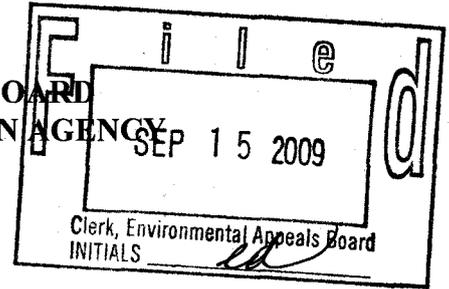


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)

Gateway Generating Station)

PSD Appeal No. 09-02

ORDER DISMISSING PETITION FOR REVIEW

On May 11, 2009, Rob Simpson (“Petitioner”) petitioned the Environmental Appeals Board (“Board” or “EAB”), pursuant to 40 C.F.R. § 124.19, for review of “the Prevention of Significant Deterioration (‘PSD’) Permit related to Gateway Generating Station issued by [t]he Bay Area Air Quality Management District (‘BAAQMD’).”¹ Pet. at 5. The only permit identified was an “Authority to Construct” that was issued by the BAAQMD on July 24, 2001, eight years ago. *See* Petition for Review Ex. 1 (Letter from Ellen Garvey, Air Pollution Control

¹ The federal PSD program is administered by the United States Environmental Protection Agency (“EPA” or “Agency”). When appropriate, EPA delegates federal PSD program authority to states and local agencies. *See* 40 C.F.R. § 52.21(a)(1), (u). California is divided into Air Pollution Control Districts (“APCD”) and Air Quality Management Districts (“AQMD”). These agencies are county or regional governing authorities that have primary responsibility for controlling air pollution from stationary sources. *See* Cal. Health & Safety Code §§ 40000, 40200; *see also* <http://www.arb.ca.gov/ei/maps/statemap/dismap.htm>. The PSD program for the area where the Gateway facility is located has been delegated to BAAQMD, one of California’s air districts. U.S. EPA - [BAAQMD] Agreement for Delegation of Authority for Prevention of Significant Deterioration of Air Quality Program (40 C.F.R. § 52.21) (Nov. 10, 1997) (EPA Region 9 Br. Ex. 1). PSD permits issued by BAAQMD are considered EPA-issued permits and are governed by federal regulations. *In re Christian County Generation, LLC*, PSD Appeal No. 07-01, slip op. at 2 n.1 (EAB Jan. 28, 2008), 13 E.A.D. at ____ (citing *In re SEI Birchwood, Inc.*, 5 E.A.D. 25, 26 (EAB 1994); *In re Hadson Power 14-Buena Vista*, 4 E.A.D. 258, 59 (EAB 1992)); *see also In re Russell City Energy Ctr.*, PSD Appeal No. 08-01, slip op. at 4 n.1 (EAB July 29, 2008), 14 E.A.D. ____.

Officer, Permit Services Division, BAAQMD to Joseph Bittner, Mirant Delta, LLC (Jul. 24, 2001) (granting the "Authority to Construct") ("2001 Permit"). The Petition, in essence, alleges various errors made in the permitting process and challenges the lack of consistency between the permitted facility and the facility as built.² The question before the Board is whether the current petition is time barred.

To assist the Board in deciding whether the matters raised by Petitioner should be reviewed, the Board requested that the BAAQMD submit a response to the Petition. *See* Letter from Eureka Durr, Clerk, Environmental Appeals Board, to Jack Broadbent, Officer, Air Pollution Center, BAAQMD (May 12, 2009). Subsequently, on May 27, 2009, Pacific Gas and Electric ("PG&E") filed a motion for leave to intervene as the current permittee and owner of Gateway Generating Station,³ which the Board granted on June 18, 2009. PG&E, along with BAAQMD, sought to have this matter stayed pending ongoing discussions with EPA Region 9 regarding alleged noncompliance with PSD regulations at the Gateway facility.⁴ In the Board's

² Specifically, Petitioner seeks review of the permit because: (1) public participation in the permitting process was lacking; (2) the facility was not constructed and is not operated in a manner consistent with the 2001 Permit or in conformity with the Clean Air Act; (3) there is no evidence that a PSD permit was ever issued; (4) "major modifications have occurred in the construction and operation of the facility that allow it to pollute even more than the 2000-2001 determinations with respect to the best available control technology" ("BACT"); and (5) the permit does not utilize BACT. Petition at 9-17.

