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Attorney for Group Petitioners California
Pilots Association, Citizens for Alternative
Transportation Systems, San Lorenzo Heritage
Association, San Lorenzo Homeowners Association,
Skywest Townhouse Homeowners and Hayward
Democratic Club

STATE OF CALIFORNIA
STATE ENERGY RESOURCES
Conservation and Development Commission

In the Matter of:

Initially noticed as "Petition to Amend the
Commission Decision Approving the Application
for Certification for the Russell City Energy
Center";

Later Noticed as "Modification of the Application
for Certification for the Russell City Energy
Center"

Docket No.: 01-AFC-7C

DECLARATION OF MICHAEL TOTH IN
SUPPORT OF GROUP PETITIONERS'
PETITION TO INTERVENE, REOPEN THE
ADMINISTRATIVE PROCEEDINGS,
REOPEN THE EVIDENTIARY RECORD
AND FOR RECONSIDERATION

Date: _TBD
Location.: TBD
Time: TBD

I, Michael Toth, hereby declare:

1. I am a resident of the City of Hayward and a Software Architect by profession. I attended the joint work sessions conducted by the California Energy Commission during the late spring / early summer 2007 which initially examined the proposed project entitled "Eastshore," a 115 megawatt thermal power plant, together with the project known as the Russell City Energy Center, a 600 megawatt thermal power plant. I have personal knowledge of the facts set forth

below and if called as a witness in this matter, would and could testify competently to the following.

2. I have reviewed the California Energy Commission's Final Decision concerning the Russell City Energy Center Project docketed on October 2, 2007 entitled "Amendment No. 1 (01-AFC-7C) Alameda County." The Final Decision appears to contain certain information that is not in agreement with publicly available scientific research and information published by other state and government agencies and omits other vital information concerning known health risks, which may have resulted in the failure to properly analyze that information and to apply current known information and may result in a substantial failure to adequately mitigate the hundreds of thousands of pounds of emissions generated by Russell City annually. Within the limited opportunity to review the Final Decision which approaches almost 250 pages, these are just some of the important issues and potential inaccuracies I have initially identified.

3. Contrary to the publicly stated CEC policy to "notify, inform and involve community members" (stated in the CEC Public Advisor's office Environmental Justice FAQ), as a resident within the zone of potentially significant health impact immediately downwind of the plant, I have never received any form of official notification by mail, e-mail, phone, handbill or other prominent public notice regarding my right and opportunity to provide meaningful input into the CEC decision making process with respect to the Russell City Energy Center Amendment.

(a) I first became aware of the Russell City project in February, 2007 when the Hayward Planning Commission, in consideration of the Eastshore project, referenced the Russell City project as having been approved and licensed by the CEC in 2002, and that the Russell City project was supported by the City of Hayward. I was never directly informed by the CEC or any other federal, state, local or county agency of an amendment to the project.

(b) I learned informally of the amendment to relocate the project to the opposite side of the street of the previously permitted location, but was never informed of an opportunity to participate

in the re-evaluation of the public health impact of the project, and was never informed that significant changes were being made to the project which would subject the public health aspect of the project to reconsideration.

(c) Despite my frequent interactions with CEC staff on topics of air quality and public health during CEC workshops pertaining to the Eastshore project, the proximity of both projects to each other and to my residence, direct notifications to me via e-mail from the CEC regarding the Eastshore project, the commonality of staff between the Eastshore and Russell City projects, and my submission of my name, street address and e-mail address to the CEC to receive notifications, the CEC did not avail themselves of these established communication channels to notify me of opportunities to provide input into the public health and air quality portions of the Russell City Amendment project. The CEC staff, at the workshops, was insistent that public comment be restricted to topics that concerned the Eastshore plant. Had I known that my concerns were also relevant to a simultaneously occurring, similarly structured proceedings involving some of the same CEC staff members with respect to the Russell City project, I would have taken the time to bring up these concerns within the context of the Russell City project.

(d) The CEC assessed in some detail cumulative Eastshore and Russell City air quality and public health impacts for consideration in the context of the Eastshore preliminary staff assessment and did not indicate that the Russell City portion of this cumulative assessment was still under review. I would have expected that a cumulative assessment based on data from a process still under review would have indicated such- the fact that it was not reinforced my understanding that the Russell City public health analysis was not under review as a result of the amendment

4. The CEC has failed to publish detailed documentation of its health risk computation. The CEC Final Decision states on page 112 that “The Public Health aspects of the proposed project do not create significant direct or cumulative environmental effects”.

