

December 16, 2011

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Pacific Gas & Electric Company
Registered Agent for Service of Process
Linda Y. H. Cheng
77 Beale Street, 32nd Floor
San Francisco, CA 94105

Radback Energy, Inc.
CEO and Registered Agent for Service of
Process
Bryan Bartacchi
145 Town & Country Dr., Suite 107
Danville, CA 94526

Contra Costa Generating Station, LLC
145 Town and Country Drive
Danville, CA 94526

Re: 60-Day Notice of Intent to Sue for Violations of the Clean Air Act—Failing to Apply for and Receive a Prevention of Significant Deterioration Permit for Oakley Generating Station.

To Whom It May Concern:

Communities for a Better Environment (“CBE”), Center for Biological Diversity (“CBD”) and Wild Equity Institute (“WEI”) give notice of intent to sue Pacific Gas & Electric Company (“PG&E”), Radback Energy, Inc. (“Radback”), and Contra Costa County Generating Station, LLC under section 304(a) of the Clean Air Act (“CAA” or “Act”), 42 U.S.C. § 7604(a)(3), and 40 C.F.R. §§ 54.2 and 54.3, for failing to apply for and receive a Prevention of Significant Deterioration (“PSD”) permit for greenhouse gas (“GHG”) emissions from the Oakley Generating Station (“Oakley”), formerly Contra Costa Generating Station, in violation of 42 U.S.C. § 7475 and 40 C.F.R. § 52.21.

CBE is a nonprofit public benefit corporation dedicated to achieving environmental health and justice and improving air quality in California’s Bay Area and South Coast area. WEI is a nonprofit public benefit corporation that unites grassroots conservation movement and the environmental justice movement in campaigns to redress inequity, both across our human communities and towards the lands in which we live. The Center for Biological Diversity is a nonprofit public benefit corporation that works through science, law and creative media to secure a future for all species, great or small, hovering on the brink of extinction.

This letter is being sent to you as the responsible owners, officers, or operators of Oakley.

I. Background

In the United States, the combustion of fossil fuel is the largest source of CO₂ emissions and accounts for 80 percent of the total GHG emissions. 75 Fed. Reg. 31,514, 31,519 (June 3, 2010). More than half of the energy-related emissions in the United States come from large stationary sources such as power plants. *Id.*

Climate change is predicted to have a number of harmful effects on the health of people and the environment. Health impacts include intensification of: the frequency of deadly heat waves and other extreme weather events; the growth of weeds such as ragweed, whose pollen triggers allergies and exacerbates asthma; ground-level ozone production which exacerbates asthma and heart conditions among other health problems; the frequency of infectious disease outbreaks. Climate change is also predicted to disrupt ecosystems, pushing species that cannot adapt to extinction.

On December 7, 2009, the EPA Administrator signed an endangerment finding regarding GHGs under Clean Air Act section 202(a):

The Administrator found that the current and projected atmospheric concentrations of the mix of six long lived and directly emitted GHGs—CO₂, CH₄, N₂O, HFCs, PFCs, and SF₆ (referred to as “well-mixed greenhouse gases” in the endangerment finding)—are reasonably anticipated to endanger the public health and welfare of current and future generations.

Id. Based on this finding, EPA created regulations intended to curb GHG emissions.

II. The Standards, Limitations, and Orders Alleged to Have Been Violated

A. EPA’s Tailoring Rule

In May 2010, EPA issued a final rule addressing greenhouse gas emissions from stationary sources under the Act’s permitting programs. 75 Fed. Reg. 31,514 (June 3, 2010) (“Tailoring Rule”). The Tailoring Rule established a phase-in schedule for permitting requirements. Phase one imposed permit requirements on sources that were then currently subject to the PSD permitting program and that had increases of 75,000 tons per year (“tpy”) or more of total GHG, on a CO₂ equivalent (“CO₂e”) basis. *Id.* at 31,523. Phase two began July 1, 2011 and extends through June 30, 2013. Phase two requires new projects with the potential to emit 100,000 tpy GHGs or greater to comply with the Act’s PSD requirements if construction on those projects had not begun by July 1. *Id.* (Beginning July 1, 2011, new projects with the potential to emit GHGs of 100,000 tpy or greater that have not begun construction must comply with PSD requirements under the Clean Air Act.) *Id.*¹

¹ Phase three becomes effective July 1, 2013, and would apply PSD and Title V to additional sources. The exact parameters have not been determined, however, and EPA will convene a rulemaking on Phase 3 by no later than July 1, 2012. 75 Fed. Reg. 31,522.

