and Mohave operations continued, OSM misstated the magnitude of the impact of the proposed project (i.e., the Kayenta and Navajo operations) on the environment. It left the impression that the proposed action would have significantly less impact.

OSM should have compared the impacts of the proposed action (i.e., including the Black Mesa operations under the permanent regularity program) to the conditions existing without the Mohave operations. This would have given the true picture of the impact to the existing environment (i.e., without the Mohave operations). Instead of showing less impact, use of the correct baseline may have shown that the proposed action had more impact. But one does not know because OSM did not perform the correct analysis.

6. The Final EIS Did Not Achieve Informed Decision-making and Meaningful Public Comment

Finally by not issuing a supplemental draft EIS, or starting over with a new NEPA compliance process, OSM denied informed decision-making and meaningful public comment. For example when OSM began the EIS preparation it conducted the

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scoping process required by the CEQ regulations. That process resulted in a list of issues raised by the public. Of the issues OSM identified for "actions and alternatives," all nine involved the Mohave Generating Station, its coal-slurry pipeline, or the required water-supply pipeline. Draft EIS 1-12 thru 1-13. Even though Peabody's revised application eliminated each of these projects, the Final EIS continued to list the same nine issues. Final EIS at 1-12. As a result OSM never considered whether the revised application presented new issues.

This failure to revise the scope and significant issue determinations violated CEQ regulations.

> An agency shall revise the determinations made under paragraphs (a) [mandatory actions such as determining the scope and the issues to be analyzed in depth] and (b) [permissive actions such as page and time limits] of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

40 C.F.R. § 1501.7 (c) (emphasis added).

But more fundamentally, the process OSM followed here – proceeding directly to a final EIS, after making "substantial changes in the proposed action" – failed to achieve NEPA's purposes.

• It failed to "inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. Because it copied the alternatives developed for an earlier and now defunct proposed action, it never considered whether different alternatives existed for the substantially changed current proposed action.

• It failed to "provide full and fair discussion of significant environmental impacts." 40 C.F.R. § 1502.1. Because it continued to analyze an unlikely alternative, it failed to focus the discussion on the impacts of the proposed action. Table 2-9 of the Final EIS provides an example of the lack of discussion given to the impacts of the proposed action. This table provides a "summary of impacts by alternative" and

devotes most discussion to the unlikely alternative (Alternative A). The result contains relatively little discussion of the environmental impacts of the new proposed action (Alternative B).

I have also considered the possibility that the Final EIS could be found sufficient if the two alternatives, B and C, are the only alternatives considered and the discussions about Alternative A are ignored. After all, OSM did analyze Alternative B, the proposed action. *See Friends of Marlot Park v. U. S. Dep't of Transp.*, 382 F.3d 1088, 1097 (10th Cir. 2004) (a supplemental EIS not required as long as the selected alternative was fully evaluated). But this possibility must be rejected for several reasons.

• It deprives OSM of potentially developing additional alternatives to B (the new proposed action). OSM did use Alternative C (the no action alternative) for comparison, but it failed to develop additional alternatives. When Alternative A was the proposed action OSM had the benefit of the scoping process to develop issues and alternatives. And while CEQ regulations do not require additional scoping for a supplemental draft EIS (40 C.F.R. § 1502.9(c)(4)), OSM could have developed additional alternatives on its own (or considered and rejected other alternatives) for a supplemental draft. But we do not know the possibilities because OSM did not follow the procedure required by the CEQ regulations (i.e, prepare a supplemental draft EIS). In addition a supplemental draft EIS may have prompted additional alternatives from public comments. OSM could have then considered these in a final EIS.

• It requires comparing Alternative B to a baseline (described in Chapter 3 of the Final EIS as the Affected Environment) developed for the assumption that the mining and slurry transportation of coal would continue from the Black Mesa Operation to the Mohave Generating Station. Because this assumption is no longer valid the Final EIS needed a revised description of the affected environment.

• By continuing to analyze the unlikely Alternative A, the Final EIS bogs down the reader (both the government and the public) in needless analysis, and the environmental impacts of Alternative B do not emerge.

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Finally the preparation of the Final EIS did not foster informed decision making or public participation because it did not develop a reasonable range of alternatives to the substantially changed proposed action. OSM prepared the Final EIS by first developing alternatives to the original proposed action (which included operation of the Blake Mesa mine, the Mohave Generating Station, and the connecting coal-slurry pipeline) and issuing the Draft EIS analyzing these alternatives. But when Peabody changed the proposed action (by eliminating the operation of the Blake Mesa mine, the Mohave Generating Station, and the connecting coal-slurry pipeline), OSM did not develop new alternatives to the new proposed action, but instead issued the Final EIS with the same set of alternatives. By proceeding directly to a final EIS, without issuing a supplemental draft, OSM deprived itself and the public of the opportunity to develop a reasonable range of alternatives to the new proposed action.

A supplemental draft would have given OSM the opportunity to prepare a new range of alternatives (or explain why none existed) for the new proposed action. Instead OSM used the same alternatives (including one that was not feasible) prepared for the old proposed action. The public should have had the opportunity to comment on alternatives tailored for the new proposed action in a supplemental draft. They could have then suggested additional alternatives that OSM could have analyzed in a final EIS. The process OSM actually used (opening a period to comment on a different preferred alternative chosen from those developed for the original proposed action) eliminated the opportunity for OSM to develop alternatives for the new proposed action which the public could comment on.

In summary the combined effects of these deficiencies in the form, content, and preparation of the Final EIS combined to deprive the public and OSM of the information they needed to participate in and make a decision on Peabody's current application. Because the Final EIS did not comply with NEPA, it cannot support OSM's permit decision, and the permit decision must therefore be vacated and remanded to OSM.

8. Other NEPA Issues

Other pending motions also raise NEPA issues. For example BMWC's NEPA Motion alleges that the Final EIS failed to (1) adequately analyze impacts related to

global warming, (2) consider the impacts of mercury and selenium emissions, and (3) consider the impacts of the National Pollution Discharge Elimination System (NPDES) permit issued by the Environmental Protection Agency. And OSM's NEPA Motion seeks to dismiss CARE's allegations that the Final EIS did not (1) provide a valid purpose and need statement or (2) consider a no action alternative.

I need not address the merits of BMWC's motion because I can grant no additional relief, even if a favorable result could be rendered on its motion. The result it sought – vacatur of the OSM decision – has been granted.

In such circumstances, where no relief can be given, further administrative review is normally moot. Nevertheless an exception applies where an issue exists that is "capable of repetition, yet evading review." *See Colo. Env't Coal.*, 108 IBLA 10, 15-16 (1989). While BMWC may make the same allegations about any new NEPA document that OSM may prepare in the future, such allegations will not escape review because they may be reviewed then in the context of any new NEPA document instead of one that this order holds invalid.

Similar reasoning applies to OSM's NEPA Motion. OSM must prepare different NEPA documentation to support a new decision that replaces the one vacated here. Because CARE may allege different errors about a new NEPA document, review of an invalidated EIS would be premature at this time. Thus the motion is no longer ripe for review.

C. Rulings on the Eighteen Other Motions

The conclusion that OSM relied on an invalid EIS requires that its decision to approve Peabody's permit application be vacated and remanded to OSM. Upon remand, OSM will have discretion to choose a different means to comply with NEPA. It may prepare a supplemental draft EIS, prepare an EA, or choose some other method. Once it has complied with NEPA, it will have discretion to issue a new decision, which could be different from the present one.

As with the NEPA motions discussed above, granting Nutumya's motion renders the other pending motions either moot or not ripe for review. Each applicant sought to vacate OSM's decision, which has now been done. Since I can give no

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additional relief, their motions are now moot. And, like the NEPA issues, if the applicants seek to review a future OSM decision, their claims must be reviewed on a new administrative record. Such a record will necessarily differ from the one now before me. Because the applicants may allege different errors about a new OSM decision, a decision on the issues raised in their motions would be premature at this time. Thus their motions are no longer ripe for review.

Similarly the motions of OSM and Peabody are rendered moot by this order because I cannot render the relief they seek, i.e., affirmance of OSM's decision. In addition their motions are no longer ripe for review since they are based on the current administrative record, which supported the vacated decision. Any future review will depend upon a different administrative record and new or different claims of error that applicants may make.

Nevertheless, two of the motions – Peabody's Navajo Aquifer Motion and BMWC's ESA Motion – merit individual comment.

• Peabody's Navajo Aquifer Motion seeks an order confirming the adequacy of OSM's Cumulative Hydrologic Impact Assessment (CHIA). OSM prepared the CHIA as required by SMCRA and based it on information provided by Peabody in its Permit Application Package (PAP). BMWC's application for review has challenged its adequacy. Since the CHIA depends on the PAP, and not on the Final EIS, a conclusion that the Final EIS is inadequate does not necessarily mean that the CHIA is inadequate. Therefore a decision on the adequacy of the CHIA could be made.

Nevertheless I decline to do so for two reasons. First, Peabody may change the PAP on which the current CHIA is based between now and the time OSM issues a new permit decision. After all, the current record shows that Peabody revised the permit application numerous timed in the past (i.e, in 2004, 2005, 2006 and 2008) A.R. 1-02-01-000005 (Record of Decision). Another revision may require OSM to revise the current CHIA. Second, Peabody has tailored its arguments to the errors claimed in BMWC's application for review. If BMWC were to apply for review of a future permit decision based on the CHIA, it may present different claims of error. Therefore addressing the merits of Peabody's Navajo Aquifer Motion will serve no concrete purpose because the circumstances may materially change by the time OSM issues a new decision on the permit application.

• BMWC's ESA Motion seeks an order that OSM's Final Biological Assessment (BA) does not satisfy ESA requirements. Similar to the CHIA, the Final BA is a separate document not dependent on the validity of the Final ESA. But the BA did rely upon information contained in Peabody's permit application. The BA concluded that approval "may affect, but was not likely to adversely affect" threatened or endangered species or their critical habitat.

The same reasons for declining to determine the adequacy of the CHIA also apply for declining to determine the adequacy of the Final BA. Peabody may change its permit application before OSM issues a new decision and BMWC may change its claims of error if it applies to review a new OSM permit decision. In addition, as a result of considering possible new alternatives in an new NEPA document, OSM may choose a different action that would have to be analyzed in a new BA or other ESA document. Therefore addressing the merits of BMWC's ESA Motion will serve no concert purpose because the circumstances may materially differ by the time OSM issues a new decision.

Therefore I will not decide the other eighteen pending motions at this time. They are either moot or not ripe for review.

IV. Conclusion

OSM violated NEPA by not preparing a supplemental draft EIS when Peabody changed the proposed action. As a result the Final EIS did not consider a reasonable range of alternatives to the new proposed action, described the wrong environmental baseline, and did not achieve the informed decision-making and meaningful public comment required by NEPA. Because of the defective Final EIS, OSM's decision to issue a revised permit to Peabody must be vacated and remanded to OSM for further action.

Having considered the motion, the other papers on file, and for good cause, it is ordered that:

1. The Motion by Petitioners, Kendall Nutumya, *et al.*, in Docket No. DV 2009-4-PR, for Summary Disposition Based on OSM's Violations of the National Environmental Policy Act (NEPA), is granted.