³ PG&E acquired the Gateway facility in 2006 from Mirant Delta, Inc., the original permittee and previous owner. *See* PG&E Br. at 3 n.2. The Gateway facility was formerly known as "Contra Costa 9"; however, for ease of discussion, the Board refers only to the Gateway facility in this decision.

⁴ More specifically, BAAQMD states that after the 2001 Permit was issued, construction
(continued...)

June 18, 2009 Order, the Board questioned its jurisdiction over this matter and denied the motion for stay pending further briefing from BAAQMD, the permittee, Region 9, and Petitioner regarding: (1) whether any appeal from the 2001 Permit would be timely; (2) whether the Board would have jurisdiction over an appeal from the 2001 Permit; and (3) whether any other jurisdictional basis for this appeal exists. The BAAQMD, PG&E, and Region 9 each submitted briefs regarding jurisdiction on July 2, 2009. Petitioner electronically submitted a reply on July 17, 2009, but did not file the original with the Board. Documents submitted solely through the Board's electronic submission system are not treated as "filed."⁵ As a practical matter, however,

⁴(...continued)

was stopped and then restarted. *See infra* Part I.B. When construction was restarted, it apparently "occurred without a current, valid PSD Permit." BAAQMD Br. at 4. As a result, according to BAAQMD, EPA Region 9 has begun enforcement action to address the noncompliance and is currently in settlement talks on this issue. *Id.*

⁵ Documents are considered filed on the date they are received by the Board, either by hand-delivery/courier or by U.S. Mail. As of the time of this decision, electronic submissions are not treated as filed. For permit cases, this is articulated in the *EAB Practice Manual* at 9-12, 34, available at <http://www.epa.gov/eab/pmanual.pdf>, as well as in the *Citizens' Guide to EPA's Environmental Appeals Board* at 20, available at [http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/fe0c5a6cd82ddcce852575c800571529/\\$FILE/CitizensGuide%2011-13-06.pdf](http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/fe0c5a6cd82ddcce852575c800571529/$FILE/CitizensGuide%2011-13-06.pdf); see also 40 C.F.R. § 22.5 (articulating this rule in the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits). The following explanation to the public is also displayed on the Board's "Electronic Submission" webpage:

Electronic Submission:

You are now able to submit an electronic copy of your original filing with the Environmental Appeals Board (EAB). Parties submitting documents electronically will be excused from the requirement to submit multiple copies. Note: At the current time, any electronic submissions will not be considered a substitute for filing an original document with the Clerk of the Board. The Clerk of the Board must actually receive the original document in hard copy by the document's due date in order for it to be filed timely. **Until further notice, the**

(continued...)

Petitioner's failure to comply with the procedural requirements for filing the reply brief in this case has no effect, because none of the arguments made in that brief would alter the outcome of this decision.

Having duly considered the briefs and other submissions of the parties, and for the reasons that follow, the Board dismisses this Petition as untimely.⁶

I. BACKGROUND

A. Statutory and Regulatory Framework

The Clean Air Act ("CAA") requires facilities to obtain a PSD permit prior to the

⁵(...continued)

electronic copy of a document submitted through the Board's electronic submission system will not be treated as a "filed" document. Electronic submission of the document copy also does not relieve you of the obligation to serve your filing on other parties.

See EAB information regarding electronic submissions, http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/Electronic+Submission?OpenDocument (some emphasis omitted).

⁶ In addition to the briefing on jurisdictional issues, the Board also received a motion to intervene from Californians for Renewable Energy, Inc., ("CARE") on July 22, 2009. PG&E filed an opposition to that motion on July 24, 2009. CARE seeks to intervene based on its submission of comments on the 2001 Permit and based on BAAQMD's failure to properly provide public notice of the final PSD permit as required by the Clean Air Act. CARE also asserts that Petitioner is a member of CARE and that any standing CARE would have should apply equally to Petitioner. CARE Motion to Intervene at 1. CARE nowhere indicates, however, how long Petitioner has been a member of CARE or whether Petitioner was a member in 2001. As explained, *infra*, Part III, the Board need not rule on CARE's Motion to Intervene as it is moot, given the dismissal of this Petition.

