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14 SAN FRANCISCO CHAPTER OF THE
15 A. PHILIP RANDOLPH INSTITUTE,
16 CALIFORNIANS FOR RENEWABLE ENERGY,
17 LYNNE BROWN, REGINA HOLLINS

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA

20 SAN FRANCISCO CHAPTER OF THE
21 A. PHILIP RANDOLPH INSTITUTE,
22 CALIFORNIANS FOR RENEWABLE
23 ENERGY, LYNNE BROWN, REGINA
24 HOLLINS,

25 on behalf of themselves, all others similarly
26 situated, and the general public,

27 Plaintiffs,

28 vs.

29 UNITED STATES ENVIRONMENTAL
30 PROTECTION AGENCY, STEPHEN
31 JOHNSON, BAY AREA AIR QUALITY
32 MANAGEMENT DISTRICT, CITY AND
33 COUNTY OF SAN FRANCISCO,

34 Defendants.

Case No.: C-07-4936-CRB

FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF

1 **NATURE OF THE ACTION**

2 1. This case challenges two proposed fossil fuel-burning power plants to be built in
3 and around San Francisco.

4 2. The first power plant would be built in a low-income, mostly minority
5 neighborhood and is called the San Francisco Electric Reliability Project (“SFERP”). The
6 facility would consist of three gas-fired combustion turbines assembled as a 146 megawatt
7 simple cycle power plant to be located in between San Francisco’s Bayview Hunters Point and
8 Potrero districts.

9 3. The second power plant would be built near the San Francisco International
10 Airport and is referred to as the “SFO CT.” That facility would consist of a single gas-fired
11 combustion turbine operating as a 49 megawatt simple cycle power plant to be located on the
12 northeast side of the airport.

13 4. CCSF’s combustion turbine power plants (collectively called the “CT power
14 plants”) will emit large quantities of carbon dioxide and other greenhouse gases and contribute to
15 an elevated level of greenhouse gases in the atmosphere. Greenhouse gases trap heat in our
16 atmosphere and contribute to global warming and climate change.

17 5. There is a scientific consensus that global warming has begun, is affecting our
18 world, and will accelerate over the coming decades unless action is taken to reduce emissions of
19 carbon dioxide and other greenhouse gases. This consensus includes a concern that building new
20 stationary sources of greenhouse gas emissions, such as CCSF’s proposed power plants, should
21 be heavily scrutinized in light of global warming and rejected whenever possible.

22 **Global Warming and the Massachusetts Case**

23 6. The United States Supreme Court recently issued a landmark decision on the
24 subject of greenhouse gases and global warming in the case of Massachusetts v. EPA, 549 U.S.
25 1438, 1455 (April 2, 2007), affirming that “[t]he harms associated with climate change are
26 serious and well recognized.”

27 7. The Massachusetts case resulted from a 2003 decision of the United States
28 Environmental Protection Agency (“EPA”) that it lacked authority under the Clean Air Act to

1 regulate carbon dioxide and other greenhouse gases, and that even if the EPA did have such
2 authority it declined to implement such regulation.

3 8. The Supreme Court, however, ruled in the Massachusetts case that the EPA's
4 current rationale for refusing to regulate greenhouse gases was not valid and ordered it to
5 "ground its reasons for action or inaction in the statute," referring to the Clean Air Act
6 (Massachusetts, at 1463). The Court argued that "greenhouse gases fit well within the Clean Air
7 Act's capacious definition of 'air pollutant'" (Massachusetts, at 1462).

8 9. Though the fact pattern in Massachusetts was confined to greenhouse gas
9 emissions from motor vehicles, statements from Justice Ginsburg, Chief Justice Roberts, and
10 Justice Breyer at oral argument on November 29, 2006 highlight the fact that the same
11 underlying policy will apply to emissions from power plants.

12 10. In fact, the instant action parallels a case entitled Coke Oven Environmental Task
13 Force v. EPA, No. 06-1131 (D.C. Cir. filed Apr. 7, 2006). The plaintiffs in Coke Oven similarly
14 requested a court order requiring the EPA to regulate greenhouse gas emissions from power
15 plants. Defendants challenged plaintiffs' standing to sue in light of the fact that the EPA does
16 not currently regulate greenhouse gas emissions from any source. The Court of Appeals,
17 however, stayed defendant's challenge pending the outcome of the Massachusetts case.

18 11. The court subsequently found that the Massachusetts ruling gave the Coke Oven
19 plaintiffs standing to proceed with their EPA challenge, just as Massachusetts gives standing to
20 plaintiffs in the instant lawsuit to proceed with their challenge.

21 **EPA Has Failed to Act**

22 12. Despite the urging of citizens and activists from around the country, the EPA has
23 still neither re-assessed its refusal to regulate greenhouse gases nor accepted the logic stressed by
24 the Supreme Court: that greenhouse gases must be regulated.

25 13. One of the primary purposes of this lawsuit is to obtain an order mandating that
26 the EPA's Administrator Stephen Johnson ("Johnson") must comply with the Massachusetts
27 ruling because the undeniable result will be that he will make an "endangerment finding," that
28

1 greenhouse gases “in his judgment cause, or contribute to, air pollution which may reasonably be
2 anticipated to endanger public health or welfare.”