(a) The BAAQMD FDOC, upon which the CEC relies to provide a portion of its public health assessment, does not document the concentrations, applicable RELs, and contribution towards the health risk for individual TACs (toxic air contaminants), and has only provided the summary conclusions of the health risk computation. This failure has denied myself and may have denied others the opportunity to present informed input into the CECs decision. I have issued a public records request with the BAAQMD and am currently awaiting receipt of the relevant documentation.

(b) This omission stands in contrast with the Eastshore Energy Center approval process, where the CEC includes documentation of the health risk screening computation in Appendix B of the BAAQMD Preliminary Determination of Compliance for the Eastshore Energy Center published on April 25, 2007. The information that the CEC has published for Russell City regarding public health risk does not include the equivalent information in either the CEC Staff Assessment or the docketed BAAQMD Final Determination of Compliance dated June 19, 2007. The level of documentation provided to the public seems to parallel the level of involvement of the community and ultimately the opportunity for the CEC to include informed public input into the decision process. The fact that this documentation was published as part of the Eastshore Energy Center process as a routine part of issuing the PDOC should establish that publishing such documentation for public consumption is neither an extraordinary nor an onerous burden.

(c) As a member of the public who had the opportunity to review the Eastshore Project PDOC, I was able to discover and correct errors in the table on page 8 of the PDOC where the chronic trigger levels in the final column were expressed as being slightly above the annual project emissions as opposed to the appropriate numbers stated in CARB regulation 2 rule 5. While no explanation was offered for the error, which may have misled the public into thinking that project emissions were below trigger levels and thus not subject to further analysis, my public input resulted in the BAAQMD correcting and re-issuing their PDOC. This incident, in my opinion,

illustrates the importance of fully documenting and allowing public scrutiny of all the steps taken to analyze public health risk in order to ensure that the analysis is free from errors, omissions, or deviations from accepted practice.

5. The use of mean emission factors from the CATEF database to estimate health risk in the BAAQMD's FDOC, the only documentation contained in the CEC's public record which substantiates the public health risk computation, the use of which is documented on page 44 of appendix A of the FDOC, may underestimate facility emissions. The use of the mean (average) factor for a given TAC to predict emissions from a single facility is contrary to the published guidance issued by the US-EPA and by CARB, and is much less conservative than the use of the maximum factor, also published in the CATEF database alongside the mean, or an upper bound of a low statistical confidence interval calculated using the relative standard deviation percentage, also published in the CATEF database alongside the mean, which would, by definition, account for the statistical variability of the data. The use of the mean value does not account for variability in measurements of a TAC between emissions sources, and thus does not yield a conservative risk estimate.

(a) The use of mean emission factors appears to be contrary to the guidance issued by the US-EPA regarding emissions factors provided by the EPA's AP-42 "WebFire" on-line emission factor retrieval system (<http://cfpub.epa.gov/oarweb/fire/view/Applicability.html>), which states "Emissions factors published in this database and in most other such compilations typically 1) are arithmetic averages of available source test data, 2) are based on limited numbers of emissions tests, 3) represent only a few hours of process operating time per test, 4) represent limited ranges of process operating conditions, and 5) represent a limited sample of operating units within any source category. As a result, site-specific emissions estimates based on emissions factors will include significant data uncertainty. Such uncertainties can easily range over more than one order of magnitude in determining emissions from any one specific facility. Use of emissions factors

should be restricted to broad area-wide and multiple source emissions cataloging applications that will tend to mitigate the uncertainty associated with quantifying site-specific emissions.”

“Because of the uncertainties inherent in the use of average emissions factors for facility-specific emissions determinations, emissions from potentially large numbers of permitted sources are characterized incorrectly in permitting and compliance applications. Further, emissions factors at best are imprecise tools for establishing emissions limits ... or standards ... For these reasons, we recommend against use of source category emissions factors (whether derived from AP-42, FIRE, or elsewhere) for site-specific emissions determinations or regulatory development. We recommend instead the use of alternatives to emissions factors (see below).”