construction or modification of any “major emitting facility”⁷ located in an area that has been designated as either “unclassified” or in “attainment”⁸ with the national ambient air quality standards (“NAAQS”).⁹ CAA § 165, 42 U.S.C. § 7475. PSD permits generally contain conditions for construction that ensure facilities meet emissions limitations that reflect the use of the best available technologies for controlling emissions of air pollutants. *See id.* § 7475(a)(4). Such permits include emissions limitations and monitoring and reporting requirements to ensure that the conditions imposed prior to construction are being implemented and followed during the operational stage as well. *See id.* § 7475(a)(7). However, once a PSD permit is final and construction is authorized and completed, the failure to implement or maintain the permit conditions becomes an issue of enforcement, rather than a question of whether the permit was

⁷ A “major emitting facility” is any of certain listed stationary sources (including petroleum refineries) that emit or have the potential to emit 100 tons per year (“tpy”) or more of any air pollutant, or any other stationary source with the potential to emit at least 250 tpy of any air pollutant. CAA § 169(1), 42 U.S.C. § 7479(1).

⁸ EPA designates areas, on a pollutant-by-pollutant basis, as being in either attainment or nonattainment with the national ambient air quality standards (“NAAQS”). An area is designated as being in attainment with a given NAAQS if the concentration of the relevant pollutant in the ambient air within the area meets the limits prescribed by 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.* In addition to construction in attainment areas, PSD permitting also covers unclassifiable areas. CAA §§ 160-169B, 42 U.S.C. §§ 7470-7492; *see In re Christian County Generation, LLC*, PSD Appeal No. 07-01, slip op. at 5 (EAB Jan. 28, 2008), 13 E.A.D. at ___ (citing *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 59 (EAB 1997); *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 766-67 (EAB 1997)).

⁹ NAAQS are “maximum concentration ‘ceilings’” for particular pollutants, “measured in terms of the total concentration of a pollutant in the atmosphere.” U.S. EPA Office of Air Quality Planning & Standards, *New Source Review Workshop Manual*, at C.3 (draft Oct. 1990) (“NSR Manual”).

appropriately issued. 42 C.F.R. § 52.21(f)(1) (“[a]ny owner or operator who constructs or operates a source or modification not in accordance with the application submitted pursuant to this section or with the terms of any approval to construct * * * shall be subject to appropriate enforcement action”).

When PSD permits are issued by a state pursuant to a delegation of the federal PSD program, as is the case here, such permits are considered EPA-issued permits and, therefore, are subject to administrative appeal to the Board in accordance with 40 C.F.R. § 124.19.¹⁰ *See In re Christian County Generation, LLC*, PSD Appeal No. 07-01, slip op. at 2 n.1 (EAB Jan. 28, 2008), 13 E.A.D. at ___ (citing *In re Hillman Power Co.*, 10 E.A.D. 673, 675 (EAB 2002)) (some citations omitted). The Board’s jurisdictional authority to review final PSD permits is found in 40 C.F.R. § 124.19. That section authorizes review of “PSD final permit decision[s],” where review is sought “[w]ithin 30 days after a * * * PSD final permit decision * * * has been issued.” 40 C.F.R. § 124.19(a); *see also id.* § 124.19(b) (allowing sua sponte review by the Board, also within 30 days of the service of notice of the final decision).

¹⁰ In general, the Board’s jurisdiction to review state-issued permits is limited to those elements of the permit that find their origin in the federal PSD program – for example, the Board lacks authority to review conditions of a state-issued permit that are adopted solely pursuant to state law. *See In re Sutter Power Plant*, 8 E.A.D. 680, 688, 690 (EAB 1999) (explaining that “[t]he Board has jurisdiction to review issues directly related to permit conditions that implement the federal PSD program” (citing *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 161 (EAB 1999)), and that “[t]he Board may not review, in a PSD appeal, the decisions of a state agency made pursuant to non-PSD portions of the CAA or to state or local initiatives and not otherwise relating to the permit conditions implementing the PSD program” (citing *Knauf*, 8 E.A.D. at 167-68)).