3 14. That endangerment finding will then require the EPA to regulate greenhouse gas
4 emissions from motor vehicles under Section 202 of the Clean Air Act. Even more important for
5 the instant plaintiffs, however, is the fact that the endangerment finding will similarly require the
6 EPA to promulgate new regulations for stationary sources under Section 111 of the Clean Air
7 Act and new national ambient air quality standards to be implemented by the states under
8 Sections 108 to 110 of the Clean Air Act.

9 15. The new rules to be promulgated under Section 111 and Sections 108 to 110 will
10 apply to power plants, including CCSF’s CT power plants.

11 **The BAAQMD Must Be Enjoined Until the EPA Complies**

12 16. The Bay Area Air Quality Management District (“BAAQMD”) is a defendant in
13 this action because the EPA has delegated to the BAAQMD implementation of the provisions of
14 Clean Air Act new source review in regard to one of CCSF’s proposed CT power plants, the
15 SFERP, designated BAAQMD Application Number 12344.

16 17. CCSF has requested that the BAAQMD issue “Authority to Construct” its
17 proposed power plant under BAAQMD Regulation 2, Rule 3, Section 301.

18 18. A second purpose of this lawsuit is to request that the Court prohibit the
19 BAAQMD’s issuance of Authority to Construct CCSF’s SFERP power plant in order to prevent
20 irreparable harm to plaintiffs.

21 19. As the EPA’s delegate for Clean Air Act implementation, the BAAQMD will be
22 responsible to enforce a brand new set of greenhouse regulations following Johnson and the
23 EPA’s endangerment finding.

24 20. The BAAQMD’s own definition of “regulated air pollutants” and resulting Rules
25 and Regulations are dictated by the EPA’s definition, and will include greenhouse gases such as
26 carbon dioxide upon defendant Johnson’s endangerment finding. All power plants emitting
27 more than 100 tons per year of a regulated air pollutant must obtain a Prevention of Significant
28

1 Deterioration (“PSD”) permit under BAAQMD Regulation 2, Rule 6 and Title V of the Clean
2 Air Act.

3 21. The BAAQMD has not required CCSF to apply for a PSD permit, nor has the
4 BAAQMD conducted the extensive review required to obtain a PSD permit, because CCSF’s
5 SFERP plant does not emit more than 100 tons per year of an air pollutant regulated today.

6 22. No agency has conducted an analysis of either of CCSF’s CT power plants’
7 greenhouse gas emissions but the plants should be expected to produce between 4,000 and 5,000
8 pounds of carbon dioxide per megawatt-hour and between 325,000 and 450,000 tons of carbon
9 dioxide per year. The power plants’ contribution of carbon dioxide and heat will be
10 disproportionately high relative to their output, because their simple cycle configuration means
11 they are only 30% efficient.

12 23. The BAAQMD must be enjoined from issuing Authority to Construct CCSF’s
13 power plant because CCSF will be required to obtain a PSD permit, and undergo a new form of
14 EPA or BAAQMD new source review, once the EPA complies with the Massachusetts ruling, as
15 a prerequisite to building its SFERP power plant. If the BAAQMD issues Authority to Construct
16 prior to the EPA’s ruling and promulgation of new EPA and BAAQMD rules and regulations,
17 plaintiffs will forever be denied the benefit designed to protect citizens and the environment from
18 global warming and the effects of ground-level greenhouse gases afforded future proposed power
19 plants.

20 **CCSF Has Deprived Plaintiffs of Their Constitutional Rights**

21 24. As a further cause of action and component of plaintiff’s prayer for relief, the
22 plaintiffs request that the Court enjoin CCSF from requesting the BAAQMD’s approval of its
23 permit application and from building both of its proposed CT power plants.

24 25. By denying the affected plaintiffs, and indeed the community at large, the
25 opportunity to meet San Francisco’s energy needs without a power plant to be sited amongst its
26 most disadvantaged citizens, CCSF has deprived plaintiffs of their constitutional rights while
27 acting under color of state law, in violation of 42 U.S.C. section 1983.

1 plant. CARE's members have concerns that will cause them injury due to global warming and
2 from emissions to be distributed from CCSF's proposed power plants due to their daily
3 proximity to the site. CARE's members thus would have standing to bring this action in their
4 own right. However, neither the claims asserted nor the relief requested require the participation
5 of CARE's individual members in this lawsuit.

6 39. Plaintiff Lynne Brown ("Brown") is a community activist and resident of
7 Bayview Hunters Point. As a resident of that neighborhood he will be directly affected by air
8 pollutants discharged by the SFERP power plant, as the San Francisco Public Utilities
9 Commission's pollution distribution study shows that the majority of the plant's emissions will
10 be distributed amongst the Bayview Hunters Point and Potrero communities. Brown will be
11 damaged by the CCSF CT power plants' contribution to global warming through their
12 greenhouse gas emissions and has been damaged by CCSF's deprivation of the rights of those
13 impacted to live without a fossil fuel-burning power plant in their community. Since 2003
14 Brown has continuously lodged his objections to the proposed CCSF power plants, both on the
15 basis of his status as resident affected by its pollutants and in his capacity as Vice-President of
16 Californians for Renewable Energy.