“We recognize that emissions factors are often used in many applications including site-specific applicability determinations, establishing operating permit fees, and establishing applicable emissions limits even though such use is inappropriate. If you must apply emissions factors for site-specific applications, we strongly recommend due consideration of the uncertainty inherent in the data. Applying emissions factors without accounting for uncertainty will result in doubtful applicability determinations, ineffective emissions reductions requirements, and poorly supported compliance determinations or enforcement actions.”

“Approaches to accounting for uncertainty include adjustments based on statistical assessments addressing bias and imprecision for both pollutant emissions control and process operations or activities variability.”

“With this information, we think it prudent to apply standard statistical adjustments in the use of emissions factors consistent with the goals of your specific application (e.g., upper confidence level in determining site-specific thresholds for applicability and fees, lower confidence level in setting emissions limits).”

(Guidance issued by the US-EPA regarding emission factors provided by the EPA's AP-42

“WebFire” on-line emission factor retrieval system)

(b) The use of mean emissions factors appears to be contrary to the Appendix F of AB-2588 document entitled "Criteria For Inputs for Risk Assessment Using Screening Air Dispersion Modeling", <http://www.arb.ca.gov/ab2588/final/f.pdf>, page F-1, paragraph (A), which states "Emission estimates must be health-protective and approved by the district, and the assessment must take into account both the highest actual emissions and the facility's potential to emit, including use of the highest levels enforceable under the facility's permit(s), if the process(es) are subject to permits." The application of basic statistics suggests the conclusion that an untested facility, by definition of the term "mean", has a 50% chance of exceeding a mean emission factor, and an untested facility's potential to emit is more conservatively characterized using the maximum emission factor, or an emission factor that that can be statistically characterized as sufficiently high that the facility is not likely to exceed it.

6. There is reason to suspect that the health risk analysis performed by the BAAQMD and partially documented in its Russell City FDOC and apparently relied upon by the CEC to assess the public health risk of the plant does not include the compound acrolein. Even though the BAAQMD has published the base acrolein emissions factor in their FDOC, the exclusion of acrolein in the actual health risk calculation for other projects regulated by the BAAQMD (ie. Eastshore Energy Center), and a guideline issued by the BAAQMD excluding acrolein from the health risk calculation procedure raise legitimate questions about the inclusion of acrolein in the health hazard index that cannot be answered without further information from the CEC and the BAAQMD, given that the BAAQMD and the CEC have excluded the details of the HRSA computation for Russell City from their published documents.

The guideline from the BAAQMD was published in their HRSA (Health Risk Screening Analysis) guidelines adopted in June 2005, on page 4, section 3 (http://www.baaqmd.gov/pmt/air_toxics/risk_procedures_policies/hrsa_guidelines.pdf), and consists of the following statement: "Assessment of Acrolein Emissions: Currently, CARB does

not have certified emission factors or an analytical test method for acrolein. Therefore, since the appropriate tools needed to implement and enforce acrolein emission limits are not available, the District will not conduct a HRSA for emissions of acrolein. In addition, due to the significant uncertainty in the derivation, OEHHA is currently re-evaluating the acute REL for acrolein. When the necessary tools are developed, the District will re-evaluate this specific evaluation procedure and the HRSA guidelines will be revised.” This guideline is functionally equivalent to treating the risk from acrolein as non-existent, when in fact the risk may be subject to some uncertainty.

A large amount of publicly available information appears to be inconsistent with the justification of the BAAQMD for excluding acrolein from the HRSA computation.

(a) The US-EPA AP-42 Emissions Factors database references emissions factors and source test methods for acrolein using the FTIR (Fourier Transform Infrared) measurement process via EPA method 320.

(b) GE Energy advertises a mobile unit (http://www.gepower.com/prod_serv/serv/env_serv/en/downloads/geal4569_ftir_techoverview.pdf) that implements the FTIR method to conduct stack testing for acrolein, along with many other TACs, with the claim: “Real-Time, On-Site Data. FTIR simultaneously measures multiple analytes in a complex gas matrix, detecting virtually all gas-phase species, including multiple Clean Air Act Hazardous Air Pollutants (HAPs), criteria pollutants, diluents, and Volatile Organic Compounds (VOCs). Measurements are made on a continuous basis and reported in real time. The most important advantage of real-time FTIR data is that it demonstrates whether or not a facility is meeting emissions requirements while the test is being conducted.”