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2. The Decision, dated December 22, 2008, of the Office of Surface Mining Reclamation and Enforcement, approving the Application for Significant Permit Revision (Project AZ-001-E-P-01)(Permit AZ-001D) filed by Peabody Western Coal Company for the Black Mesa Complex, is vacated.

3. The other pending motions in this consolidated preceding are denied as moot or not ripe for review.

4. The requests for review filed by the following applicants are dismissed as moot.

Californians for Renewable Energy, Docket No.DV 2009-1-PR
Victor Masayesva, Jr., Docket No. DV 2009-2-PR
Black Mesa Water Coalition, *et al.*, Docket No.DV 2009-3-PR
The Forgotten People, Docket No. DV 2009-5-PR
Coal Mine Canyon Chapter, Docket No. DV 2009-6-PR
Tonalea Chapter, Docket No. DV 2009-7-PR
Leupp Chapter, Docket No. DV 2009-8-PR

5. The prehearing conference scheduled for March 9, 2010, and the hearing scheduled for March 16, 2010, are cancelled.

Appeal Rights

Any party aggrieved by this decision may file a petition for discretionary review with the Interior Board of Land Appeals, or seek judicial review, pursuant to the provisions in 43 C.F.R. § 4.1369.

Robert G. Holt
Administrative Law Judge

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DV 2009-1-PR thru DV 2009-8-PR

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BY ELECTRONIC MAIL
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Assistant Attorney General
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Addendum to CARE comments on the consent decree in 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

Dated: January 8, 2010

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ADDENDUM TO CARE COMMENTS ON THE CONSENT DECREE IN 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

CAlifornians for Renewable Energy, Inc. (CARE) wishes to provide this addendum to comments on the consent decree in 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.

Attached is Exhibit 6 an Administrative Law Judge Order Vacating the December 22, 2008 Life-of-Mine Permit for the Black Mesa Complex, issued by the US DOI Office of Surface Mining Reclamation and Enforcement (OSM), Permit AZ 0001D, that was appealed to the US DOI Office of Hearings and Appeals, Appeals DV-2009-1-PR[1] thru DV-2009-10-PR. We apologize for the attachment being upside down and ask your Honor to rotate the attachment pages by 180 degrees for purposes of reading.

Requests for Relief

In addition to the previously mentioned relief; we request your Honor vacate all the Decision's of the California Energy Commission (CEC) and BAAQMD related to the Gateway Generating Station in order to require the permitting process to begin anew.

If your Honor grants CARE's Party status request we ask you notify CARE's legal counsel Martin Homec, Attorney for CAlifornians for Renewable Energy, Inc. (CARE), PO Box 447, Davis, CA 95617, or FAX (530) 686-3968, or E-mail to martinhomec@gmail.com.

Respectfully submitted,

Michael E. Boyd

_____

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Lynne Brown

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Lynne Brown Vice-President
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January 8, 2010

cc.
Martin Homec

Verification

I am an officer of the Commenting 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 this 8th day of January, 2010, at San Francisco, California.

Lynne Brown

Lynne Brown Vice-President
CAlifornians for Renewable Energy, Inc.
(CARE)

Continued from the previous page

[1] DV-2009-1-PR was the Appeal brought by CARE challenging the EIS and ROD for the project based on an inadequate alternatives analysis which this Order upheld.

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Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611 Ben Franklin Station
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CARE comments on the consent decree in 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

Dated: January 8, 2010

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Index of Exhibits

I. INTRODUCTION

CAlifornians for Renewable Energy, Inc. (CARE) wishes to provide comments on the consent decree in 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.

We incorporate the comments submitted by Golden Gate University (GGU) dated November 4, 2009 and those submitted by Robert Sarvey and Robert Simpson as if fully set forth by CARE in their entirety. Robert Sarvey and Robert Simpson are both members of CARE and Robert Sarvey is an Officer of the board of directors serving as its Treasurer.

We provide these comments both in an effort to better inform your Honor of the context of Pacific Gas and Electric Company's (PG&E)'s violations prior to entering into a consent decree and to alert you to the fact that there is evidence that PG&E acted in concert with the

United States Environmental Protection Agency on its own accordances or through its delegate of authority at the Bay Area Air Quality Management District (BAAQMD) who also conspired with the California Energy Commission (CEC) to "knowingly" violate the Clean Air Act (CAA) including its criminal penalty provisions. Essentially the victims in this crime are the victims who live in the predominantly low income communities of color of Pittsburg and Antioch California who breathe the project's unregulated emissions of criteria pollutants, greenhouse gases, and toxic air contaminants. The perpetrators of this crime under local, state, federal, and international law and treaty is PG&E in concert with the United States Environmental Protection Agency on its own or through its delegate of its authority at the Bay Area Air Quality Management District (BAAQMD) with the California Energy Commission (CEC); all who conspired "knowingly" to violate the Clean Air Act (CAA) including its criminal penalty provisions. Let us call that Conspiracy A.

We present as additional evidence other unlawful conspiracies by the US EPA, and BAAQMD, in this case with the City and County of San Francisco (CCSF) its SF Redevelopment Agency, and Lennar BVHP; regarding US EPA's miss-handling of the exposure of the surrounding low-income community of color of Bay View Hunters Point to toxic dust containing asbestos as a result of Lennar's demolition activities at the the former naval shipyard and US EPA's subsequent retaliatory actions against critics of cleanup and land dealings with the developer. Additional we incorporate attached evidence that US EPA's so-called consent decree is a clear effort to retaliate against CARE's members and officers for bringing complaints and exercising our rights to judicial review; thereby rewarding criminal polluters like PG&E by making the Consent Decree inappropriate, improper, as well as inadequate. Let us call that Conspiracy B.

This makes it no surprise that PG&E and US EPA would be willing to agree to the consent decree as proposed.

Finally we discuss how the consent decree is inadequate in light of the US EPA Administrator's findings regarding public endangerment due to greenhouse gases and its impacts on Best Available Technology Requirements (BACT) requirements for New Source Review (NSR).

II. CONSPIRACY A

An example of Respondent US EPA's retaliatory actions against Mr. Boyd and CARE's members is CARE's first Civil Rights Act complaint brought in 2000 with Respondent US EPA that was against three power plants under development review in Contra Costa County California in the low-income communities of color of Pittsburg and Antioch. CARE's civil rights complaint was joined by the Pittsburg Unified School District Board of Trustees who unanimously supported the Resolution[1] to join CARE's complaint because of their concerns for the impacts of these projects on school children; low-income children of color in particular, who like the Bay View community in San Francisco demonstrated a high percentage of health issues related to exposure to environmental toxins that adversely impacted their school performance. Respondent US EPA, now nearly a decade later, has failed to respond. Therefore we believe US EPA and BAAQMD are liable under 42 U.S.C. § 7413 (c) (3), since they (US EAP) have delegated authority under the CAA to BAAQMD to act in their stead including their handling of asbestos dust.

Despite not having received a PSD permit, Authority to Construct (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 it proposed to construct in its 2007 permit application to the District. Specifically, the facility includes all of the equipment that was described in its 2007 permit application, including the dewpoint heater and the diesel engine.

Under the Clean Air Act, the U.S. Environmental Protection Agency (U.S. EPA) sets limits on how much of a pollutant can be in the air anywhere in the United States. This ensures that all Americans have the same basic health and environmental protections. The Act allows individual states to have stronger pollution controls, but states are not allowed to have weaker pollution controls than those set for the entire country.

The GGS has significant potential to violate the CAA act because it has the potential to violate the existing SIP and the public has not been provided proper Notice pursuant to the CAA of this change. "[T]he Air Resources Board's Proposed State Strategy for California's 2007 State

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[1] See Figure 7 Resolution 99-32 of the Pittsburg Unified School District at: http://www.calfree.com/OCRDelta.html

Implementation Plan (State Strategy) relies on emission reductions from already adopted State control programs and the expected reductions from new State Measures;"

Congress enacted the PSD provisions of the CAA in 1977 for the purpose of, among other things, "insu[ring] that economic growth will occur in a manner consistent with the preservation of existing clean air resources." CAA § 160(3), 42 U.S.C. § 7470(3). The statute requires preconstruction approval in the form of a PSD permit before anyone may build a new major stationary source or make a major modification to an existing source[2] if the source is located in either an "attainment" or "unclassifiable" area with respect to federal air quality standards called "national ambient air quality standards" (NAAQS).[3] See CAA §§ 107, 161, 165, 42 U.S.C. §§ 7407, 7471, 7475. EPA designates an area as "attainment" with respect to a given NAAQS if the concentration of the relevant pollutant in the ambient air within the area meets the limits prescribed in the applicable NAAQS. CAA § 107(d)(1)(A), 42 U.S.C. § 7407(d)(1)(A). A "nonattainment" area is one with ambient concentrations of a criteria pollutant that do not meet the requirements of the applicable NAAQS. Id. Areas "that cannot be classified on the basis of available information as meeting or not meeting the [NAAQS]" are designated as "unclassifiable" areas. *Id.*

The PSD Regulations provide, among other things, that the proposed facility be required to meet a "best available control technology" (BACT)[4] emissions limit for each pollutant subject

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[2] The PSD provisions that are the subject of the instant appeal are part of the CAA's New Source Review (NSR) program, which requires that persons planning a new major emitting facility or a new major modification to a major emitting facility obtain an air pollution permit before commencing construction. In addition to the PSD provisions, explained infra, the NSR program includes separate "nonattainment" provisions for facilities located in areas that are classified as being in nonattainment with the EPA's national Ambient Air Quality Standards. See infra; CAA §§ 171-193, 42 U.S.C. §§ 7501-7515. These non-attainment provisions are relevant to the instant case.

[3] See CAA §§ 107, 160-169B, 42 U.S.C. §§ 7407, 7470-7492. NAAQS are "maximum concentration ceilings" for pollutants, "measured in terms of the total concentration of a pollutant in the atmosphere." See U.S. EPA Office of Air Quality Standards, New Source Review Workshop Manual at C.3 (Draft Oct. 1990). The EPA has established NAAQS on a pollutant-by-pollutant basis at levels the EPA has determined are requisite to protect public health and welfare. See CAA § 109, 42 U.S.C. § 7409. NAAQS are in effect for the following six air contaminants (known as "criteria pollutants"): sulfur oxides (measured as sulfur dioxide (SO_2)), particulate matter (PM), carbon monoxide (CO), ozone (measured as volatile organic compounds (VOCs)), nitrogen dioxide (NO_2) (measured as NO_x), and lead. 40 C.F.R. § 50.4-.12.

[4] BACT is defined by the CAA, in relevant part, as follows:
The term "best available control technology" means an emissions limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, 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 such facility through application of production

Continued on the next page

to regulation under the Clean Air Act that the source would have the potential to emit in significant amounts. CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4); see also 40 C.F.R. § 52.21(b)(5).