17 40. Plaintiff Regina Hollins ("Hollins") is a community activist and resident of
18 Potrero. As a resident of that neighborhood she will be directly affected by air pollutants
19 discharged by the SFERP power plant, as the San Francisco Public Utilities Commission's
20 pollution distribution study shows that the majority of the plant's emissions will be distributed
21 amongst the Bayview Hunters Point and Potrero communities. Hollins will be damaged by the
22 CCSF CT power plants' contribution to global warming through their greenhouse gas emissions
23 and has been damaged by CCSF's deprivation of the rights of those impacted to live without a
24 fossil fuel-burning power plant in their community. Since 2003, Hollins has regularly
25 registered her disapproval of the proposed CCSF power plant as yet another project in which her
26 community bears the sole burden of a city-wide benefit.

27 41. Plaintiffs are and will be affected adversely by the EPA, the BAAQMD, and
28 CCSF permitting the construction of CCSF's power plants in the absence of new greenhouse gas

1 regulations to be set forth by EPA. If the BAAQMD issues Authority to Construct the SFERP
2 before the EPA has complied with the Supreme Court's directive in Massachusetts, CCSF will
3 begin to build its power plants and plaintiffs will be denied the benefit of rules which will
4 operate to force CCSF to build power plants that are less harmful to the affected plaintiffs or to
5 build no power plants at all. These new regulations and the renewed, fully-informed public
6 debate requested herein will lead to mitigation of the deleterious effects of greenhouse gases on
7 plaintiffs, in particular global warming and ground-level ozone, or will convince CCSF to
8 abandon the CT power plant projects altogether.

9 42. Defendant United States Environmental Protection Agency ("EPA") was
10 established in the executive branch as an independent agency pursuant to Reorganization Plan
11 No. 3 of 1970 (5 U.S.C. app.), effective December 2, 1970. The EPA is an agency within the
12 meaning of 5 U.S.C. § 522(f) and is responsible for the administration and enforcement of the
13 Clean Air Act.

14 43. Defendant Stephen Johnson ("Johnson") is the Administrator of the EPA, and is
15 being sued in his official capacity. The Administrator has the statutory authority to administer
16 the Clean Air Act.

17 44. Defendant Johnson, as the Administrator of the EPA, is obligated to carry out the
18 directives of the United States Supreme Court.

19 45. Defendants Johnson and EPA are referred to collectively herein as the "EPA
20 Defendants."

21 46. Defendant Bay Area Air Quality Management District ("BAAQMD") is, by
22 statute, a public agency of the state of California. The BAAQMD is the agency responsible for
23 the adoption and enforcement of certain rules to attain and maintain the air quality standards set
24 under the Clean Air Act in the Bay Area, which includes CCSF. In regard to the proposed
25 SFERP, the EPA has delegated to the BAAQMD responsibility for administering the federal
26 New Source Review program and the BAAQMD incorporates the EPA's roster of regulated air
27 pollutants in implementing its own new source and power plant permit review procedures. Once
28 the EPA makes an endangerment finding as prompted in this complaint, the BAAQMD will

1 necessary be required to include greenhouse gases such as carbon dioxide in its definition of
2 regulated air pollutants.

3 47. Defendant City and County of San Francisco “CCSF” is a municipal corporation
4 within the State of California.

5 **BACKGROUND STORY**

6 48. In 2004 CCSF adopted a plan to provide reliability to the city’s electrical grid
7 without two older power plants located within city limits: the Hunters Point Power Plant and the
8 Potrero Power Plant.

9 49. That plan, called the 2004 San Francisco Action Plan, was submitted to the
10 California Independent System Operator, the non-profit corporation charged with maintaining
11 reliability of California’s electrical grid, and led to the closure of the Hunters Point Power Plant.

12 50. However, the plan now calls for the Potero Power Plant to be replaced with the
13 equally undesirable SFERP and SFO CT power plants.

14 51. In light of widespread concern over San Francisco’s contribution to global
15 warming and other issues raised in this complaint it is clear that CCSF needs to replace its 2004
16 San Francisco Action Plan with a 2008 San Francisco Action Plan that incorporates the wide-
17 spread understanding that cities should not be building fossil fuel-burning power plants in 2008,
18 especially amongst their disadvantaged neighborhoods.

19 52. The United States Supreme Court’s ruling in the Massachusetts case signifies a
20 sea change in terms of how our society now views the cumulative effect of greenhouse gas
21 emissions on the environment. Municipalities must view the creation of new fossil fuel-burning
22 power plants in light of growing concern regarding global warming and new EPA regulations to
23 be promulgated in order to curb climate change.

24 53. The 2004 San Francisco Action Plan contemplates that “any significant change to
25 the assumptions underlying [its] analysis may change [its] conclusions.”