In any petition filed under section 124.19 of title 40, the petitioner bears the burden of setting forth, in the petition, the basis for appeal and the threshold jurisdictional requirements. *See* 40 C.F.R. § 124.19(a) (requiring petitioners to state in the petition the grounds for review and to include a demonstration that any issues being raised were raised during the public comment period to the extent required); *see also In re Beeland Group, LLC*, UIC Appeal Nos. 08-01 to 08-03, slip op. at 8-9 (EAB Mar. 6, 2008), 14 E.A.D. ____ (explaining that a petitioner must demonstrate that the threshold procedural requirements for permit appeals are met, including timeliness, standing, preservation of issues for review, and articulation of the challenged permit conditions with sufficient specificity); *In re BP Cherry Point*, 12 E.A.D. 209, 216-17 (EAB 2005) (explaining that the petitioner bears the burden of demonstrating that review is warranted).

B. *Factual Background*

The Gateway Generating Station is a natural gas-fired combined-cycle power plant, located near Antioch, California. EPA Region 9 Br. at 1. Construction on the Gateway facility began in late 2001, but was suspended in early 2002, then restarted in 2007, after PG&E acquired the facility. *See* Pet. at 6; BAAQMD Br. at 3-4; PG&E Br. at 4. It is undisputed that construction of the facility is now complete and the facility is fully operational. Pet. at 6; BAAQMD Br. at 4; PG&E Br. at 5; EPA Region 9 Br. at 6.

BAAQMD originally authorized construction of the Gateway facility in an “Authority to Construct” Permit it issued on July 24, 2001. At the time the permit was issued, federal PSD permitting authority had been delegated to BAAQMD, and the facility’s PSD requirements were

among those included in the 2001 Permit.¹¹ BAAQMD received one comment on the draft 2001 Permit. That comment was submitted by Michael Boyd on behalf of CARE. BAAQMD responded in February 2001, before the final permit was issued. Neither Mr. Boyd, nor CARE, appealed the 2001 Permit. EPA Region 9 Br. at 3-4. On multiple occasions after the Permit was issued, and during the period when construction had ceased, BAAQMD issued extensions to the 2001 Permit. BAAQMD states that it intended these permit extensions to effectively extend the PSD provisions of the Permit, such that the PSD portions of the Permit remained in force and effect. BAAQMD Br. at 3.

During the course of construction, PG&E sought to amend the 2001 Permit. As a result, BAAQMD issued a “Public Notice” and “Engineering Evaluation for Proposed Amended Authority to Construct (ATC) and Draft PSD Permit” on June 4, 2008. BAAQMD Br. at 3; Pet. at 6 & Ex. 6 attach. A (cited in Petition as Ex. 2). BAAQMD never finalized that proposed amendment and draft permit, however, because PG&E withdrew its application for modification to the Permit on February 15, 2009, indicating that the increases in emission limits that it had requested were unnecessary. BAAQMD Br. Ex. B. PG&E completed and began operating the facility purportedly in reliance upon the 2001 Permit and subsequent permit extensions. PG&E Br. at 4-5.

¹¹ BAAQMD issues “Authority to Construct” permits under an integrated state/federal permitting system that incorporated various requirements, including federal PSD requirements, under one integrated permit that authorized construction. *See* BAAQMD Br. at 2; Region 9 Br. at 3; *see also In re Russell City Energy Ctr.*, PSD Appeal No. 08-01, slip op. at 8-11 (EAB Jul. 29, 2008), 14 E.A.D. ____.

Some time after the withdrawal of the permit application, EPA Region 9 informed BAAQMD that its extensions of the authority to construct did not validly extend the facility's federal PSD permit. BAAQMD Br. at 4 & Ex. C (Declaration of Alexander G. Crockett, Assistant Counsel, BAAQMD). PSD regulations provide that "[a]pproval to construct shall become invalid * * * if construction is discontinued for a period of 18 months or more[.]" 40 C.F.R. § 52.21(r)(2). The regulations also provide that the 18-month period may be extended "upon a satisfactory showing that an extension is justified." *Id.* Given Region 9's position, BAAQMD is now of the view that construction of the Gateway facility occurred without a valid PSD permit as required by the PSD provisions of the Clean Air Act. *See* BAAQMD Br. at 4.¹²

In May of 2009, Petitioner filed this petition for review of the PSD permit, many years after the issuance of the 2001 Permit, and several months after the completion and commencement of the operation of the Gateway facility. As such, the Board must determine first whether this PSD appeal from the Permit issued to the Gateway facility is time barred. For the reasons articulated below, the Board concludes this petition is not timely and, accordingly, dismisses this appeal.