In addition to the substantive provisions for EPA-issued PSD permits, found primarily at 40 C.F.R. § 52.21, PSD permits are subject to the procedural requirements of Part 124 of Title 40 of the Code of Federal Regulations (Procedures for Decisionmaking), which apply to most EPA-issued permits. See 40 C.F.R. pt. 124.[5] These requirements also apply to permits issued by state or local governments pursuant to a delegation of federal authority, as is the case here. Among other things, Part 124 prescribes procedures for permit applications, preparing draft permits, and issuing final permits, as well as filing petitions for review of final permit decisions. *Id.* Also, of particular relevance to this proceeding, part 124 contains provisions for public notice of and public participation in EPA permitting actions. See 40 C.F.R. § 124.10 (Public notice of permit actions and public comment period); id. § 124.11 (Public comments and requests for public hearings); *id.* § 124.12 (Public hearings).[6]

Continued from the previous page
processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of such pollutant.
CAA § 169(3), 42 U.S.C. § 7479(3); see also 40 C.F.R. § 52.21(b)(12).

[5] Part 124 sets forth procedures that affect permit decisions issued under the PSD program, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k; the National Pollution Discharge Elimination System ("NPDES") program under the Clean Water Act, 33 U.S.C. § 1342; and the Underground Injection Control program under the Safe Drinking Water Act, 42 U.S.C. § 300h to 300h-7. 40 C.F.R. § 124.1(a).

[6] The requirement for EPA to provide a public comment period when issuing a draft permit is the primary vehicle for public participation under Part 124. Section 124.10 states that "[p]ublic notice of the preparation of a draft permit * * * shall allow at least 30 days for public comment." 40 C.F.R. § 124.10(b). Part 124 further provides that "any interested person may submit written comments on the draft permit * * * and may request a public hearing, if no public hearing has already been scheduled." Id. § 124.11. In addition, EPA is required to hold a public hearing "whenever [it] * * * finds, on the basis of requests, a significant degree of public interest in a draft permit(s)." Id. § 124.12(a)(1). EPA also has the discretion to hold a hearing whenever "a hearing might clarify one or more issues involved in the permit decision." Id. § 124.12(a)(2).

40 C.F.R. § 124.10 instructs EPA (and its delegates) how to provide notice of permitting actions such as draft permits (including public comment periods and any public hearings), and final permits. See 40 C.F.R. § 124.10(a). Section 124.10 provides instruction on both the method and content of notice.

With regard to the method of notice, the section 124.10 regulations require that EPA notify by mail designated governmental agencies and officials. See § 124.10(c). More particularly, notice is required to be given to the following governmental agencies and officials:

> [A]ffected State and local air pollution control agencies, the chief executives of the city and county where the major stationary source or major modification would be located, any comprehensive regional land use planning agency and any State, Federal Land Manager, or Indian Governing Body whose lands may be affected by emissions from the regulated activity[.]

40 C.F.R. § 124.10(c)(1)(vii).

As to general outreach efforts, 40 C.F.R. § 124.10 directs the EPA to proactively assemble a "mailing list" of persons to whom PSD notices should be sent. See 40 C.F.R. § 124.10(c)(1)(ix). The mailing list must be developed by:

> (A) Including those who request in writing to be on the list;
>
> (B) Soliciting persons for "area lists" from participants in past permit proceedings in that area; and
>
> (C) Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as Regional and State funded newsletters, environmental bulletins, or State law journals.
>
> 40 C.F.R. § 124.10(c)(1)(ix).10

CARE and the public wish to participate and this is an activity which is protected by the first amendment of the federal constitution.

Procedural Background

In February 2009, PG&E withdrew the 2007 permit application from the District, claiming that it was no longer necessary. In response, the District notified PG&E that any further review by the District of the project would require a new permit application.

Then, by letter dated April 14, 2009 to BAAQMD, PG&E requested modification of its 2001 ATC to conform to the facility it had constructed and began operating. In the letter, PG&E seeks to obtain approval for, among other things, the substitution of the dewpoint heater for a

natural gas-fired preheater, but does not seek to modify the BACT as PG&E had in its 2007 permit application.

On or about May 1, 2009, BAAQMD and PG&E entered into a Compliance Agreement allowing PG&E to continue operating without a Permit to Operate. BAAQMD and PG&E extended this Compliance Agreement on or about June 1, 2009.

Under BAAQMD Regulation 407.1 "[t]he following requirements shall apply to renewals: 1.1 Except as provided in Sections 2-1-407.2 and 407.3, an authority to construct may be renewed one time for an additional two years; 1.2 Except for renewals pursuant to Section 2-1-407.3, renewal is contingent upon meeting the current BACT and offset requirements of Regulation 2-2-301, 302 and 303; and 1.3 Except as provided in Sections 2-1-407.2 and 407.3, an authority to construct that has been renewed shall expire four years after the date of original issuance." Under Rule "407.2 "If the authority to construct was issued pursuant to an environmental impact report (EIR) that explicitly covered a construction period longer than four years, the authority to construct shall, upon request by the applicant, be renewed for additional two-year terms throughout the construction period covered by the EIR." And under Rule 407.3 "If substantial use of the authority to construct has begun, either during the initial term or during a renewal term, the authority to construct shall, upon request by the applicant, be renewed for additional two-year terms until the permit to operate is issued, or, if a term of less than two years is requested, for such term as is requested." Therefore BAAQMD's extension of the ATC for PG&E's project was unlawful in the first instance.

During an August 5, 2009 evidentiary hearing before the California Energy Commission ("CEC") on the Gateway Complaint the Chief Counsel of the Bay Area Air Quality Management District, Mr. Crockett's public statements where that US EPA Region IX had stated that there was no PSD Permit for the Gateway project and PG&E did not seem to indicate that it planned to stop operating the facility since there was no PSD Permit and this was on the record.

9 MR. CROCKETT: This is Mr. Crockett and
10 I am here. I apologize, I have been joining and
11 dropping off because of other commitments.
12 HEARING OFFICER CELLI: Please,
13 Mr. Crockett, you have the floor, go ahead.
14 MR. CROCKETT: Let me just clarify what
15 representation we made in the Environmental
16 Appeals Board proceeding. We have been in
17 discussions with EPA Region 9. EPA Region 9 is

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18 ultimately the agency that has the authority to
19 issue the federal PSD permit. They delegate that
20 authority to us to issue the PSD permit.
21 When the question of whether the PSD
22 permit had expired or not, whether it has been
23 validly extended. When that question arose we
24 brought it to the attention of EPA Region 9 and
25 asked for their interpretation. And they gave us
1 their interpretation, which was that it was not
2 validly extended.
3 And so what we have represented in the
4 Environmental Appeals Board is that we have
5 discussed the issue with EPA Region 9 and they
6 have given us their interpretation.
7 Really we are bound to follow EPA's
8 interpretation on this question. In the
9 delegation agreement it says if any questions of
10 interpretation of PSD requirements come up that we
11 should seek guidance from Region 9 and be bound by
12 that guidance. We have done that.
13 And the interpretation we have gotten
14 from EPA Region 9 is, as Mr. Sarvey said, that the
15 PSD permit expired, was not validly extended at
16 the point of expiry. So that is what we have
17 informed the Environmental Appeals Board, is of
18 that interpretation that we got from EPA Region 9.
[2009-08-05 Hearing Transcript[2]]

At the August 26, 2009 Business Meeting Mr. Galati of PG&E stated "[y]es, I first want to state that PG&E believes that it has all perfect permits" [2009-08-26 Business Meeting Transcript at page 32 lines 12 to 13] This was following CARE's representative Mr. Boyd giving the Commission fair warning that its actions to approve the amendment allowed PG&E to continue operating the facility without a federal air permit under the Clean Air Act and that this subjected the CEC to liability under the Act.

21 CHAIRPERSON DOUGLAS: Thank you very much. And
22 finally, Michael Boyd, are you on the line?
23 MR. BOYD: Yes, ma'am. I am here.
24 CHAIRPERSON DOUGLAS: All right, please --
25 MR. BOYD: I am Mike Boyd, President of CARE. I

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[2] See http://www.energy.ca.gov/sitingcases/gateway/compliance/2009-08-05_hearing_transcript.pdf

9

1 [don't] want to duplicate what Rob said. I also would like to
2 incorporate for the record on behalf of CARE, the comments
3 of ACORN, that they submitted, as well. My comments are
4 that I do not believe that the Commission has authority to
5 approve this amendment because you have knowledge and have
6 known for a significant amount of time that this facility
7 is operating without a federal permit. And because of
8 that, if you do decide to approve this, I wish to let you
9 know that I am going to give you a notice that under the
10 Clean Air Act, to take you guys to federal court for
11 violating the Clean Air Act by giving them the permit to
12 operate when, clearly, they do not have their federal
13 permit. That is all I have to say. Thank you.
[2009-08-26 Business Meeting Transcript at pages 25 to 26][8]

On September 3, 2009 Mr. Boyd of CARE received a letter from Mr. Crockett of BAAQMD that included as an attachment a Notice of Violation of the CAA by USEPA to PG&E and BAAQMD date stamped received on August 13, 2009. This confirmed Mr. Crockett's August 5, 2009 public statements where correct. USEPA's statement of Statutory and Regulatory Authorities finds "PG&E failed to obtain a valid PSD permit prior to restarting construction of and operating GGS. PG&E's failure to have a valid permit continues to this time…PG&E violated the SIP and Act by restarting construction of and operating GGS, a major new source of air pollution, without obtaining a valid PSD permit."

The statutory authority cited criminal penalties "for any person who knowingly violates any SIP or permit requirement more than 30 days after the date of issuance of a FNOV, Section 113 (c) of the Act provides for criminal penalties, imprisonment, or both. 42 U.S.C. § 7413 (c) (3)."

Since to our knowledge US EPA Region IX has been aware of this matter since Mr. Simpson filed his Appeal to the US EPA Environmental Appeals Board[9], PG&E has continued the Gateway project operations un-abated purportedly with the CEC's approval we with the utmost of caution notified the CEC on September 3, 2009 of 60-day Notice of Intent to bring Clean Air Act Citizens Suit Pursuant to 42 USC § 7604[10] for the CEC's approval of PG&E's amendment allowing continued operations of the Gateway project under CEC Docket Number

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[8] See http://www.energy.ca.gov/business_meetings/2009_transcripts/2009-08-26_TRANSCRIPT.PDF
[9] See http://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Dockets/PSD+09-02

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00-AFC-1C, Gateway Generating Station, without a PSD permit. Therefore this complaint included CEC's August 26, 2009 actions to approve PG&E's amended permit to the degree CEC includes "any person" under 42 U.S.C. § 7413 (c) (3).