26 54. Numerous changes to the assumptions underlying CCSF CT power plant proposal
27 have occurred since 2004 which undercut the supposed benefit of building them, culminating in
28

1 the fact that EPA has been ordered to regulate greenhouse gas emissions as regulated air
2 pollutants under the Clean Air Act.

3 55. For example, San Francisco will build 104 megawatts of distributed generation
4 within city limits over the next three years, including 31 megawatts of solar photovoltaic power.
5 The city recently announced an ambitious incentive program that will encourage the
6 development of 50 megawatts of solar generation on San Francisco rooftops.

7 56. San Francisco in 2007 approved a project called the Trans Bay Cable that will
8 bring 400 megawatts of pollution-free power to the city in the first quarter of 2010.

9 57. CCSF also plans to derive over 100 megawatts from conservation and energy
10 efficiency technologies over the next three years, and upgrades to San Francisco's transmission
11 lines will complete the key to electric reliability in San Francisco.

12 58. That San Francisco today requires 960 megawatts of electricity and has created
13 pollution-free programs to increase its generation and capacity by over 650 megawatts means
14 that CCSF must revisit its 2004 plan to build 194 megawatts of fossil fuel-burning combustion
15 turbines.

16 59. CCSF must create a 2008 San Francisco Action Plan that meets the goals
17 articulated in 2004, but without the construction of greenhouse gas-producing power plants, in its
18 most historically burdened and polluted neighborhood, that will not receive the benefit of new
19 Clean Air Act regulations to be promulgated by the EPA.

20 **STATUTORY SCHEME**

21 60. The Clean Air Act is a comprehensive program for controlling and improving the
22 nation's air quality. Under the Clean Air Act, the EPA identifies air pollutants that endanger the
23 public health or welfare, determines what concentrations of those pollutants are safe, and
24 promulgates those determinations as national ambient air quality standards. See 42 U.S.C. §§
25 7408, 7409. Each state bears responsibility for ensuring that its ambient air meets the
26 appropriate NAAQS. See 42 U.S.C. § 7407(a).

27 61. Section 202 of the Clean Air Act establishes emissions standards for "new motor
28 vehicles or new motor vehicle engines. Section 202 requires the Administrator to identify

1 sources of emissions “which in his judgment cause, or contribute to, air pollution which may
2 reasonably be anticipated to endanger public health or welfare.” The Administrator is then
3 mandated to prescribe standards applicable to the emission of such endangering air pollutants
4 from motor vehicles.

5 62. Section 111 of the Clean Air Act establishes emissions standards for “stationary
6 sources,” defined as any building, structure, facility, or installation “which emits or may emit any
7 air pollutant.” Similar to Section 202, Section 111 also requires the Administrator to identify
8 sources of emissions “which may reasonably be anticipated to endanger public health or
9 welfare.” The Administrator is similarly mandated by Section 111 to regulate such emissions
10 from “significant” sources such as power plants.

11 63. The Supreme Court stated in the Massachusetts case that “under the clear terms of
12 the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse
13 gases do not contribute to climate change or if it provides some reasonable explanation as to why
14 it cannot or will or will not exercise its discretion to determine whether they do” (Massachusetts,
15 127 S. Ct. at 1462).

16 64. In other words, the EPA defendants’ compliance with the Supreme Court’s
17 Massachusetts order as urged in this lawsuit means that the statutory scheme of pollutants
18 regulated under the Clean Air Act will necessarily change.

19 65. Section 108 of the Clean Air Act requires the Administrator to create a list of
20 criteria air pollutants that “may reasonably be anticipated to endanger public health or welfare.”
21 If carbon dioxide and other greenhouse gases meet the requirements of Section 202, such
22 emissions will have to be regulated under Section 108.

23 66. Once a pollutant is listed under Section 108, the EPA is required under Section
24 109 to establish National Ambient Air Quality Standards for the pollutant. Section 110 requires
25 states to develop State Implementation Plans for metropolitan areas to meet the standard.

26 67. It is clear that once the EPA Defendants comply with the Supreme Court’s order
27 in Massachusetts the entire scheme of review of new sources of greenhouse gases in our country,
28 such as CCSF’s power plants, will change forever.

1 68. The Clean Air Act requires the proponent of any new major stationary sources of
2 air pollution to obtain a construction permit before commencing construction. 42 U.S.C § 7411.
3 This review process, known as New Source Review was delegated to the BAAQMD in regard to
4 the SFERP power plant, Application Number 12344. BAAQMD has its own new source review
5 provisions in place in BAAQMD Regulation 2, Rules 2 and 3 and Regulation 10 which are
6 linked to the provisions and list of regulated pollutants found in the Clean Air Act.

7 69. Regulations to be promulgated by the EPA may bring the SFERP into the
8 definition of a “Major Facility” as that term is used by the BAAQMD in Regulation 2, Rule 6,
9 Section 212. The BAAQMD follows the EPA definition of a “Major Facility” as a facility that
10 “has the potential to emit 10 tons per year or more of a single hazardous air pollutant, 25 tons per
11 year or more of a combination of hazardous air pollutants, or such lesser quantity as the EPA
12 Administrator may establish by rule.”