(c) A study funded by Cal-State Long Beach (reference: IN-SITU ENGINE EMISSIONS TESTING AND COMPARISON FOR A HIGH SPEED FERRY AND COMPETING LAND TRANSIT VEHICLE, PHASE I: TASK 7.0: Final Report FY 2001, PROGRAM ELEMENT 1.16 SUBCONTRACT NO. DTMA91-97-H00007 -

<http://www.ccdott.org/Deliverables/2001/task1.16/task%201.16.pdf>), states on page v, in the Executive Summary section: “This report concludes that well-established large-bore stationary diesel engine test methods are best suited for this analysis. This will be accomplished using extractive Fourier Transform Infrared Spectroscopy (FTIR) for testing of all targeted pollutants. The following pollutant species will be measured: acetaldehyde, *acrolein*, carbon 4+ straightchain hydrocarbons, carbon dioxide, carbon monoxide, ethane, ethylene, formaldehyde and adelhyde compounds, methane, oxides of nitrogen (NOx), oxygen, particulate matter, sulfur dioxide, water vapor and any other FTIR-detected species. [Emphasis and italics added.] With FTIR, a single instrument will directly measure all targeted compounds and yield the highest quality data achievable utilizing any known test method. The FTIR analyzer will measure all targeted emissions simultaneously, in real-time, also enabling excellent measurement of engine transients.”

(d) A Canadian company named Avensys, Inc (Suite 301, 1493 Johnston Road, White Rock, British Columbia V4B 3Z4) advertises the “Gasmet In Situ Continuous Gas Monitoring analyzer” (http://www.avensyssolutions.com/AvensysSolutions/Applications.php?locale=en&Application_no=&sub_category_id=181) that is designed to be permanently installed in a stack and purports to measure acrolein using the FTIR method, along with many other emissions.

(e) According to the Eastshore project documentation, which, unlike the Russell City documentation, published the calculations underlying the health risk analysis in the BAAQMD PDOC Appendix B – Tables, pages 2 and 3, the health risk index computed for the residential receptor when acrolein was included was higher by approximately a factor of 10 than the health risk index computed without including acrolein. This suggests that acrolein could be a major component of the health risk for the Russell City project, underscoring the importance of performing a more detailed analysis in the face of uncertainty rather than simply ignoring the risk. Since the health risk computation was not documented, neither the CEC or the public had an

opportunity to consider these issues with respect to the Russell City project, and thus there was no evidence for the CEC to consider and mitigate the project with respect to acrolein emissions and their public health impact in their Final Decision.

7. Recent, publicly available scientific research implicates acrolein as a cancer agent. The following scientific study published in 2006 in the journal "Proceedings of the National Academy of Sciences", appears from its abstract to identify acrolein as a lung cancer risk: "Acrolein is a major cigarette-related lung cancer agent: Preferential binding at p53 mutational hotspots and inhibition of DNA repair" Zhaohui Feng , Wenwei Hu , Yu Hu, and Moon-shong Tang; Departments of Environmental Medicine, Pathology, and Medicine, New York University School of Medicine, Tuxedo, NY 10987; Communicated by Richard B. Setlow, Brookhaven National Laboratory, Upton, NY, August 14, 2006 (received for review June 22, 2006) (PNAS, October 17, 2006, vol. 103, no. 42, 15404-15409). It does not appear that California regulatory agencies governing the computation of health risk have incorporated this new information into their regulatory framework, and thus it appears that the CEC has not considered this information in their determination that the health impacts of the project are mitigated.

8. Recent, publicly available scientific research has quantified the correlation between generic fine particulate matter (PM2.5) and increased cancer risk. According to their abstracts, at least 2 reputable studies have associated ambient PM2.5 concentrations with an increase in cancer risk:

(a) "Lung cancer, cardiopulmonary mortality, and long-term exposure to fine particulate air pollution." Pope, et al., JAMA. 2002 Mar 6;287(9):1132-41

(b) "Reduction in fine particulate air pollution and mortality: Extended follow-up of the Harvard Six Cities study." Laden F, et al., Am J Respir Crit Care Med. 2006 Mar 15;173(6):667-72

The OEHHA, discussing PM2.5 specific to diesel engine emissions in its published

guidelines for Health Risk Assessment

(http://www.oehha.ca.gov/air/hot_spots/pdf/HRAguidefinal.pdf, appendix D, page D-2, says

“potential cancer risk from inhalation exposure to whole diesel exhaust will outweigh the multipathway cancer risk from the speciated components.”