On September 8, 2009, CARE filed a complaint[11] requesting that the Federal Energy Regulatory Commission ("FERC" or "Commission") impose civil penalties on PG&E under the Federal Power Act (FPA) for operating the Gateway Generating Station without a permit required under the Clean Air Act. CARE complaint argues before FERC that PG&E's operation of the Gateway Generating Station without required permits violates section 4A of the Natural Gas Act (NGA) and sections 31(a) and 222 of the FPA, as well as the Commission's rules in its request for rehearing of December 19, 2009.[12]

CARE's complaint included an attached August 4, 2008 e-mail[13] from the Bay Area Air Quality Management District ("BAAQMD")'s attorney that stated "Sandy Crockett provided a summary of the [USEPA Environmental Appeals Board] EAB decision on the Russell City Energy Center [RCEC] PSD permit amendment and the timing implications of at EAB appeal for GGS. District was taken to task by EAB for not complying with noticing requirements of 40 CFR 124 and is concerned that the notice provided for the GGS amendment might also be viewed by EAB as deficient. Sandy is concerned that the EAB plaintiff in the RCEC case would appeal the GGS permit to the EAB on the same grounds. He indicated that the RCEC plaintiff [who is a CARE member] had been in contact with [CARE member] 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 more even if EAB ultimately rejects the appeal…. Gary noted that under EPA policy, once a facility starts up, a non-major amendment no longer requires PSD review and public notice, so if amendment issuance were to be delayed until after startup the PSD issues could be moot. However, District would appear to be circumventing the regulatory process if it were to delay. If GGS were to

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Continued from the previous page
[10] 42 USC § 7604. Citizen suits
[11] See FERC Docket EL09-73 *et al*. See http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12137577
[12] See http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12172687
[13] See http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12140873 Submittal 20090928-5082 at pages 3 and 4.

withdraw permit amendment until after commissioning it would be hard for District staff to support, and the Hearing Board to grant, a variance." The BAAQMD at that time and currently has a delegation agreement with USEPA for PSD permits for facilities such as GGS.

CARE believes this agreement should be revoked by the court setting a precedent that affects all other air districts in the State of California along with an enforcement order for compliance with 40 C.F.R. § 124.10 by US EPA going forward. CEC should also be bared by the court from any say over this or other power plant or transmission project Federal permitting; particularly any notice for public comment hearing or participation on any Federal permits since no statutory authority exists to allow CEC to do so and as CEC has demonstrate a propensity in this case to aid and abet PG&E's noncompliance.

On August 12, 2009 the United States Environmental Protection Agency ("USEPA") issued its "Finding and Notice of Violation" ("FNOV") regarding the PSD permit for the project or lack thereof.[14] On September 24, 2009 the United States Department of Justice ("USDOJ") lodged a "Consent Decree" before the US District Court for the Northern District of California.

The Consent Decree filed with the court included a Complaint which stated "[a]s set forth more fully herein, PG&E constructed the Gateway Generating Station ('GGS'), a natural gas-fired power plant in Antioch, California, without first obtaining an appropriate PSD permit authorizing this construction and without installing appropriate technology to control emissions of nitrogen oxides and carbon monoxide, as required by the Act and the Act's implementing regulations. As a result of the Defendant's operation of the GGS following this unlawful construction, in the absence of appropriate controls, excess amounts of nitrogen oxides and carbon monoxide has been and are still being released into the atmosphere."

On September 28, 2009 PG&E filed its Answer and Motion to Dismiss CARE's FERC Complaint[15], stating "PG&E completed and began operating the facility in February 2009 in reliance upon the 2001 BAAQMD PSD Permit and subsequent permit extension….PG&E contests that conclusion and continues to believe it lawfully constructed Gateway Generating Station in compliance with, and in good faith reliance upon, the permits issued to it by the BAAQMD."[PG&E Answer at pages 6 and 7]

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[14] The FNOV was attached to CARE's Complaint.
[15] See http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12159219

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The August 4, 2008 e-mail and the United State's September 24, 2009 Complaint filed in the US District Court for the Northern District of California that "PG&E constructed the Gateway Generating Station ('GGS'), a natural gas-fired power plant in Antioch, California, without first obtaining an appropriate PSD permit authorizing this construction and without installing appropriate technology to control emissions of nitrogen oxides and carbon monoxide" demonstrates that PG&E had actual "knowledge" within the meaning of 15 USC § 3414 (B) that it did not have a valid PSD permit and therefore on September 28, 2009 PG&E knowingly provided "false information" regarding the permit to the Commission in violation of FPA § 824u.

Violations of Emission Standards or Limitations

The Clean Air Act authorizes citizen suits against any person who has violated or is in violation of an "emissions standard or limitation." Section304(a)(1) of the Act, 42 U.S.C. § 7604(a)(1). The term "emission standard or limitation" is broadly defined to include an emission limitation; emission standard; "any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of air quality)"and any condition or requirement under an applicable implementation plan relating to . . . . air quality maintenance plans;" or any other standard or limitation established under "any applicable State implementation plan;" and any requirement to obtain a permit as a condition of operations. .Id. § 7604(f). PG&E has violated and continues to violate an emission standard or limitation within the meaning of the Act because PG&E has failed to comply with the Act's requirements that major stationary sources obtain a permit before constructing, which would have established BACT current to that time, and an operation permit, which would have established emissions limits for the operation of the facility.

III. CONSPIRACY B

We present as additional evidence of other unlawful conspiracies by the US EPA, and BAAQMD, in this case with the City and County of San Francisco (CCSF) its SF Redevelopment Agency, and Lennar BVHP; regarding US EPA's miss-handling of the exposure of the surrounding low-income community of color of Bay View Hunters Point to toxic dust containing asbestos as a result of Lennar's demolition activities at the the former naval shipyard

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and US EPA's subsequent retaliatory actions against critics of cleanup and land dealings with the developer.

On October 6, 2009 CARE, Michael Boyd and Mr. Lynne Brown respectfully provide the following comments and complaint on the proposal to dissolve (disband) the Hunters Point Naval Shipyard (HPS) Restoration Advisory Board (RAB) and to provide a 60-Day Notice of Intent to Bring Citizens Suit under CERCLA[16] and CAA[17]. Commenters allege US Navy, US EPA, the Bay Area Air Quality Management District ("BAAQMD"), CCSF, SFRA, and Lennar-BVHP LLC knowingly conspired to release asbestos, a hazardous air pollutant, into the ambient air, thereby knowingly placing persons in imminent danger of death or serious bodily injury in violation of 42 U.S.C. § 7413(c)(5)(A).

We allege that the proposal to dissolve the Hunters Point Naval Shipyard (HPS) Restoration Advisory Board (RAB) is retaliatory action for Mr. Leon Muhammad the Dean of the Muhammad University of Islam, CARE, Mr. Boyd, and Mr. Brown bringing complaints with US Navy, US EPA, OSHA, and US DOJ against BAAQMD, CCSF, SFRA, and Lennar-BVHP LLC, regarding their exposure of the surrounding shipyard community to dust containing asbestos on a continuous unabated basis, with full knowledge and informed consent of US Navy and US EPA.

We also contend that since US EPA is a respondent to an appeal before the US Dept. of Labor Office of Administrative Law Judges[18] because Mr. Boyd is a whistleblower against US EPA before Department of Labor/OSHA for its miss-handling of his individual civil rights complaint and civil rights complaints[19] brought in behalf of CARE with US EPA; therefore at a

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[16] Title 42 Chapter 103, Subchapter III § 9659: Citizens suits

[17] 42 USC 7604 authorizes Citizen Suits under the Clean Air Act ("CAA") if you follow the required notice.

[18] This is under Case No. 2009-SDW-00005.

[19] Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. §§2000d to 2000d-7), under Title VI - Law and EPA's Regulations (http://www.epa.gov/civilrights/t6lawrg.htm), and Executive Order 12898.

Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. §§2000d to 2000d-7) prohibits recipients of federal financial assistance from discriminating on the basis of race, color, or national origin in their programs or activities. Title VI itself prohibits intentional discrimination.

Under EPA's Title VI implementing regulations found at 40 C.F.R. Part 7 EPA-funded agencies are prohibited from taking acts, including permitting actions that are intentionally discriminatory or have a discriminatory effect based on race, color, or national origin.

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minimum the proposal to dissolve the Hunters Point Naval Shipyard (HPS) Restoration Advisory Board (RAB) should be held in abeyance until such time as the case is decided, and OSHA has an opportunity to investigate whether or not the disbanding of the RAB to be retaliatory action on US Navy's and US EPA's parts for Mr. Leon Muhammad, CARE, Mr. Boyd, and/or Mr. Brown participating in protected activities.

Procedural Background

CARE filed a Title VI complaint with the US EPA on October 20, 2004 against the City and County of San Francisco ("CCSF") and it's San Francisco Redevelopment Agency ("SFRA"), with US EPA, Complaint ID 12R-04-R9, alleging that the actions taken by the CCSF and SFRA in regards to the Hunters Point Naval Shipyard violated the Act. The SFRA took action at its April 29, 2004 meeting adopting environmental findings pursuant to the California Environmental Quality Act ("CEQA") and authorizing execution of the following documents with the United States Department of the Navy concerning the former Hunters Point Naval shipyard site: "(1) the Conveyance Agreement, (CA), (2) the Security Services Cooperative agreement, and (3) ancillary related documents [including the Disposition Development Agreement (DDA) between the San Francisco Redevelopment Agency (SFRA) and Lennar-BVHP for the Redevelopment of the Shipyard]; and authorizing related actions; Hunters Point Shipyard Redevelopment project area."

The SFRA took discretionary action on December 2, 2003, by approving the DDA for the development of the Hunters Point Shipyard. Additionally, by and through Mayor Gavin Newsom, CCSF took what is clearly discretionary action by approving (*i.e.*, entering into) the CA with the U.S. Navy. The CA sets a specific timetable for giving CCSF a portion of the Hunters Point Shipyard for residential development (herein referred to as Parcel A), as well as giving commercial development rights to Lennar/BVHP, a private, non-governmental organization.

On August 6, 2007 CARE filed an amendment to the complaint to include the BAAQMD. CARE amended its complaint to include the BAAQMD as a charged party because

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If a member of the public raises a concern that EPA itself has acted in a manner that is discriminatory or does not comply with the President's Executive Order 12898 on Environmental Justice, that issue is referred to EPA's Office of Environmental Justice which works to ensure that EPA's actions are in compliance with the Executive Order.

CARE alleges that the BAAQMD failed to follow the California Environmental Quality Act ("CEQA") public hearing procedures designed to produce an effective asbestos dust control plan for Parcel A of the former Hunters Point shipyard, and for their failure to protect the health and welfare of the workers on the project and the surrounding community of Bay View Hunters Point from exposure to asbestos dust which exceeded action limits on a repeated basis as a result of construction activities on Parcel A of the Hunters Point shipyard by Lennar/BVHP. The neglect with which the US Navy and the US EPA treated these complaints stymied CARE's ability to resolve the problems involved in our complaints.

US EPA denied CARE's amendment to include BAAQMD on September 3, 2009 in what appears to us to be in retaliation because it took over two years to get a response from US EPA which exceeded US EPA's statutory deadline of 180 days and in retaliation for naming their permitting delegate BAAQMD in our complaint.

BAAQMD Action Levels

According to BAAQMD's informational flyer[20] the "District based the action levels [used in its Asbestos Dust Mitigation Plan ('ADMP')] on health risk assessment protocols established by the State Office of Environmental Health Hazard Assessment (OEHHA). The first action level in the ADMP is set at 1,600 asbestos structures per cubic meter and requires that Lennar notify the Air District and implement more stringent dust control measures. The second action level in the ADMP is set at 16,000 asbestos structures per cubic meter and requires Lennar to stop work until asbestos levels decline."