13 70. If the SFERP’s level of carbon dioxide and greenhouse gas emissions rise to that
14 of a post-Massachusetts “Major Facility,” the SFERP becomes subject to “Major Facility
15 Review” under BAAQMD Regulation 2, Rule 6, Section 213 including Title V of the Clean Air
16 Act and Prevention of Significant Deterioration (“PSD”) analysis.

17 71. PSD process is designed, according to the EPA, to “protect public health and
18 welfare” and “assure that any decision to permit increased air pollution...is made only after
19 careful evaluation of all the consequences of such a decision and after adequate procedural
20 opportunities for informed public participation.”

21 72. Having issued Final Determination of Compliance in regard to the SFERP plant
22 on approximately February 25, 2006, BAAQMD is able to issue “Authority to Construct” the
23 SFERP plant under BAAQMD Regulation 2, Rule 3, Section 301.

24 73. Plaintiffs, however, request that this Court stay further the issuance of BAAQMD
25 Authority to Construct the SFERP and CCSF’s construction of the power plants until the EPA
26 has complied with the court’s rule in the Massachusetts case, because nearly every statute cited
27 within this statutory scheme will change and possibly change drastically. CCSF’s power plant
28 proposal will require amendment to comply with new EPA and BAAQMD standards, and neither

1 the EPA, the BAAQMD, or CCSF have ordered an analysis of, or raised in any public forum, the
2 contribution of the power plants to global warming or the effect of their greenhouse gases at the
3 ground-level.

4 **THE CT POWER PLANTS' ENVIRONMENTAL IMPACTS**

5 74. The SFERP would be located on a 4-acre parcel owned by the City and County of
6 San Francisco and located south of 25th Street and approximately 900 feet east of Illinois Street.

7 75. The nearest residence to the SFERP is located approximately 1,600 feet west of
8 the site. There are over 500 sensitive receptors including 233 schools and day care facilities, 15
9 hospitals, 32 senior care facilities, 221 churches, and 57 parks and recreation centers within a 3-
10 mile radius. There also appear to be some transient residents at Warm Water Cove Park located
11 about 700 feet northeast of the project site. The closest church is located just 474 feet southwest
12 of the project site.

13 76. The SFERP plant will emit up to a total of 39.7 tons of nitrogen oxides, 27.9 tons
14 of carbon monoxide, 7.7 tons of precursor organic compounds, 18 tons of particulate matter, and
15 2.7 tons of sulfur dioxide into the community per year, according to BAAQMD.

16 77. Nitrogen oxides contribute to the formation of ground-level ozone and
17 atmospheric particles. Carbon monoxide also contributes to smog. Particulate matter reduces
18 visibility and makes bodies of water more acidic and disrupts nutrient balance. Sulfur dioxide
19 too reduces visibility and contributes to acid rain and building decay.

20 78. The SFO CT power plant will be sited on the north side of San Francisco
21 International Airport, near the United Cogeneration Facility.

22 79. Emissions data of the SFO CT power plant are not available to the public, because
23 as a facility of less than 50 megawatts, the SFO CT plant is not subject to the extensive
24 regulation and review undertaken in regard to the SFERP plant. A general assumption is that the
25 SFO CT plant will produce emissions at a level one-third that of the SFERP if it is run for the
26 same duration, and more if it runs the permitted number of hours of 4900 per year.

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28

1 and prolonged heat waves, also poses a specialized kind of health risk for plaintiff APRI, whose
2 constituent members will work across the street from the SFERP power plant.

3 86. The SFERP power plant will emit low-level ozone that due to its eighty-five foot
4 stack, which is less than a third of the height of the Potrero plant's two hundred eighty-foot
5 stack. Those emissions will affect APRI in a different manner than other plaintiffs due to the
6 fact that its constituent members work across the street from the SFERP.

7 87. Ground-level ozone is the primary constituent of smog and breathing ozone can
8 trigger a variety of health problems including chest pain, coughing, throat irritation, and
9 congestion. It can worsen bronchitis, emphysema, and asthma.

10 88. Ground-level ozone also can reduce lung function and inflame the linings of the
11 lungs. Repeated exposure may permanently scar lung tissue.

12 89. The Clean Air Act requires the EPA to set air quality standards to protect both
13 public health and the public welfare. This is the rationale behind the Supreme Court's holding in
14 the Massachusetts case and a compelling reason for this Court to enjoin the SFERP power plant
15 until the EPA dictates changes to the Clean Air Act that municipalities like CCSF can follow.

16 **FIRST CLAIM FOR RELIEF**

17 **For Mandamus Relief**

18 **As to EPA Defendants, BAAQMD, and CCSF**

19 90. Plaintiffs adopt and incorporate by reference Paragraphs 1-89 of this Complaint.

20 91. On April 2, 2007 the United States Supreme Court ordered the EPA to "ground its
21 reasons for action or inaction in the [Clean Air Act]" (Massachusetts v. EPA, 127 S. Ct. at 1463).