¹² BAAQMD indicated in its brief that Region 9 is currently undertaking enforcement action to address any Clean Air Act non-compliance. *See* BAAQMD Br. at 4; PG&E Motion for Stay at 1. In fact, Region 9 recently issued a Finding and Notice of Violation ("NOV") to PG&E alleging that at the time "PG&E took over ownership of [the Gateway facility] and restarted construction[,] * * * the PSD permit for the construction and operation of [the Gateway facility] had expired and PG&E [had] not applied for a new PSD permit." *See* Letter from Alexander Crockett, Assistant Counsel, BAAQMD to Environmental Appeals Board attachment (Sept. 2, 2009) (bringing to Board's attention Region 9's Aug. 12, 2009, NOV and suggesting that this Petition is now moot). Thus, it seems, Petitioner's concerns may be addressed in an alternative forum. Nevertheless, because this Petition has not been withdrawn, and Petitioner's concerns may not necessarily be addressed in enforcement proceedings, we consider further this petition.

II. DISCUSSION

A. *Petitioner's Appeal from the 2001 Authority to Construct Permit Is Untimely*

The only permit identified in this Petition for Review is the "Authority to Construct" that BAAQMD issued on July 24, 2001, more than eight years ago. *See* Pet. at 5 & Ex. 1. That permit included PSD provisions for the Gateway facility.¹³ *Id.*; *see also* EPA Region 9 Br. at 5; BAAQMD Br. at 2-3. Under the regulations governing PSD permit appeals, a petition for review of a PSD permit decision must ordinarily be filed with the Board within 30 days of service of notice of the final permit decision by the permitting authority. 40 C.F.R. § 124.19(a) ("Within 30 days after a * * * PSD final permit decision * * * has been issued * * *, any person who filed comments on the draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision."); *see In re Puna Geothermal Venture*, 9 E.A.D. 243, 273 (EAB 2000). The failure to timely file a petition, for review will generally lead to dismissal of the petition, as the Board strictly construes threshold procedural requirements, such as the filing of a thorough, adequate, and timely petition. *Puna*, 9 E.A.D. at 273 (citing *In re Envotech, L.P.*, 6 E.A.D. 260, 266 (EAB 1996) (dismissing as untimely permit appeals received after the filing deadline); *see also In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 328 (EAB 1999).

¹³ Although Petitioner implies that the 2001 Authority to Construct did not include a PSD permit for the facility, *see* Pet. at 11, the PSD permitting provisions were included among the provisions of the comprehensive 2001 Permit. *See supra* note 11. Moreover, if Petitioner were correct that the 2001 Permit did not include a PSD permit, there would be no PSD permit identified from which Petitioner could appeal.

The Board has, on limited occasions, entertained untimely petitions where warranted by special circumstances.¹⁴ See *AES Puerto Rico*, 8 E.A.D. at 329 (“[t]he Board will relax a filing deadline only where special circumstances exist”). For example, special circumstances warranting review of an otherwise untimely petition have been found, inter alia, in cases where mistakes by the permitting authority have contributed to the delay in filing. See *In re Hillman Power Co.*, 10 E.A.D. 673, 680 n.4 (EAB 2002) (permit issuer failed to serve all parties that had filed written comments on the draft permit); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 123-24 (EAB 1997) (delay attributable to permitting authority that mistakenly instructed petitioners to file appeals with EPA’s Headquarter’s Hearing Clerk); *c.f. In re Russell City Energy Ctr.*, PSD Appeal No. 08-01, slip op. at 4 n.1 (EAB July 29, 2008), 14 E.A.D. ____ (determining that the Board need not consider whether a petition, filed two months after the decision date, was timely filed because the failure to provide the legally required notice prejudiced the petitioner’s ability to timely file a petition for review).

Petitioner suggests special circumstances are present here when he quotes, without citing, the Board’s decision in *In re Russell City Energy Center*, and then states that the “time period for review should not be considered expired until after the public notice period, which has not yet occurred.” Pet. at 7. Petitioner’s reliance on *Russell City* is misplaced. In that case, the petitioner, also Mr. Simpson, argued that his failure to meet threshold requirements for review

¹⁴ It is “within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.” *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970).