The Department of Public Health Current Cumulative Airborne Asbestos results for the Parcel A monitoring stations report several exceedances[21] over the District's action levels. According to a San Francisco Department of Public Health (SFDPH) memorandum dated June 2007, there were complaints about dust from the very beginning of Lennar's grading activities in April of 2006. The California Department of Public Health (CDPH) reviewed asbestos monitoring data collected between Aug. 3, 2006, and Aug. 19, 2007. No asbestos monitoring

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[20] See http://www.sfdph.org/dph/files/EHSdocs/ehsHuntersPointdoc/BAAQMDFactSheet.pdf

[21] See the San Francisco Department of Public Health Current Cumulative Airborne Asbestos results for the Parcel A monitoring stations: http://www.sfdph.org/dph/files/EHSdocs/ehsHuntersPointdoc/ASBdata.xls

data was available from April 25, 2006, through Aug. 2, 2006. In 2006, SFDPH issued three Notices of Violation to the developer concerning the generation of visible dust.

On July 17, 2007, Dr. Rajiv Bhatia, director of Occupational and Environmental Health for the San Francisco Department of Public Health, requested that ATSDR review and interpret the incomplete logs of air monitoring data, analyze data gaps and evaluate judgments made by SFDPH about the health impacts and significance of exposure to naturally occurring asbestos in the community.

The analysis was completed by the California Department of Public Health (CDPH) on Sept. 10, 2007, and directed to Capt. Susan L. Muza, regional head of ATSDR. Capt. Muza, who met with community leaders in August of 2007, was asked by Minister Christopher Muhammad to recommend a temporary halt to Lennar's construction activities while the ATSDR investigation was underway. Muza made an off-line comment suggesting that the agency had to accept "political realities" in dealing with "political monsters."

The report conducted by the Site Assessment Section of the CDPH for ATSDR reports that "the contractor exceeded the Bay Area Air Quality Management District asbestos action level that triggers work stoppage on 13 percent of excavation days, and because there have been complaints about dust which may cause health concerns, SFDPH should assign a person to continuously monitor dust production and dust abatement during working hours."

We have reason to believe we have been denied our rights to due process under the state and federal constitutions by CCSF, BAAQMD, the US EPA, acting in concert with the Centers for Disease Control and Prevention ("CDC") for documents related to the CDC's Agency for Toxic Substances and Disease Registry's ("ATSDR") handling of an investigation into potential off-site exposure to the public from dust containing asbestos, lead, and other inorganics from the development of and the approval of and non-enforcement of the Naturally-Occurring Asbestos Dust Mitigation Plan for Parcel A, Phase I Development of Hunters Point Shipyard by Lennar Corp.

"The exposures did result in some increased risk for community residents, although it is not possible to quantify this risk." – Thomas Sinks, Ph.D., deputy director, Agency for Toxic Substances Disease Registry. "Prior to the ATSDR cover letter coming out, there seemed to be an indication that due to political realities, ATSDR would not be able to help much with the asbestos issue. Lennar was on a fast track." – Agenda topic at a meeting of ATSDR, CDPH

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(California Department of Public Health), EPA (U.S. Environmental Protection Agency) and community coalition members at the EPA Region 9 Conference Center on Nov. 13, 2007.

Dr. Sinks, in fact, concluded in his cover letter to the SFDPH that "there was clear evidence that levels of asbestos exceeded the mandated thresholds at both the fence line and in the community. The concentrations of dust could not be interpreted because of the sampling methods and … the exposures did result in some increased risk for community residents, although it is not possible to quantify this risk."

In a Community Health Update flyer funded by Lennar-BVHP LLC and widely distributed to a hearing before the San Francisco School Board in October of 2007 – where dozens of parents, teachers, administrators and buildings and grounds supervisors testified that toxic dust from the grading activities on Parcel A was causing headaches, nosebleeds, asthma, bronchitis and declining school performance.

On January 5, 2010 the SF Chronicle that it had issued a report that "[t]he report by the Environmental Protection Agency is the latest in a string that have found the project to be safe, despite lawsuits, a record fine and more than three years of heated public hearings as activists seek to halt the work." See Exhibit 1.

US Navy and US EPA must demonstrate their actions to disband the RAB are not based on discrimination and retaliation for engaging in protected activities. US Navy and US EPA must take enforcement actions against BAAQMD, CCSF, SFRA, and Lennar-BVHP LLC for knowingly conspiring to release asbestos, a hazardous air pollutant, into the ambient air, thereby knowingly placing persons in imminent danger of death or serious bodily injury in violation of 42 U.S.C. § 7413(c)(5)(A). The RAB must be reconvened and the US Navy and US EPA must prepare and make public the administrative record as required for every response action. 40 CFR § 300.800

Occupational Safety & Health Administration the permissible exposure limit (PELS)

According to the Occupational Safety & Health Administration the permissible exposure limit (PELS) time-weighted average limit (TWA) for asbestos dust is as follows:

> The employer shall ensure that no employee is exposed to an airborne concentration of asbestos in excess of 0.1 fibers per cubic centimeter of air as an eight (8)-hour time-weighted average (TWA).[22]

The San Francisco Department of Public Health maintains a data base for asbestos air monitoring results and other documents related to Parcel A.[23] The San Francisco Department of Public Health Current Cumulative Airborne Asbestos results for the Parcel A monitoring stations lists 0.2121 fiber per cubic centimeter of air as an eight (8)-hour time-weighted average for December 29, 2008 at BAAQMD monitor HV-4 and 0.2613 fiber per cubic centimeter of air as an eight (8)-hour time-weighted average at monitor HV-4 and 0.2968 fiber per cubic centimeter of air as an eight (8)-hour time-weighted average at monitor HV-9 on December 30, 2009 and the report stated grading was ongoing since Lennar's continued operations continue to expose the surrounding low-income community of color to toxic levels of dust containing asbestos and other hazardous materials in excess of OSHA limits unabated by Lennar BVHP, US Navy, US EPA, BAAQMD, and CCSF.

Under the Federal Clean Air Act ("CAA") of 1970[24], the US EPA has been regulating Asbestos Containing Materials ("ACM") that contains more than 1 percent asbestos. Regulations issued by the Occupational Safety and Health Administration ("OSHA") provide, with respect to the permissible levels of asbestos to which employees protected by the Occupational Safety and Health Act[25] may be exposed, one standard for regulating general industry and another for regulating construction work. Both standards contain an action level defined as "an airborne concentration of asbestos . . . of 0.1 fibers per cubic centimeter[26] . . . calculated as an eight (8)-hour time-weighted average."[27] Under both standards, if employees are exposed to asbestos at or

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[22] See Regulations (Standards - 29 CFR) Asbestos. - 1910.1001(c): http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=9995

[23] See http://www.sfdph.org/dph/EH/HuntersPoint/default.asp

[24] 42 U.S.C. §§ 7401-7671 (1988 & Supp. 1992).

[25] 29 U.S.C. §§ 651-675 (1988 & Supp. 1992).

[26] On May 30, 2008 Monitoring Station HV-9 reported 0.1388 fibers/cc which is above the permissible levels of asbestos to which employees protected by the Occupational Safety and Health Act may be exposed. No NOV has been issued against Lennar-BVHP, LLC by BAAQMD. For Quantitative Data (e.g. charts, tables, and graphs) see http://www.sfdph.org/dph/files/EHSdocs/ehsHuntersPointdoc/ASBdata.xls

[27] 29 C.F.R. § 1910.1001(b) (1993); 29 C.F.R. § 1026.58(b) (1993).

above the action level, the employer must take specified compliance actions, including air monitoring, employee training, and medical surveillance.

On November 5, 2007 CARE demanded "the Bay Area Air Quality Management District (BAAQMD and/or District) take immediate enforcement action against the City and County of San Francisco's redevelopment project on Parcel A at Bay View Hunters Point comprises 75 acres located in the northern portion of the Hunters Point Shipyard. Lennar Bay View Hunters Point, LLC (Lennar BVHP) plans to construct approximately 1600 attached single family homes."

On November 19, 2007 BAAQMD responded by stating that the City and County of San Francisco Planning Department and San Francisco Redevelopment Agency was the Lead Agency on the Parcel A project's environmental review.

BAAQMD appears to interpret this to mean that this covers their responsibility for environmental review on the Asbestos Dust Control Plan the District had approved for the project in 2006 three months after Lennar had commenced demolition activities on Parcel A resulting in the disturbance of soil containing asbestos.

On October 1, 2008 the BAAQMD first publicly disclosed that it had reached a $515,000 settlement[28] with Lennar – BVHP, LLC over alleged air quality violations at the Hunter's Point Parcel A development. The settlement, finalized in early September, was announced at the Air District's October 1st board meeting.

Commenters allege US Navy, US EPA, BAAQMD, CCSF, SFRA, and Lennar-BVHP LLC knowingly conspired to release asbestos, a hazardous air pollutant, into the ambient air, thereby knowingly placing persons in imminent danger of death or serious bodily injury in violation of 42 U.S.C. § 7413(c)(5)(A).

Appellant Mr. Boyd[29]believes US EPA's failure to properly process his individual complaint and complaints for CARE is based on discrimination based on race and in retaliation for engaging in a protected activity including but not limited to disclosing the presence of dust containing naturally occurring asbestos and other hazardous materials in regard to his CFC

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[28] See http://www.baaqmd.gov/~/media/Files/Board%20of%20Directors/2008/brd_min_10-01-08.ashx and http://www.baaqmd.gov/~/media/ss_min_011209.ashx

[29] Before the US Dept. of Labor Office of Administrative Law Judges, Case No. 2009-SDW-00005.

complaint (OCR ID 16R-05-R9) and the CARE shipyard complaint (OCR ID 12R-04-R9 as amended). His September 8, 2005 Title VI charge against CFC states "I allege that I have been the victim of discrimination by so called representatives of CFC based on my race as a person of Caucasian ethnicity in his employment, compensation, and termination of employment.[30] "

Mr. Boyd alleges he is being retaliated against by US EPA in concert with the City and County of San Francisco, the San Francisco Redevelopment Agency, the US Navy and the Bay Area Air Quality Management District ("BAAQMD") for participating in protected activities regarding US EPA's handling of the Parcel A clean up, and demolition activities there by Lennar Corporation that disturbed asbestos dust exposing the surrounding community that is already disparately burdened by environmental toxins.

The community co-chair of the Hunters Point Shipyard Restoration Advisory Board ("RAB") elected by other RAB members from the community to serve for the 2009 year provides a case in point for retaliation and discrimination based on race and religion for his continuously raising the issue of the surrounding community being exposed to asbestos dust from the shipyard Parcel A development. The treatment of Mr. Leon Muhammad, the Dean of the Muhammad University of Islam located in Bay View Hunters Point San Francisco California, provides a supporting evidence to the fact that USEPA has a "pattern and practice" of retaliation against anyone who raises the issue of the presence of dust containing naturally occurring asbestos as will be the case if US Navy in concert with USEPA is allowed to disband the community's shipyard Restoration Advisory Board (RAB) created as part of the CERCLA[31] community acceptance criteria for the clean-up of superfund sites.[32]

We allege the disbanding of the RAB is discrimination against Mr. Muhammad based on race and religion and in retaliation for the Nation of Islam's January 29, 2008 *Final Call* article titled Toxic legacy of the clean-up at the Hunters Point Shipyard[33] *Coalition fights community*

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[30] Mr. Lynne Brown (who is African American) was the CFC co-chair RAB co-chair and a signer of the CFC/US EPA TAG Grant.