22 92. To date the EPA defendants have not performed a duty owed to plaintiffs: to
23 comply with the order of the Supreme Court in order to slow global warming and to promulgate
24 rules that will lessen the environmental and health impacts of fossil fuel-burning power plants
25 such as CCSF's CT plants.

26 93. The United States Supreme Court in Massachusetts stated that there is no
27 reasonable grounds for the EPA defendants to continue to refuse to regulate greenhouse gases
28

1 because greenhouse gases “fit well within the Clean Air Act’s capacious definition of ‘air
2 pollutant” (Massachusetts, at 1462).

3 94. In other words, once the EPA defendants are ordered to perform the
4 aforementioned duty to plaintiff, Johnson will determine that greenhouse gases “in his judgment
5 cause, or contribute to, air pollution which may reasonably be anticipated to endanger public
6 health or welfare.”

7 95. The aforementioned endangerment finding will thus require the EPA to regulate
8 greenhouse gases under the Clean Air Act Section 202, in regard to motor vehicles, and under
9 Section 111, in regard to stationary sources such as CCSF’s power plant. The EPA must then
10 promulgate new National Ambient Air Quality Standards for greenhouse gases that the states
11 must implement, pursuant to Clean Air Act Sections 108 to 110.

12 96. As a result of EPA’s failure to comply with the Supreme Court’s order, plaintiffs
13 are poised to receive in and around their neighborhood power plants that have not received even
14 a cursory analysis of their greenhouse gas emission levels, their contribution to global warming
15 and resulting impact, or the ground-level environmental and health impacts of their greenhouse
16 gas emissions on the community.

17 97. If the EPA defendants do not perform their duty owed to plaintiffs, plaintiffs will
18 be irreparably injured because CCSF will construct its power plants without the benefit of new
19 regulations to be promulgated by the EPA in order to lessen the environmental and health
20 impacts of fossil fuel-burning power plants, regulations which will prompt a true public debate
21 on whether or not municipalities should even be building power plants like CCSF’s CT plants.

22 98. BAAQMD is an indispensable party in plaintiffs’ claim for relief because it is the
23 EPA’s delegate for implementation of the Clean Air Act, because its own Rules and Regulations
24 are derived from the provisions and list of regulated air pollutants found in the Clean Air Act as
25 it will be modified post-EPA compliance with Massachusetts, and because once it issues
26 Authority to Construct the SFERP power plant CCSF will commence construction of the plant
27 and deny plaintiffs’ their only remedy for preventing the harm herein alleged.

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1 impacts of fossil fuel-burning power plants, regulations which will prompt a true public debate
2 on whether or not municipalities should even be building power plants like CCSF's CT plants.

3 106. BAAQMD is an indispensable party in plaintiffs' claim for relief because it is the
4 EPA's delegate for implementation of the Clean Air Act, because its own Rules and Regulations
5 are derived from the provisions and list of regulated air pollutants found in the Clean Air Act as
6 it will be modified post-EPA compliance with Massachusetts, and because once it issues
7 Authority to Construct the SFERP power plant CCSF will commence construction of the plant
8 and deny plaintiffs' their only remedy for preventing the harm herein alleged.

9 107. CCSF is an indispensable party in plaintiffs' claim for relief because it needs no
10 further regulatory approval to commence construction of the SFO CT power plant and once it
11 commences construction of the plant it will deny plaintiffs' their only remedy for preventing the
12 harm herein alleged.

13 108. Plaintiffs have no adequate remedy at law.

14 **THIRD CLAIM FOR RELIEF**

15 **Public Nuisance Under California Law**

16 **As to CCSF and BAAQMD**

17 109. Plaintiffs adopt and incorporate by reference Paragraphs 1-108 of this complaint.

18 110. CCSF's proposed power plants are injurious to plaintiffs' health and to the health
19 of the public in general, and interfere with plaintiffs' comfortable enjoyment of life and property.

20 111. CCSF's proposed power plants are injurious because they have not received even
21 a cursory analysis of their greenhouse gas emission levels, their contribution to global warming
22 and resulting impact, or their ground-level environmental and health impacts of its greenhouse
23 gas emissions on the community.

24 112. In addition, because CCSF will not own or control its power plants for at least the
25 first thirteen years of their operation there is a very real danger that the SFERP power plant will
26 be more destructive toward the environment and the health of the affected community than the
27 older power plant it is designed to replace.

1 113. Plaintiff APRI will be specially injured by the SFERP power plant because its
2 constituent members will work literally across the street from the SFERP, and thus be damaged
3 by ground-level greenhouse gases that will not affect other members of the community.

4 114. Plaintiffs' fear of future injury is well founded for the following reasons: the
5 impact of ground-level greenhouse gases such as ozone are well-documented by the World
6 Health Organization and the environmental science community as causing respiratory problems
7 for those directly exposed to the degree that APRI's constituent members will be exposed when
8 they work across the street from the SFERP power plant and its low emissions stack, and for
9 those low-income people of color represented by CARE.