(including his lack of participation in the permit proceedings) was due to the permitting authority's failure to provide adequate notice of the draft permit. The petition for review was filed approximately two months after the final PSD permit for the facility was issued and less than 30 days after notice was published in the *Oakland Tribune*. *Russell City*, slip op. at 15-16, 14 E.A.D. at _____. Specifically, the Board determined that it need not consider whether the petition was timely filed because it determined first that the permit issuer had failed to provide the legally required notice. The Board determined that the petitioner had not received adequate notice of the draft permit because the permit issuer had failed to properly compile mailing lists of interested persons in accordance with 40 C.F.R. § 124.10(c)(1)(ix). *Russell City*, slip op. at 24, 14 E.A.D. at _____. Because the permit issuer had not fully complied with the notice requirements, the Board determined that the petition warranted review despite petitioner's failure to participate in the proceedings below. *Id.* at 25-26.

The circumstances of this case are clearly distinct from those in *Russell City*. First, the Petitioner has submitted no specific information regarding BAAQMD's notice of the 2001 Permit and asserts only that he "demonstrated an interest in permitting activities and requested to be placed on the [BAAQMD's] mailing list of persons interested" at the *amendment* stage, long *after* the 2001 Permit issuance. Pet. at 8.¹⁵ Thus, Petitioner has set forth no special

¹⁵ As noted in Part I.B., above, BAAQMD asserts that it had issued a "Public Notice" and "Engineering Evaluation for Proposed Amended Authority to Construct (ATC) and Draft PSD Permit" on June 4, 2008.

circumstances to suggest this late filing is the fault of the issuing agency.¹⁶ *See supra* Part I.A. (citing 40 C.F.R. § 124.19(a)) (“petitioner bears the burden of setting forth, in the petition, the basis for appeal and the threshold jurisdictional requirements”).

Second, the Board’s decision in *Russell City* does not provide precedent for allowing an individual to reach back in time indefinitely to challenge the failure to properly notify the public of a preconstruction permit after the facility has already finished construction and commenced operation. Clearly, the Board has an interest, as does the public and the regulated community, in bringing finality to the Agency’s administrative proceedings, particularly in the context of preconstruction permits. *See In re Shell Offshore, Inc.*, OCS Appeal Nos. 07-01 & 07-02, slip op. at 53 n.55 (EAB Sept. 14, 2007), 13 E.A.D. at __ (quoting *In re New England Plating Co.*, 9 E.A.D. 726, 732 (EAB 2001)) (restating the well-established policy that decisions on permit issues should be made by the permit issuer in the first instance – and not raised for the first time on appeal – because, among other things, this serves the *important function of providing “predictability and finality” in the permitting process* (emphasis added); *In re ConocoPhillips Co.*, PSD Appeal 07-02 (Sept. 26, 2007) (Order) (noting the Board’s ongoing practice of assigning PSD permit appeals the highest priority on its docket, relative to other appeals where resolution of the appeal is not a prerequisite to a facility’s construction or operation); *see also In re B & L Plating, Inc.*, 11 E.A.D. 183, 191 (EAB 2003) (noting the Board’s interest in bringing finality to Agency proceedings, and dismissing as untimely an appeal from an enforcement

¹⁶ As noted above, *supra* at 4, Petitioner bears the burden of setting forth in the petition the basis for appeal and the threshold jurisdictional requirements. 40 C.F.R. § 124.19.

proceeding where there were no known special circumstances to excuse the untimeliness).

Accordingly, the Board holds that this appeal from the 2001 Permit is untimely.

B. No Other Permit or Basis for Jurisdiction Has Been Identified

Other than the 2001 Permit, Petitioner identifies no other permitting action that can be characterized as a final permit within the meaning of 40 C.F.R. sections 124.2 and 124.19.¹⁷ In any permit appeal to the Board, Petitioner bears the burden to set forth, in the petition, the basis for appeal and the threshold jurisdictional requirements, which include identifying the permit terms from which the appeal arises. 40 C.F.R. § 124.19(a) (requiring petitioners to state in petitions the grounds for review); *see also In re Beeland Group, LLC, Beeland Disposal Well #1*, *uic Appeal Nos. 08-01, 08-02 & 08-03*, slip op. At 8-9 (EAB Mar. 6, 2008), 14 E.A.D. ____ (explaining that a petitioner must demonstrate that the threshold procedural requirements for permit appeals are met, including timeliness, standing, preservation of issues for review, and