[31] Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610

[32] Seehttp://www.bracpmo.navy.mil/base_docs/hps/documents/public_notices/HPS_PublicNoticeRABDissolutionEmail090209.pdf

[33] This article is a copy of *Toxic Terror in San Francisco* by Charlene Muhammad, Staff Writer *Final Call* Jan 29, 2008. Following in that great tradition of the Nation of Islam's publications, *The Final Call Online Edition* aims to

Continued on the next page

exposure to asbestos, other hazards and in retaliation for this Coalition taking control of the RAB in 2009.

> A cross section of Black, Latino, Asian-Pacific Islander and progressive Whites are determined to win a battle with city and congressional leaders over what activists call one of the most horrific cases of environmental racism and political double dealing in the country.
>
> The fight began when children at the Muhammad University of Islam (MUI), which sits at the top of Bay View Hunters Point, were unknowingly exposed for months, maybe longer, to asbestos and other cancer-causing toxins when the Lennar Corporation a multi-billion dollar housing developer began grading a hill directly beside the school to make way for 1,500 homes on the site of the old Hunters Point Naval Shipyard.
>
> MUI opened its doors to the community in 1997 and moved to its current location in Hunters Point in 2002. It currently educates Muslim children as well as children from across the city. Currently the school educates about 100 students and often, as they played outside during recess and physical education classes, thick, toxic dust would begin to blow in a tornado-like pattern over the schoolyard.
>
> During that same period, Leon Muhammad, MUI's dean, noticed that the children began complaining about breathing problems, and experiencing chronic nosebleeds, skin rashes, asthma and eye swelling. One student became so ill she was hospitalized for a month for bronchitis.
>
> Catherine Muhammad's son developed skin rashes, but his worst experience was being sent home from school after his actual eyeball swelled up. Her two-year-old daughter underwent surgery and a three-day hospital stay to remove hardened mucous from her left lung.

One of the reasons given by US Navy for disbanding was because of "the RAB voting to stop all work on HPS due to concerns about a developer's construction work on the developer's property adjacent to HPS."[34] Mr. Leon also has agreed that US EPA in concert with US Navy disbanded the RAB based on discrimination based on race and religion, and retaliated against RAB members therefore. Clearly the RAB members (and the community as a whole) is being

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serve as an essential source of information for those who thirst for uncompromised reporting in today's arena of corporate driven media.
See http://www.finalcall.com/artman/publish/National_News_2/Toxic_Terror_in_San_Francisco_4345.shtml

[34] See http://www.bracpmo.navy.mil/base_docs/hps/documents/public_notices/HP_RAB_01SEP09.pdf at page 3.

retaliated against by US EPA for engaging in a protected activity; including but not limited to disclosing the presence of dust containing naturally occurring asbestos.

Respondent US EPA's improper handling of CARE's 2007 amendment to CARE's 2004 Civil Rights Act complaint (OCR ID 12R-04-R9) to include BAAQMD regarding the HPS cleanup reflects Respondent US EPA is clearly intent to continue to retaliating against Mr. Boyd for his participation in protected activities. In this matter CARE amended its 2004 complaint to include BAAQMD because Respondent failed to properly process it. It is now improper for the Respondent to open a new complaint years later and then deny the administrative complaint because it is untimely now; due to Respondent's own actions to make it untimely. See Exhibit 2 September 2, 2009 letter from US EPA rejecting administrative complaint.

CARE provided December 9, 2009 comments and a request for an extension period in the consent decree in *United States v. Lennar Communities Development, Inc.*, D.J. Ref. 90–5–2–1– 08655. CARE respectfully request your Honor grant such extension request if you deem it appropriate.

Citizen Suits

CERCLA[35], like many environmental statutes, provides for citizen suits.These permit citizens to ensure that statutes are complied with via the use of civil actions. If, for example, the US EPA issues an order under CERCLA that is not complied with, or an environmental regulation has been breached, and the US EPA does not pursue the matter, an ordinary citizen

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[35] The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675, commonly referred to as "CERCLA" or "Superfund," was enacted by Congress in 1980. CERCLA was, designed primarily to respond to situations involving the past disposal of hazardous substances. CERCLA refers to the actions it mandates to address inactive hazardous waste sites as "response actions." There are two basic response actions: "removals" and "remedial actions." A removal action is usually taken in response to an imminent danger to human health or the environment. Remedial actions, on the other hand, are long-term cleanups designed to permanently address the threat posed by contamination at a site. While removals may only take weeks, remedial actions may take years or even decades to complete.

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
CERCLA is the primary federal law addressing the problem of releases of hazardous substances into the environment. It was significantly amended in 1986 by SARA. Federal agencies are required to comply with CERCLA and the NCP (42 U.S.C. § 9620(a)(1)). It requires the federal government and other responsible parties to clean up inactive hazardous waste sites. CERCLA requires a response where necessary to protect human health and the environment when there is a release of a hazardous substance into the environment or when there is a release of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare. Given this broad authority, CERCLA applies to most federal facility releases or threatened releases of hazardous substances, pollutants, or contaminants.

can launch a civil suit that would, if successful, compel the offending party to comply with the statute. A successful citizen suit does not result in any benefit to the citizen in the form of compensation for damages; at best, the polluter pays for clean-up and for the legal costs incurred by the citizen in the filing of the suit.

Feasibility Study (FS)

A Feasibility Study should have been conducted on the Asbestos Dust Mitigation Plan ("ADMP") approved by BAAQMD, to who US EPA's had delegated its authority over such plans under the CAA. A Feasibility Study ("FS") must be undertaken prior to conducting Remedial Action in this case to prevent the disturbance of soil containing asbestos dust. The FS "means a study undertaken by the lead agency to develop and evaluate options for remedial action (40 C.F.R. § 300.430(e)). The FS emphasizes data analysis and is generally performed concurrently with the remedial investigation (RI), using data gathered during the RI. The RI data are used to the define the objectives of the response action, to develop remedial action alternatives, and to undertake the initial screening and detailed analysis of the alternatives . . ." (40 C.F.R. §§ 300.5 and 300.430(e)(1)).

The FS is the second step in the "investigation" stage of the remedial action process. The primary purpose of the FS is to ensure that appropriate remedial alternatives are developed and evaluated so that relevant information concerning the remedial action options can be presented to a decision-maker and an appropriate remedy selected. To do this the lead agency must identify potential treatment technologies and screening technologies, assemble technologies into alternatives, screen the alternatives preserving an appropriate range of alternatives, identify ARARs, and perform a detailed analysis of alternatives (40 C.F.R. § 300.430(e)). Within the FS, an ARARs table is developed to document all federal and state ARARs with which the final remedy must comply. The FS must utilize nine criteria to assess each alternative and to compare alternatives: (1) protectiveness of human health and the environment; (2) ARARs compliance; (3) long-term effectiveness and permanence; (4) reduction of toxicity, volume or mobility through treatment; (5) short-term effectiveness; (6) implement ability; (7) cost; (8) state acceptance; and (9) community acceptance (40 C.F.R. § 300.430(e)(9)).

A proposed plan must outline the preferred remedial alternative and summarizes the other alternatives considered in the FS. The proposed plan should be written in a manner that can

be easily understood by the public. A clear statement of the restrictions associated with the proposed action should be included to allow the public to be fully informed about the proposed action. The remedy selection process under CERCLA are described in the National Contingency Plan (NCP) (40 CFR Part 300.430(a)(1)(iii)) and its preamble (55 FR 8706). Under the NCP, *community acceptance is one of the nine criteria for selecting a CERCLA remedy*. While community acceptance is an essential ingredient in making the final remedy selection, it is not always possible to accomplish all the community's goals. It is the Department of Defenses (DoD) responsibility to make the final remedy selection in accordance with applicable laws and requirements and to ensure that it will be protective of human health and the environment, as well as be compatible with, to the extent reasonably practicable, community reuse plans. This final remedy selection is formalized through the Record of Decision (ROD), which will be compatible with any ICs that may be implemented at the site.

$82 million in federal funding for the toxic cleanup of the Hunters Point Shipyard

On March 7, 2009 CARE filed a request with US Navy under the Freedom of Information Act ("FOIA") requesting among other things "[a]ll records and other communications (in electronic format where available) regarding the expenditure of the $82 million in federal funding for the toxic cleanup of the Hunters Point Shipyard superfund site". In July 2009 a partial response was provided to the FOIA in the form of various of contract documents for various cleanup activities purportedly taking place at the shipyard. A spread sheet of the documents was prepared to list the expenditures and other transactions reported. The data provided was unresponsive to the request and added confusion by reporting expenditures totaling $357,229,399.23 far in excess of what was publicly reported; $82 million.

US Navy refused to provide the following information in response to the March FOIA request; all records and other communications (in electronic format where available) regarding the $82 million in federal funding for the toxic cleanup of the Hunters Point Shipyard superfund site announced by House Speaker Nancy Pelosi and San Francisco Mayor Gavin Newsom on December 19, 2007 in press releases; all records and other communications (in electronic format where available) regarding and a list of all persons in attendance of the meeting in early January to announce the $82 million in federal funding for the toxic cleanup of the Hunters Point Shipyard superfund site announced by the Fogcityjournal on January 3, 2008; and, all records

and other communications (in electronic format where available) regarding the $82 million in federal funding for the toxic cleanup of the Hunters Point Shipyard superfund site includes every and all communications with all federal state and local agencies, Lennar Homes of California and any of its agents, affiliates, subsidiaries, or joint venture partners, and any other person or corporation.

CERCLA Section 113(k) requires the establishment of administrative records upon which the President shall base the selection of a response action. 42 U.S.C. §9613(k). The US Navy has been using its response action authorities under CERCLA to conduct cleanup at Hunters Point. That being the case, the US Navy is responsible for complying with all requirements of CERCLA and the NCP. One such requirement is the "Administrative Record and Participation Procedure" requirements of 42 U.S.C. § 9613(k) and 40 CFR Part 300, Subpart

The US Navy has established a RAB at Hunters Point. The US Navy has provided certain documents on proposed cleanup actions to the RAB and sought their comments. Nonetheless, notice to the RAB does not constitute nor does it meet the notice required by 40 CFR § 300.820, or the public participation requirements of 40 CFR §§300.820 and 825.

A few of the most significant deficiencies and violations of law are:

A separate administrative record is required for every response action. 40 CFR § 300.800. It appears the US Navy only kept a chronological file of some relevant documents.

There is no evidence that the administrative record for each response was placed in a public repository within regulatory timeframes nor that the record was made available and notice of same was published in a local newspaper. 40 CFR §§ 300.805 and 820.

There is no evidence that the US Navy has taken public comment on any response action, and if it did, the publication of the decision and the public comments received and the Army's responses are not in an administrative record. 40 CFR § 300.820. Furthermore, evidence of compliance with the community relations requirements for each response of 40 CFR § 300.415(m) is not evident from the index.