In response to my public comment to this effect at the joint Eastshore-Russell City CEC workshop in June 2007, Dr. Alvin Greenberg suggested that, unlike diesel PM, the cancer risk of non-diesel PM_{2.5} was fully accounted for by the cancer risk of its speciated components that were already included in the health risk assessment for the Eastshore Project. No scientific evidence for this conclusion was referenced in the publicly available documents, therefore, at least within the written public record before the CEC in the context of the Russell City decision, there is little basis to conclude that whole non-diesel PM_{2.5} does not also exhibit a higher inhalation cancer risk than that contributed by its speciated components.

Given the results of the above studies and the OEHHA's position on diesel PM_{2.5}, it would appear to be more health protective to conduct a parallel cancer risk assessment using risk factors indicated by the studies based on the amount of generic PM_{2.5} emitted by the project, to compensate for the possibility of an erroneous assumption by CEC staff.

9. The fireplace retrofit program does not appear to be mitigative. The BAAQMD has elected to allow the project applicant to bank ERCs (emission reduction credits) from a future fireplace retrofit program, the precise structure and details of which were deferred until after the CEC's Final Decision, in lieu of securing ERCs from the marketplace, where they have been subject to a verification process before being banked by other facilities (see CEC Russell City Final Decision, condition AQ-SC12, AQ-SC13). The CEC has allowed the BAAQMD and the applicant to defer resolution of the details of this program until after the CEC has issued its decision, requiring a condition of certification that requires the applicant to obtain other ERCs from the marketplace if the retrofit program does not yield a sufficient amount of ERCs.

The failure to require the applicant to demonstrate that they have obtained valid ERCs before approving the project may represent a failure to mitigate, since the emission reductions gained from a fireplace retrofit program are difficult to verify and easily inflated, fireplace retrofit programs are prone to failure (as in the Los Esteros project,) and the ERC marketplace, being highly competitive, may not yield sufficient ERCs. In the Lost Esteros Project (see Los Esteros Critical Energy Facility II, Phase 1, Presiding Members Proposed Decision, page 102), CEC staff stated that “The applicant provided funding for specific PM10 abatement programs administered by the air district, consistent with the strictures of the Final Decision. Staff asserts that the funded programs failed to sufficiently mitigate the contribution of the project. In summary, the evidence indicates that the woodstove/fireplace retrofit program resulted in approximately 5.7 tons per year (tpy) of PM10 reductions. Purchase of three new school buses resulted in a further 88 pounds per year of PM10 reductions. In Staff’s view, that we adopt, this mitigation falls far short of offsetting the project’s 21.9 tpy of fall/winter quarter PM10 emissions”

Without documentation of actual wood combustion in the target fireplaces as a means to distinguish between fireplaces used for heating and fireplaces used for ornamental or entertainment purposes, the applicant may seek credit for the reduction of the burning of many hundreds of pounds of wood per-fireplace, per-year, when in actuality, a significant portion of these fireplaces may only burn a small amount of wood per year, if any, especially given that the area under consideration is urban and consists predominantly of structures with gas heating installed as part of the original construction. The BAAQMD states, in its “Model Wood Smoke Ordinance”, http://www.baaqmd.gov/pio/wood_burning/ordinance_background.htm, that the average residence burns .28 cords of wood per winter season, and that 38 percent of homeowners burn wood during the winter season. Depending on the type of wood, a cord weighs around 1 to 3 tons, so .28 cords is equivalent to about 560 to 1680 pounds.

While the CEC has stated (in its Final Decision on page 7 and 8) that residents with low-use

fireplaces would not likely pay the non-rebated portion of the cost of a retrofit, and that requiring the applicant to pay the entire cost would be unwise as it would encourage the inclusion of low-use fireplaces, the CEC saw fit to permit the project applicant to control the rebate amount. If marketplace ERCs are scarce and expensive, it appears that the applicant would have a tremendous incentive when faced with the prospect of non-operation to pay a greater proportion of the retrofit cost in order to include lesser-used fireplaces, overstating actual emission reductions, thus gaining emissions credits without proportionately reducing emissions.