B. PSD Requirements Under the Clean Air Act

“The PSD program is a preconstruction review and permitting program applicable to new major stationary sources and major modifications at existing major stationary sources.” 75 Fed. Reg. 31,514, 31,520. The Clean Air Act requires major emitting sources of pollutants subject to regulation under the Act to receive a PSD permit prior to construction. 42 U.S.C. § 7475(a); 40 C.F.R. 52.21(a)(2)(iii). As of January 2, 2011, pollutants “subject to regulation” include Greenhouse gases (75 Fed. Reg. at 31,520). Under the Tailoring Rule, facilities with the potential to emit 100,000 tpy GHGs or greater must obtain a PSD permit if construction on the facility has not begun by July 1. 75 Fed. Reg. 31,523.

The Oakley Generating Station is a natural gas-fired, combined-cycle electrical generating facility with a projected output of 624 megawatts (MW).² Radback estimates that the facility would “operate up to approximately 8,463 hours per year, with an expected facility capacity factor at 60 to 80 percent.”³ Oakley calculated its CO₂e emissions at 1,932,480.1 tpy, *twenty times* the 100,000 tpy threshold triggering the requirement of a PSD permit.⁴

Under the Clean Air Act, construction of a major emitting facility has “*commenced*” if:

the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations **and** either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

42 U.S.C. § 7479(2)(A) (defining “commenced” (emphasis added)). EPA defines “construction” as “any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in emissions.” 40 C.F.R. § 52.21(b)(8). “Begin actual construction” is

² <http://www.energy.ca.gov/sitingcases/oakley/index.html>

³ Air Quality and Public Health, Supplemental Filing in Support of the Application for Certification for Oakley Generating Station Project, submitted by Radback Energy to the California Energy Commission (April 7, 2010), p. 5.1-1, accessed at:

http://www.energy.ca.gov/sitingcases/oakley/documents/applicant/2010-07-12_Supplemental_Filing_Air_Quality_Public_Health_TN-56162.pdf.

⁴ *Id.* at 5.1-15.

initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

40 C.F.R. § 52.21(b)(11). Radback and PG&E failed to commence construction of Oakley prior to July 2, 2011 under either CAA definition of “commence” in 42 U.S.C. § 7479(2)(A), and failed to obtain a PSD permit; therefore, Radback and PG&E have violated the Act.

III. Activities at the Facility Alleged to Constitute Violations, and Dates of Violation

On June 30, 2009, Contra Costa Generating Station, LLC filed an Application for Certification (AFC) with the California Energy Commission. On May 18, 2011, the CEC gave final approval on Oakley’s Application for Certification. On June 1, the CEC provided Radback Energy and PG&E with a limited “Notice to Proceed/Start of Construction” approval for planning and very preliminary construction. Phase two began for the Tailoring Rule on July 1, 2011. Witnesses report, however, that as of August 14, 2011, construction activities, as defined within the Clean Air Act still had not commenced. Hence, Radback and PG&E failed to begin construction on Oakley before the start of Phase two of the Tailoring Rule. They additionally failed to obtain PSD permits for Oakley’s GHG emissions. Therefore, each and every day since July 1, 2011, Radback and PG&E have been and continue to be in violation of the Clean Air Act, 42 U.S.C. § 7475 and 40 C.F.R. § 52.21.

IV. Location of the Violations

The Oakley Generating Station located at 6000 Bridgehead Rd., Oakley, CA 94561 is the location for which the PSD was not obtained and where the violation is being committed.

V. Persons Responsible for the Violations

PG&E is the operator of Oakley. PG&E has an office in San Francisco, CA. Radback is the developer of Oakley and has an office in Danville, CA.

CBE puts PG&E and Radback, its owners, officers, and operators on notice that they are the persons responsible for the violations described above. If additional persons are subsequently identified as also being responsible for the violations set forth above, CBE puts PG&E and Radback on notice that CBE intends to include those persons in this action.

VII. Name and Address of Noticing Party

Our name, address and telephone number is as follows:

Communities for a Better Environment
1904 Franklin Street, Suite 600
Oakland, CA 95612

Wild Equity Institute
PO Box 191695
San Francisco, CA 94119

Center for Biological Diversity
351 California St., Ste. 600
San Francisco, CA 94104

VIII. Counsel.

CBE, WildEquity, and CBD are represented by counsel in this matter. Please direct all communications to the following attorneys:

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Staff Attorney
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San Francisco, CA 94104
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Wild Equity Institute
PO Box 191695
San Francisco, CA 94119.

(415) 349-5787

Conclusion

At the conclusion of the 60-day notice period, CBE, CBD and WEI intend to file suit in U.S. District Court to compel PG&E and Radback to apply for a PSD permit. If you wish to further discuss the basis for this claim, or explore possible options for resolving this claim short of litigation, please direct all correspondence to the attorneys referenced for each party.

Sincerely,



Maya Golden-Krasner, Staff Attorney
Adrienne Bloch, Staff Attorney
Communities for a Better Environment

Brent Plater
Wild Equity Institute

Jonathan Evans, Staff Attorney
Center for Biological Diversity

CC via U.S. Mail:

Regional Administrator
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105