There is no indication that the EPA's comments on the Navy's investigation reports, planned cleanup actions, data analysis, or other regulatory technical reviews are contained in the administrative record for each cleanup action the Navy chose to take. Thus, there likely are other documents which the Navy considered in deciding to take action that are not contained in the record. 40 CFR §300.800(a). All documents that form the basis for the selection of the response

are to be placed in the record. Documents required to be included are relevant documents that were relied on in selecting the response action, as well as, relevant documents that were considered but ultimately rejected as a basis for the response action. See Preamble to the NCP (46 Fed. Reg. 8807, March 8, 1990) and EPA AR Guidance.

There are no decision documents that comply with the NCP and EPA guidance. In accordance with US EPA guidance, if the Navy was using removal authorities then an action memorandum is required. Decision documents are required to be in the administrative record as required by 40 CFR §300.825.

We incorporate attached evidence that US EPA's so-called consent agreement is a clear effort to retaliate against CARE's members and officers for bringing complaints and exercising our rights to judicial review; thereby rewarding criminal polluters like PG&E by making the Consent Decree inappropriate, improper, as well as inadequate. This makes it no surprise that PG&E would be willing to agree to the consent decree as proposed.

Appellant Mr. Boyd[36]believes US EPA's failure to properly process his individual complaint and complaints for CARE is based on discrimination based on race and in retaliation for engaging in a protected activity including but not limited to disclosing the presence of dust containing naturally occurring asbestos and other hazardous materials in regard to his CFC complaint (OCR ID 16R-05-R9) and the CARE shipyard complaint (OCR ID 12R-04-R9 as amended). On December 15, 2009 the Administrative Law Judge, Case No. 2009-SDW-00005 issued Exhibit 3 an order for evidentiary hearings in Mr. Boyd's case to demonstrate that the ALJ seems to indicate that there are sufficient facts to go to trial.in Mr. Boyd's whistleblower appeal against the US EPA.

Exhibit 4 is a letter dated December 30, 2009 which we allege demonstrates US EPA is continuing to retaliate harass and intimidate Mr. Boyd by continue to purport to process their untimely "investigations" of Mr. Boyd's Civil Rights Act complaint to US EPA OCR and denying his request for administrative delay during the pendancy of his appeal before the Administrative Law Judge in his Case No. 2009-SDW-00005.

Commenters ask your honor to grant an administrative delay during the pendancy of Mr. Boyd's appeal before the Administrative Law Judge in his Case No. 2009-SDW-00005.

IV. COMMENTS OF GGU, ROBERT SARVEY AND ROBERT SIMPSON

We incorporate the comments submitted by Golden Gate University (GGU) dated November 4, 2009 and those submitted by Robert Sarvey and Robert Simpson.

CARE agrees whole heartedly with GGU that "[t]his 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."

CARE also agrees with Mr. Sarvey that your Honor should "[p]ermanently enjoin Defendant PG&E from operating the Gateway Generating Station except in accordance with the Clean Air Act and any applicable regulatory requirements... Order Defendant PG&E to remedy its past violations by, inter alia, requiring PG&E to apply for all necessary permits in conformity with the requirements of the PSD provisions of the Act...Order Defendant PG&E to remedy its past violations by, inter alia, requiring Defendant to install, as appropriate, the best available control technology at the GGS for each pollutant subject to regulation under the Act, and to take such other measures as are necessary to bring the Gateway Generating Station into compliance

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Continued from the previous page

[36] Before the US Dept. of Labor Office of Administrative Law Judges, Case No. 2009-SDW-00005.

with the PSD provisions of the Act…[and therefore].. [a]ssess an appropriate civil penalty[37] against Defendant PG&E". CARE however asks that your honor also assess criminal penalties where appropriate as well.

CARE agrees with Robert Simpson as well that "[t]he complaint and consent decree does not consider significant factors. On its face it does not examine the complete context of how this facility came to operate illegally and how the California power plant licensing system serves to violate the Clean Air Act. The Gateway facility did not magically appear one day and accidentally operate in violation of the Clean Air Act. This is the result of a systematic process coordinated by the California Energy Commission (CEC) and associated Air Districts cooperating with power plant developers to violate the Clean Air Act. The consent Decree neither addresses these issues nor cures the system that allows power plants to be constructed and operate despite the provisions of the Clean Air Act. Power plant licensing in the S[t]ate of California is guided by the Warren Alquist Act. The Warren Alquist Act interjects itself and the CEC between California Air Districts and their Compliance with their State Implementation Plans of the Clean Air Act, with a parallel process known as a Preliminary Determination of Compliance (PDOC) and a final Determination of Compliance(FDOC) which stands in the place of a Draft permit and an Authority to Construct (ATC). The process serves to derail, public participation and review. It is at odds with clear Congressional direction for 'informed public participation,' see CAA § 160(5), 42 U.S.C. § 7470(5), and § 124.10's expansive provision of notice and participation rights to members of the public.' EAB PSD Remand 08-01 page 26…The facility does not simply operate without a PSD permit, it operates without a Title IV or Title V permit. It operates in violation of the New Source Review provisions of the Clean Air Act, without a legal Authority to Construct (ATC) or any Operating Permit. It operates in conflict with its CEC license. The demonstration of the facility operating without permits is the result of years of work by myself, Robert Sarvey and organizations like Golden Gate University Environmental Law and Justice Clinic, CAlifornians for Renewable Energy (CARE), and Communities for a Better Environment (CBE) and therefore I concurrently incorporate their comments herein…..In the Remand of the PSD permit issued by the Bay Area Air Quality

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[37] We assume this means all penalties available under CAA and FPA pursuant to CARE's FERC complaint where we believe your Honor also has jurisdictional authority.

Management District for the planned Russell City Energy Center (actually located in the City of Hayward), the EAB implicated both the CEC and the Air District in its Remand. The EAB held that: 'The District's almost complete reliance upon CEC's certification related outreach procedures to satisfy the District's notice obligations regarding the draft permit resulted in a fundamentally flawed notice process.' page 3 'the pivotal importance to Congress of providing adequate initial notice within EPA's public participation regime under 40 C.F.R. part 124, see supra Part IV.B.,' EAB 08-01 page 39....The United States should investigate how the CEC approved the continued operation of GGS in an "Order Amending the Energy Commission Decision to Modify Equipment and Change Air Quality Conditions of Certification"[] despite pending complaints at the CEC regarding a lack of a PSD permit. and in the Shadow of the EPA Notice of Violation. The CEC's decision to approve this facility in clear violation of the Clean Air Act should not be ignored in this proceeding." CARE provides a copy of the Remand Order in EAB PSD Docket 08-1 as Exhibit 5.

V. THE CONSENT DECREE IS INADEQUATE IN LIGHT OF THE US EPA ADMINISTRATOR'S FINDINGS REGARDING PUBLIC ENDANGERMENT DUE TO GREENHOUSE GASES

On December 7, 2009, the US EPA Administrator signed two distinct findings regarding greenhouse gases under section 202(a) of the Clean Air Act:

* Endangerment Finding: The Administrator finds that the current and projected concentrations of the six key well-mixed greenhouse gases--carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6)--in the atmosphere threaten the public health and welfare of current and future generations.

* Cause or Contribute Finding: The Administrator finds that the combined emissions of these well-mixed greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas pollution which threatens public health and welfare.[38]

No BACT analysis is provided for the public to consider greenhouse gas emissions (as regulated pollutants) emitted from GGS. Carbon Dioxide, CO_2, and Nitrous Oxide, N_2O, are

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[38] These findings were signed by the Administrator on December 7, 2009. On December 15, 2009, the final findings were published in the Federal Register (www.regulations.gov) under Docket ID No. EPA-HQ-OAR-2009-0171. The final rule will be effective January 14, 2010. http://www.epa.gov/climatechange/endangerment.html

components of the emissions expected to indirectly result from the GGS[39] that must be included as regulated emissions, and the quantities produced projected. The United States Environmental Protection Agency (USEPA) website[40] recognizes the climate change impacts of these emissions and yet these impacts were not included as pollutants.

This BACT analysis needs to identify the siting of new fossil fuel power plants locations so as not to disparately place environmental burdens upon low-income, minority residents, as the TGGS has significantly increased emissions of greenhouse gases responsible for global warming. The United States Supreme Court has affirmed that "[t]he harms associated with climate change are serious and well recognized," *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438, 1455 (April 2, 2007). In that case, the Supreme Court ruled that the Clean Air Act (CAA or Act) authorizes regulation of greenhouse gases (GHGs) because they meet the definition of air pollutant under the Act.[41] This is the provision entitling CARE to commence a civil action against the PG&E, Lennar, CCSF, SFRA, US EPA, "any person" who violates the Clean Air Act including the President.

The Clean Air Act requires that the proposed facility be subject to the best available control technology for each pollutant subject to regulation that results from the facility. CAA § 165(a)(4). The Act defines "best available control technology" as "the maximum degree of reduction of each pollutant . . . 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 such facility . . . ." *Id.* § 169(3). US EPA's guidance provided in the New Source Review Workshop Manual (draft Oct. 1990) outlines the analytical steps typically followed to make this case-by-case determination. *See Northern Mich. U.*, PSD Appeal No. 08-02, slip op. at 12. The April 2, 2007 Supreme Court ruling recognizing "GHGs" as a form of "pollutant" extended the list of qualified gases covered by the CAA, these included but are not limited to CO_2, Methane (CH_4), and Nitrous Oxide (N_2O). "Non-CO_2 greenhouse gases are a significant

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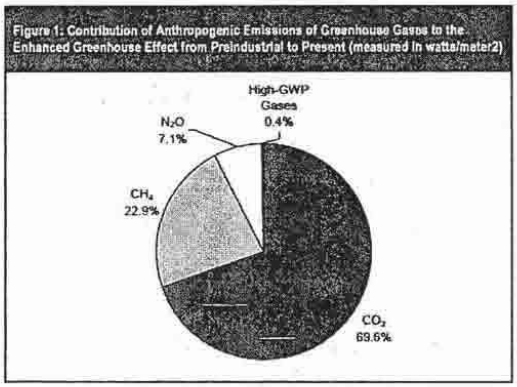
[39] Greenhouse Gases
Greenhouse gases are any gas that absorbs infrared radiation in the atmosphere. Greenhouse gases include, but are not limited to, water vapor, carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrochlorofluorocarbons (HCFCs), ozone (O_3), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6). [ARB CEQA Functional Equivalent Document at J-25]

[40] http://epa.gov/climatechange/index.html

[41] 42 USC § 7604. Citizen suits

contributor to climate change. Figure 1 shows the global contribution of human-related greenhouse gas emissions to the enhanced greenhouse gas effect since Preindustrial times. Approximately 30 percent of the human-induced greenhouse effect can be attributed to the non-CO_2 greenhouse gases. EPA collects data on international historical and projected greenhouse gas emissions and estimates the costs of reducing these emissions, and has issued several analytical reports on international emissions projections and mitigation opportunities for the non-CO_2 greenhouse gases."[42]



Source: IPCC, 2001

Carbon Dioxide was not analyzed for BACT

CARE disagree with the consent decree because it does not consider greenhouse gas emissions as regulated pollutants and the combustion of coal is the leading source of greenhouse gas production worldwide. Carbon Dioxide, CO_2, Methane, and Nitrous Oxide, N_2O, are components of the emissions expected from the Black Mesa Complex and yet they are not included as regulated emissions. Agencies must prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." Id. § 4332(2) (C). The regulations define "human environment" broadly to "include the natural and physical environment and the relationship of people with that environment," and note that "[w]hen an [EIS] is prepared and economic or social and natural or physical environmental effects are interrelated, then the [EIS]

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[42] See http://www.epa.gov/climatechange/economics/international.html

will discuss all of these effects on the human environment." 40 C.F.R. § 1508.14

The United States Environmental Protection Agency (US EPA) website[43] recognizes the climate change impacts of these emissions and yet these impacts were not included as pollutants. This project has been located so as to disparately place environmental burdens upon low-income, minority residents, and this project significantly increases emissions of greenhouse gases responsible for global warming. The United States Supreme Court has affirmed that "[t]he harms associated with climate change are serious and well recognized," *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438, 1455 (April 2, 2007). In that case, the Supreme Court ruled that the Clean Air Act (CAA or Act) authorizes regulation of greenhouse gases (GHGs) because they meet the definition of air pollutant under the Act which is therefore subject to the Citizen Suit provisions of the CAA.[44] This is the provision of the Act that allows CARE and Vernon Masayesva to file suit against Peabody, OSM, and US EPA for violating the Act for the EIS failing to consider the impacts of these emissions.