10 115. The manner in which CCSF seeks to build and operate its power plants constitutes
11 a nuisance, consisting of building the SFERP across from a location where APRI's constituent
12 members will work, placing a disproportionate impact on low-income people of color
13 represented by CARE, and misrepresenting the merits of its power plants as alleged below and
14 without pause to allow the plants to receive the benefit of the EPA's new greenhouse gas
15 regulations.

16 116. It is necessary to enjoin CCSF from requesting and receiving BAAQMD
17 Authority to Construct its SFERP power plant because CCSF's determination to construct the
18 power plant before the EPA complies with the Massachusetts case, and before meaningful public
19 debate on its proposed power plant can occur, means that preventing the CCSF from requesting
20 Authority to Construct the plant is the only means by which to prevent the injury herein
21 described.

22 117. BAAQMD is an indispensable party in plaintiffs' request to enjoin issuance of
23 Authority to Construct the SFERP power plant because CCSF's determination to construct the
24 SFERP power plant means that as soon as CCSF receives Authority to Construct the plant from
25 BAAQMD it will commence construction and deny plaintiffs the relief requested.

26 118. Unless CCSF is enjoined from commencing construction of its power plant, the
27 injury herein described is reasonably probable and even certain unless enjoined by the Court.

28 119. Plaintiffs have no adequate remedy at law.

1 **FOURTH CLAIM FOR RELIEF**

2 **Violation of 42 U.S.C 1983 – Right to Procedural Due Process**

3 **As to CCSF**

4 120. Plaintiffs adopt and incorporate by reference Paragraphs 1-119 of this complaint.

5 121. The United States Constitution guarantees to plaintiffs the rights to liberty and
6 property.

7 122. In addition, the California Constitution guarantees to plaintiff the right to enjoy
8 life, to possess and protect property, and to pursue and obtain safety.

9 123. The aforementioned guarantees are state and federal rights that must not be denied
10 without due process of law pursuant to the Fourteenth Amendment of the United States
11 Constitution.

12 124. CCSF's proposed CT power plants are an infringement upon plaintiffs' rights as
13 asserted herein in that the plants will increase global warming, discharge pollution into plaintiff's
14 neighborhoods, diminish the value of plaintiffs' property, and decrease plaintiffs' quality of life.
15 Therefore, these rights must not be deprived without due process of law.

16 125. CCSF has delegated to its San Francisco Public Utilities Commission ("SFPUC")
17 and SFPUC General Manager Susan Leal (the "General Manager") the duty of developing and
18 implementing City policies to promote clean, reliable, and reasonably-priced electricity for the
19 resident and business of San Francisco.

20 126. The General Manager and her SFPUC staff have therefore been delegated final
21 policymaking authority in regard to energy policy in San Francisco and their acts may fairly be
22 said to represent official policy.

23 127. Since the inception of CCSF's plan to build its SFERP and SFO CT power plants,
24 the General Manager and her SFPUC staff have failed to disclose to the public fundamental
25 flaws in the city's CT power plant proposal and misrepresented facts in an effort to prevent
26 resistance to and rejection of the power plants.

27 128. Plaintiffs learned on October 23, 2007 that the General Manager and her SFPUC
28 staff have failed to inform the public that the 2004 San Francisco Action Plan's goal of closing

1 the old Potrero power plant has been nearly totally accomplished by a December 2006 change in
2 BAAQMD's rules regarding gas turbines, misrepresented that the SFERP power plant offers
3 health benefits over the old Potrero power plant when it presents a "similar health concern"
4 according to the BAAQMD, and declined to participate in 2006 proceedings with the BAAQMD
5 that could have led to shut down of the old Potrero power plant without the construction of new
6 fossil fuel-burning power plants.

7 129. When BAAQMD Air Quality Engineering Manager Barry Young announced
8 these facts in testimony before the SFPUC on October 23, rather than continue public discussion
9 of this new information the General Manager dispatched a member of her staff to take Mr.
10 Young's microphone from him. In fact the SFPUC continued to misrepresent the merits of its
11 CT power plants until cautioned against doing so by CCSF's city attorney.

12 130. In addition, the SFPUC staff have for many years indicated to the public that the
13 California Independent System Operator ("CAISO") requires a power plant in San Francisco, but
14 plaintiffs recently learned that in private emails the SFPUC indicate to one another that "CAISO
15 is requiring generation on the SF peninsula" (emphasis added).

16 131. In addition, the General Manager and her staff refuse to conduct an analysis of the
17 CT power plants' impact on global warming or allow the power plant projects to receive the
18 benefit of new rules to be promulgated by the EPA and the BAAQMD.

19 132. Plaintiffs have been denied at least one year of fully informed public participation
20 regarding the CT power plants that would have been a very different debate had the General
21 Manager and her staff indicated that the December 2006 BAAQMD rule change means that the
22 new power plants offer no improvement over the old plants, that the new power plants emit more
23 greenhouse gases than the old plants according to the BAAQMD, or that the CAISO actually
24 does not require a power plant in the city's most disadvantaged neighborhood.

25 133. Plaintiffs stand to be deprived of their constitutional rights as herein alleged due to
26 the General Manager and her staff's misrepresentations and failure to disclose facts that would
27 have discouraged public and legislative support for CCSF's CT power plants.