¹⁷ Although not technically filed with the Board, Petitioner's reply brief alludes to other ill-defined permitting actions that cannot be characterized as final permits within the meaning of 40 C.F.R. sections 124.2 and 124.19. *See Reply Br.* at 2 ("The final permitting action is likely that which permits the facility's operation. * * * The present permit may or may not be in writing and may or may not be identified as a PSD permit. * * * The Final action was likely after the February 13, 2009 letter when PG&E allegedly 'withdrew' its Major Amendment of the permit[.] * * * The PSD permit may take a more affirmative form in some document that has not been introduced or is contained in the administrative record that has been kept a secret or some document that will be subsequently characterized as a PSD permit."). As noted before, *supra* note 4 and accompanying text, the Board does not treat the reply brief as filed. The Board notes, however, that the reply brief also fails to identify a basis for Board review. It is not the Board's job to scour the record to find a supportable basis for jurisdiction. 40 C.F.R. § 124.19(a) (requiring petitioners to state in their petitions the grounds for review); *cf. In re ConocoPhillips Co.*, PSD Appeal 07-02, slip at 45 (EAB Jun. 2, 2008), 13 E.A.D. ____ (articulating the well-established parallel principle that it is not the Board's responsibility "to scour the record to determine whether an issue was properly raised below").

articulation of the challenged permit conditions with sufficient specificity); *In re BP Cherry Point*, 12 E.A.D. 209, 216-17 (EAB 2005) (explaining that the petitioner bears the burden of demonstrating that review is warranted). Petitioner has not met his burden in this petition.

III. CONCLUSION

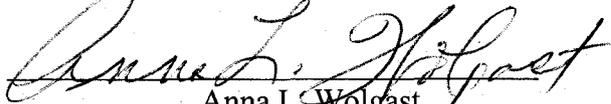
Based on the foregoing, the Board holds that this Petition to review the 2001 Permit is untimely and no other basis for jurisdiction has been identified. As such, this Petition is dismissed.¹⁸

So ordered.¹⁹

Dated:

September 15, 2009

ENVIRONMENTAL APPEALS BOARD


Anna L. Wolgast
Environmental Appeals Judge

¹⁸ Because the Board is dismissing this Petition, CARE's Motion to Intervene and Petitioner's pending Motion to Compel and Request for Sanctions (filed June 9, 2009) are moot.

¹⁹ The three-member panel deciding this matter is comprised of Environmental Appeals Judges Anna L. Wolgast, Kathie A. Stein, and Charles J. Sheehan. *See* 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order Dismissing Petition for Review** in *Gateway Generating Station*, PSD Appeal No. 09-02, were sent to the following persons in the manner indicated.

**By Certified Mail
Return Receipt Requested**

Rob Simpson
27126 Grandview Avenue
Hayward, CA 94542
(510) 909-1800 (Tel.)
(510) 537-9801 (Fax)

Brian C. Bunger
Alexander G. Crockett
Assistant Counsel
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109
(415) 749-4732 (Tel.)
(415) 749-5103 (Fax)

David R. Farabee
Diana J. Graves
Pillsbury Winthrop Shaw Pittman LLP
50 Fremont Street
Post Office Box 7880
San Francisco, CA 94120-7880
(415) 983-1000 (Tel.)
(415) 983-1200 (Fax)

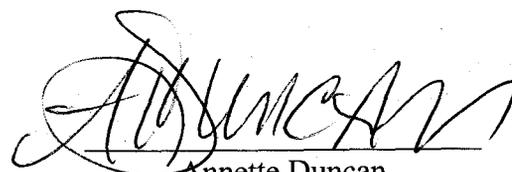
William V. Manheim
David T. Kraska
Law Department
Pacific Gas and Electric Company
Post Office Box 7442
San Francisco, CA 94120
(415) 973-7503 (Tel.)
(415) 973-5952 (Fax.)

Californians for Renewable Energy, Inc.
Robert Sarvey
Lynne Brown
24 Harbor Road
San Francisco, CA 94124
(415) 285-4628 (Tel.)

By Pouch Mail and by Facsimile:

Nancy Marvel, Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 9
75 Hawthorne Street
San Francisco, CA 94105
(415) 947-8705 (Tel.)
(415) 947-3571 (Fax)

Dated: SEP 15 2009


Annette Duncan
Secretary