According to USEPA the "largest source of CO_2 emissions globally is the combustion of fossil fuels such as coal, oil and gas in power plants, automobiles, industrial facilities and other sources."[45]

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[43] http://epa.gov/climatechange/index.html
[44] 42 USC § 7604. Citizen suits
[45] The source of this information is the USEPA website at: http://www.epa.gov/climatechange/emissions/co2_human.html and it includes the following figure that demonstrates coal is the largest electricity generation fuel source for CO2 production by fuel type in 2006.

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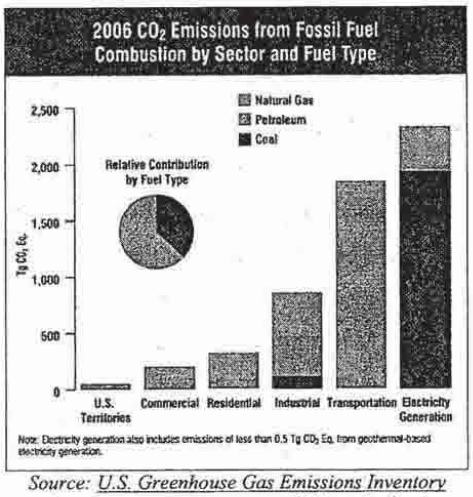

Source: U.S. Greenhouse Gas Emissions Inventory
(y-axis units are teragrams of CO_2 equivalent)

Carbon dioxide (CO_2) was not subject to US EPA's regulations until the United States Supreme Court affirmed that "[t]he harms associated with climate change are serious and well recognized," *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438, 1455 (April 2, 2007). In that case, the Supreme Court ruled that the Clean Air Act (CAA or Act) authorizes regulation of greenhouse gases (GHG) s because they meet the definition of air pollutant under the Act.

US EPA is well aware that the Environmental Appeals Board (EAB) has returned multiple PSD permits for failing to consider whether CO_2 is a pollutant "subject to regulation" under the Clean Air Act. *See In re Deseret Power Elec. Coop.*, PSD Appeal No. 07-03 (EAB Nov.13, 2008); *In re Northern Mich. University Ripley Heating Plant*, PSD Appeal No. 08-02 (EAB Feb.18, 2009). In light of these decisions, US EPA Region 9 also withdrew portions of the PSD Permit issued to Desert Rock Energy Company in order to reconsider the issue of whether CO_2 is a pollutant subject to regulation. Yet US EPA did not require a PSD permit for the Black Mesa Complex and thereby failed to account for how many tons of CO_2 would be produced each year (directly or indirectly) without any discussion of these contentious issues whatsoever. EPA must revise the proposed permit to explain US EPA's position on BACT for CO_2 so that the

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public can comment on the control levels selected or US EPA's rationale for refusing to impose such controls.[46]

While Commentors believe US EPA should be well informed of the legal and technical issues surrounding the control of CO_2, commenters nonetheless provide the following summary. The Clean Air Act defines BACT as an emission limitation based on the maximum degree of reduction of *each pollutant subject to regulation under this Act*." CAA § 169(3) (emphasis added). Thus, a BACT analysis for carbon dioxide must be completed if: (1) carbon dioxide is a "pollutant"; and (2) if it is "subject to regulation" under the Act.

Carbon Dioxide is a Clean Air Act "Pollutant"

The Supreme Court of the United States has held unequivocally that carbon dioxide is a "pollutant" as that term is used in the Act. *See Massachusetts v. EPA,* 549 U.S. 497, 528- 29 (2007). In *Massachusetts,* "a group of States, local governments, and private organizations," challenged EPA's contention that it lacked authority under the Clean Air Act to regulate greenhouse gas pollution, including carbon dioxide emissions, from motor vehicles. *Id.* at 504. The Court sided with challengers, ruling that "greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant.'" *Id.* at 532.

Carbon Dioxide is "Subject to Regulation"

Congress first enacted the PSD program (and the BACT requirements) as part of the 1977 Clean Air Act Amendments. One year later, EPA finalized its first regulations governing the PSD permitting process. In the preamble to those regulations, US EPA stated: Some questions have been raised regarding what "subject to regulation under this Act" means relative to BACT determinations. . . . "[S]ubject to regulation under this Act" means any pollutant regulated in

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[46] For example, commenters should be informed if EPA's decision not to address controls for CO_2 is based on the memo from former EPA Administrator Stephen Johnson entitled "EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program" (Dec. 18, 2008). This memo was issued in violation of the procedural requirements of the Administrative Procedure Act and conflicts with the plain language of the Clean Air Act. As a result, Administrator Jackson granted a petition for reconsideration on February 17, 2009 noting that the Johnson memo does not represent the "final word on the appropriate interpretation of Clean Air Act requirements." *See* Letter from Administrator Jackson, EPA, to David Bookbinder, Sierra Club (Feb. 17, 2009). EPA is in the process of formal rulemaking to resolve the meaning of the phrase "subject to regulation." *See* 74 Fed. Reg. 51535 (Oct. 7, 2009). If EPA Region 9 now contends that the Johnson memo does represent the "final word" without further discussion, commenters need to be made aware of this claim so that the appropriate record of responses can be prepared.

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Subchapter C of Title 40 of the Code of Federal Regulations for any source type. 43 Fed. Reg. 16388, 16397 (June 19, 1978) (*hereinafter* the "1978 Preamble").

As US EPA is aware, there are multiple examples of regulations in 40 CFR Subchapter C that specifically apply to CO_2. Two of these. Section 821(a) of the 1990 Clean Air Act Amendments provides: Monitoring. – [US EPA] . . . shall promulgate regulations within 18 months after the enactment of the Clean Air Act Amendments of 1990 to require that all affected sources subject to Title [IV] of the Clean Air Act shall also monitor carbon dioxide emissions . . . . The regulations shall require that such data be reported to the Administrator. *See* 42 USC§ 7651k note; Pub. L. 101-549; 104 Stat. 2699. In 1993, when US EPA promulgated the regulations implementing this carbon dioxide monitoring and reporting program, it did so by amending Subchapter C of Title 40 of the Code of Federal Regulations. *See* 40 C.F.R. §§ 75.1(b), 75.10(a)(3), 75.33, 75.57, 75.60-64. The EAB recently confirmed that, based on this example, "the 1978 Federal Register Notice augers in favor of a finding that" CO_2 *is* subject to regulation under the Act. *Deseret,* PSD Appeal No. 07-03, slip op. at 41.

As US EPA is also aware, on April 29, 2008, the Agency approved a state implementation plan revision for Delaware establishing federally enforceable emission limits for CO_2. *See* 73 Fed. Reg. 23101. US EPA's approval notice stated that US EPA was approving the CO_2 emission limits for new and existing generators "in accordance with" and "under" the Clean Air Act. *See id.*; 73 Fed. Reg. 11845 (Mar. 5, 2008). US EPA's approval made these CO_2 control requirements enforceable under the Act. *See* CAA §§ 113, 304(a)(1) and (f)(3). These revisions to the state implementation plan appear in the regulations codified in Subchapter C of Title 40 of the Code of Regulations. *See* 40 CFR § 52.420 (2009). Accordingly, these regulations are also within the scope of the 1978 Preamble interpretation of "subject to regulation."

US EPA in *Deseret* argued that "EPA does not currently have the authority to address the challenge of global climate change by imposing limitations on emissions of CO_2 and other greenhouse gases in PSD permits." *Deseret*, PSD Appeal No. 07-03, slip op. at 16 (internal quotation marks omitted). The EAB rejected this rationale as "clearly erroneous." *Id.* at 9. It then rejected US EPA's BACT decision and remanded the permit to US EPA. *Id.* at 63. The EAB recently reaffirmed this decision. *See Northern Mich. U.*, PSD Appeal No. 08-02, slip op. at 31 (instructing the state agency on remand to be "guided by our findings in *Deseret*, to undertake

the same consideration whether the CAA's 'pollutant subject to regulation' language requires application of a BACT limit to CO_2 emissions").

While the EAB in *Deseret* found that the Clean Air Act is ambiguous and allows room for agency interpretation, it was careful to warn that the agency's discretion was not unbounded. It advised that construing the Act to require BACT for CO_2 is not only plausible, but is also supported by the only regulatory history that speaks directly to the meaning of "subject to regulation." *Deseret*, PSD Appeal No. 07-03, slip op. at 38-42.

US EPA's silence on the issue in the project's Statement of Basis[47] provides nothing to support its apparent decision to ignore CO_2 controls. This approach is inconsistent with the EAB's directives following remand of the *Deseret* and *Northern Michigan University* permits. It also denies commenters the ability to meaningfully review and comment on the proposed permitting decisions. The failure to address the legal status of CO_2 control is consequential for approval of this permit because the proposed permit does not otherwise ensure that CO_2 will be subject to BACT.

If US EPA had conducted any analysis, it could not have approved this project as meeting the BACT requirement for CO_2. A proper BACT analysis should have explored the full range of alternatives available to reduce CO_2 emissions from the proposed project.

Requests for Relief

In addition to the above mentioned relief we request your Honor grant Party status to CARE and other commenters on the consent decree. If your Honor has reason to approve the consent decree as proposed we ask that we have an opportunity for additional discovery and an opportunity to brief the matter prior to the courts approval of the consent decree.

Conclusion

US EPA's so-called consent agreement is a clear effort to retaliate against CARE's members and officers for bringing complaints and exercising our rights to judicial review;

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[47] See http://yosemite.epa.gov/R9/air/EPSS.NSF/6924c72e5ea10d5e882561b100685e04/68f094f72d568ebb88256dab0068a4c1/body/0.144C!OpenElement&FieldElemFormat=gif

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thereby rewarding criminal polluters like PG&E making th proposed Consent Decree inappropriate, improper, as well as inadequate.

Respectfully submitted,

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January 8, 2010

cc.
Martin Homec

Verification

I am an officer of the Commenting 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 this 8th day of January, 2010, at San Francisco, California.

Lynne Brown

Lynne Brown Vice-President
CAlifornians for Renewable Energy, Inc.
(CARE)

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