It appears reasonable that the applicant should only be permitted to use ERCs which can be reasonably verified. In order for the fireplace retrofit program to meet this condition of verifiability and establish whether the program is likely to achieve the desired mitigation, in my opinion, the CEC should commission an independent, comprehensive survey to reflect fireplace usage by zip-code, specifically to determine the frequency and purpose of fireplace use on a per-household basis, to determine a reasonable set of retrofit targets and reduction levels. Any emission reduction credits generated for retrofit of wood-burning systems should, in my opinion, be contingent on purchase receipts or sworn affidavits provided by the owner of such systems which document the amounts, sources and purchase dates for wood purchased for consumption for the unit being retrofitted. The credit amount should be proportionate to the amount of wood that will no longer be burned in that unit, such that the ERCs yielded by such a program would verifiably offset a proportionate amount of actual wood combustion.

It appears that a fireplace retrofit scheme that does not have a reasonable amount of verification would not be enforceable and may thus become a loophole for polluters to bypass air quality regulations, and should not be considered by permitting agencies as mitigation.

10. It does not appear that the CEC has included a neighborhood leveltoxics inventory in its public health analysis to determine whether the Russell City project, when combined with all current and planned emission sources, would result in levels or add to levels of toxic air

contaminants that exceed applicable impact thresholds in the neighborhoods downwind of the plant.

The local air quality in the area being considered is currently impacted by the emissions from existing industrial sources, heavy local truck traffic, an interchange of two highly congested major highways (routes 880 and 92), the Hayward Executive Airport, and the Oakland International approach flight path, and would likely be impacted by future projects such as the planned Eastshore Energy Center and local transportation related construction projects.

Because the process that the CEC has followed may have only considered the impact of the project's contribution absent the existing and planned toxics inventory, the logical outcome if this process if repeated is an accumulation of sources which would each individually fall under the threshold of a significant health impact, but may collectively exceed these thresholds and possibly endanger the public health.

Since the actual selection of sites for projects appears to be an unregulated confidential function of private industry based on solely economic considerations, it appears that the industry driven selection process results in the selection of inexpensive land that is close to infrastructure, in communities that lack the socio-economic resources to mount significant challenges to the process which may lack the necessary critical examination to protect health and safety.

By not challenging the siting of power plants by project applicants on the basis of existing and planned local toxics inventory, it appears that the CEC has failed to uphold the rights of residents of these communities to equal protection from air toxics presenting health hazards.

A 2003 study commissioned by the CEC on measurement methods ("A survey of monitoring instruments for measurement of airborne pollutants-

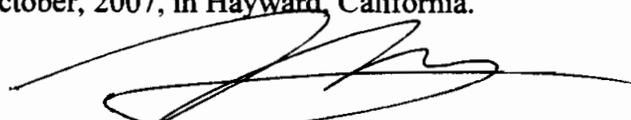
http://www.energy.ca.gov/reports/2003-07-31_500-03-053F.PDF, authored by Philip Hopke,

Ph.D., Clarkson University and Dina Markowitz, Ph.D., University of Rochester) states on page 1 of the Executive Summary: "Currently, power plant siting determinations are based on existing

ambient air monitors and meteorological sites that may be located miles from the site of the proposed project. These monitoring and meteorological data are use to estimate ambient air quality in the siting location and surrounding area, as well as to evaluate the potential impact of the proposed power plant on the site and surrounding area. This approach can be problematic, because ambient air quality levels have tremendous spatial and temporal variation and are difficult to interpret. Moreover, routine air quality measurement devices are expensive and require trained technicians to operate. These limitations hinder our ability to identify areas disproportionately affected by air pollution (i.e., environmental justice (EJ) communities) and to determine the air quality impacts of new sources (e.g. power plants)--particularly for DG technologies.”

It appears that the availability and cost of air quality monitoring and toxics detection devices have recently improved, and thus it appears that it is within the means of the CEC to conduct ambient air monitoring studies both before and during facility operation to determine the local air toxics inventory and impose conditions on the applicant which mitigate any contributions to local concentrations of air toxics that result in exceedance of applicable significance thresholds, and to prevent projects from being constructed where such contributions cannot be mitigated, as a means of upholding the rights of impacted communities to equal protection under the power plant siting process.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 23rd day of October, 2007, in Hayward, California.



Michael Toth