28

1 143. Plaintiffs have no adequate remedy at law but for the Court to order that CCSF
2 and its officers, boards, and commissions adhere to the Precautionary Principle and perform the
3 actions requested in plaintiffs' prayer for relief.

4 144. Plaintiffs' herein requested claims for relief and remedies will in no way impact
5 San Francisco's electric reliability as it exists today, nor will they affect the availability of
6 reliable electricity to plaintiffs or any other member of the public.

7 WHEREFORE, Plaintiffs request that this Court:

8 UNDER THE FIRST AND SECOND CLAIMS FOR RELIEF

9 1. Declare that the EPA and Johnson must respond to the United State Supreme
10 Court's demand in Massachusetts v. EPA to ground the EPA's action or inaction in the Clean Air
11 Act;

12 2. Declare that in the likely event that the EPA and Johnson make an endangerment
13 finding in regard to motor vehicles under Section 202 of the Clean Air Act the same
14 endangerment finding will apply to Section 111 regarding stationary sources, Section 108
15 regarding criteria pollutants, Section 109 regarding National Ambient Air Quality Standards
16 (NAAQS), and Section 110 regarding State Implementation Plans.

17 3. Grant an order enjoining the BAAQMD from taking further action with respect to
18 Authority to Construct the SFERP power plant, Application Number 12344, until such time as
19 the EPA defendants have complied with the Supreme Court's demand in Massachusetts v. EPA.;

20 4. Grant an order enjoining CCSF from taking further action with respect to
21 Authority to Construct the SFERP power plant, Application Number 12344, or commencement
22 of construction of its SFO CT plant until such time as the EPA defendants have complied with
23 the Supreme Court's demand in Massachusetts v. EPA.;

24 UNDER THE THIRD CLAIM FOR RELIEF

25 5. Grant an order stating that, in the event that the EPA defendants make the
26 expected endangerment finding in regard to Section 202 of the Clean Air Act, CCSF must
27 neither request Authority to Construct the SFERP nor commence construction of either of its CT
28

1 power plants until the EPA defendants incorporate the endangerment finding into Section 111
2 and Sections 108 to 110 of the Clean Air Act and apply those rules to CCSF's power plants;

3 6. Grant an order stating that, in the event that the EPA defendants make the
4 expected endangerment finding in regard to Section 202 of the Clean Air Act, the BAAQMD is
5 enjoined from issuing Authority to Construct the SFERP power plant until the EPA defendants
6 incorporate the endangerment finding into Section 111 and Sections 108 to 110 of the Clean Air
7 Act and the EPA and BAAQMD accordingly promulgate new rules that will apply to CCSF's
8 SFERP power plant;

9 UNDER THE FOURTH CLAIM FOR RELIEF

10 7. Grant an order enjoining the SFPUC taking further action in promoting its CT
11 power plants until the General Manager and SFPUC staff in a public hearing correct the
12 misrepresentations and facts that they have failed to disclose to date, so that the public is able to
13 participate in a renewed, fully-informed discussion of the merits, or lack thereof, of CCSF's
14 power plants, incorporating the relief requested under plaintiffs' fifth claim for relief;

15 UNDER THE FIFTH CLAIM FOR RELIEF

16 8. Grant an order mandating that CCSF, its SFPUC, and SFPUC staff must comply
17 with the San Francisco Precautionary Principle in doing the following:

- 18 a) Creating a 2008 San Francisco Action Plan that explores and carefully analyzes
19 electric reliability in San Francisco without the fossil fuel-burning CT power
20 plants;
- 21 b) Using the best available science to determine if the generation and transmission
22 developments that will add over 650 pollution-free megawatts to San Francisco
23 will make the city's electrical grid reliable in the absence of the Potrero Power
24 plant, SFERP power plant, and SFO CT power plant;
- 25 c) Using the best available science to determine, if some generation is required,
26 where generation might be built elsewhere "on the S.F. peninsula" and outside of
27 Bayview Hunters Point and Potrero;

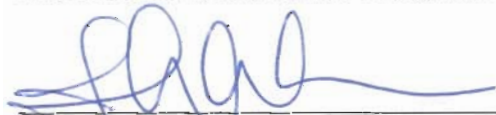
- 1 d) Using the best available science to determine how much renewable generation can
2 be created with the \$120 million CCSF planned to **spend on its CT power plants**,
3 consisting of a \$60 million bond and \$60 million in combustion turbines;
4 e) Acknowledging the flawed assumptions that have led **CCSF's power plants** to
5 gain support in a climate which discourages contribution to global warming;
6 f) Creating new standards for transparency within the SFPUC to encourage fully
7 informed public participation as CCSF finds and selects the alternative to building
8 fossil fuel-burning power plants in 2008.

9 UNDER ALL CLAIMS FOR RELIEF

10 9. Grant plaintiffs their costs of suit herein and reasonable attorney and expert
11 witness fees, and such other and further relief as may be proper.

12
13 Respectfully submitted this 14th day of December, 2007,

14
15 **BRIGHTLINE DEFENSE PROJECT**

16 

17
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