

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

In the matter of)	
)	PSD Appeal No. 08-08
Gateway Generating Station)	
_____)	

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9's BRIEF IN SUPPORT OF SUMMARY DISPOSITION**

INTRODUCTION

On June 18, 2009, the Environmental Appeals Board ("EAB") issued an Order to the United States Environmental Protection Agency, Region 9 ("EPA"). The Order indicated that Rob Simpson had petitioned for review of a permit issued by the Bay Area Air Quality Management District ("District") on July 24, 2001. The District issued the permit to allow Pacific Gas & Electric Company ("PGE") to construct a natural gas fired combined cycle power plant near Antioch, in Contra Costa County, California.

The EAB's Order directed EPA, the District and PGE to file briefs on or before July 2, 2009 addressing three specific jurisdictional questions.

Those three questions are: (1) whether any appeal from the original Authority to Construct permit would be timely; (2) whether the EAB would

have jurisdiction over an appeal from the Authority to Construct permit; and
(3) whether there is any other jurisdictional basis for this appeal.

As explained in detail below, the response to the first question is that any appeal of the combined local and federal PSD permit (called an “Authority To Construct” permit by the District and Petitioner) to Gateway Generating Station¹ filed after August 23, 2001, is untimely. The response to the second question, based on certain assumptions described more fully below, is that the EAB could have had jurisdiction over an appeal of the portions of the Authority to Construct comprising a combined local and federal PSD permit if the appeal had been filed within 30 days after July 24, 2001 (i.e. by August 23, 2001). And the response to the third question is that EPA is aware of no other basis for EAB jurisdiction over this matter.

STATEMENT OF FACTS

The District issued a final permit to PGE on July 24, 2001. Petitioner has submitted a copy of the permit as Exhibit 1 to his Petition, which EPA believes to be true and accurate. EPA understands that the District issued the permit pursuant to its local rules, Regulation 2, Rule 2, and pursuant to

¹ In July 2001, the permit was issued to Mirant Corporation LLC and the project was known then as Contra Costa Unit 8. PGE acquired the permit and facility subsequently and the project is now known as Gateway Generating Station. EPA will refer to the facility as Gateway Generating Station in this document.

EPA's delegation of authority for the federal Prevention of Significant Deterioration ("PSD") program set forth at 40 C.F.R. 52.21, in effect in July 2001. A copy of the delegation agreement in effect in July 2001 is appended to this Brief as EPA's Exhibit 1. Although the District issued a single permit which it called an Authority to Construct, the District's record as well as the permit itself clearly references the federal PSD program. *See e.g.* Petitioner's Exhibit 1, Conditions 14, 16, 20 - 24.

It is EPA's understanding that the District received one comment on the proposed permit. The comment was submitted by Michael Boyd on behalf of CALifornians for Renewable Energy ("CARE"). The District provided a written response to CARE's comment in February 2001, before the District issued the final permit in July. The District noted it could not issue the final permit until it had completed the Endangered Species Act consultation triggered by issuance of a federal PSD permit and the final PSD permit record included a letter from EPA stating that "the District may issue a final PSD permit . . . in accordance with the PSD Delegation Agreement between EPA and BAAQMD." Letter from Gerardo Rios, EPA Region 9, to Ellen Garvey, BAAQMD, July 12, 2001. When the District issued the final permit on July 24, 2001, the District's permit cited the federal PSD

regulations as a basis for several conditions in the permit. *See, e.g.,*

Petitioner's Exhibit 1, Conditions 14, 15, 20-24.

EPA is not aware that any person filed a timely appeal of the permit after it was issued on July 24, 2001. CARE, the sole commenter in 2001, was appealing a very similar combined local and federal PSD permit issued by the District in July 2001. *In re Metcalf Energy Center*, PSD Appeal Nos. 01-07 and 01-08 (Aug. 10, 2001), *aff'd*, *Santa Teresa Citizens Action Group v. EPA*, No. 01-71611 (9th Cir. Nov. 21, 2002).

ARGUMENT

I. The Board Lacks Jurisdiction Over this Appeal

A. An Appeal Filed After August 23, 2001 of the Federal PSD Permit Issued by the District on July 24, 2001 Would be Untimely

The District issued a combined local and federal PSD permit authorizing construction of the Gateway Generating Station on July 24, 2001. The permit was issued pursuant to the District's local permitting rules as well as the delegation of authority to implement the regulations at 40 C.F.R. 52.21. See EPA Exhibit 1 hereto.

The Petition introduces two possible sources of confusion as to the nature of the action being challenged. First, the Petition improperly characterizes the combined local and federal PSD permit as only a local Authority to

Construct permit. As the permit language itself and the final permitting record demonstrate, the permit was issued to implement the federal PSD regulations notwithstanding the District calling the permit an Authority to Construct permit.

Second, the Petition dwells on PGE's application to amend the 2001 combined permit. But the May 11, 2009 Petition's discussion of PGE's 2008 application for an amendment is a red herring.² PGE withdrew that application and will operate the facility as originally permitted on July 24, 2001. If PGE fails to comply with federal PSD conditions in the July 24, 2001, permit, PGE may be subject to federal enforcement. See 40 U.S.C. 7413.

In response to the Board's first and second questions, the final combined local and federal PSD permit the District issued on July 24, 2001, could have been appealed to this Board until August 23, 2001, provided a petition otherwise met this Board's threshold pleading requirements. See, e.g., *In Re Dominion Energy Brayton Point LLC*, PSD Permit Appeal 09-01, Unpublished Final Order (EAB May 13, 2009) (Petitioners are required to meet all threshold pleading requirements in 40 C.F.R. Part 124).

² A Petition filed on May 11, 2009 also would have been untimely as a challenge to *any* action taken in 2008, which ended more than 30 days before the filing.

A primary threshold pleading requirement is timeliness of the appeal as set forth at 40 C.F.R. 124.19, which is generally within 30 days after final permit issuance. As this Board held in *In Re: Town of Marshfield, Mass.*, NPDES 07-03, Unpublished Final Order, (EAB Mar. 27, 2007).

Failure to ensure that the *Board* receives a petition for review by the filing deadline will generally lead to dismissal of the petition on timeliness grounds as the Board strictly construes threshold procedural requirements like the filing of a thorough, adequate and timely petition. *Id*; *In re AES Puerto Rico L.P.*, 8 EAD 324, 328 (EB 1999) *cf.* *In Re Knauf Fiber Glass GmbH*, 9 EAD 1, 5 (EAB 2000)(denying review of several petitions on timeliness and standing grounds and noting the Board's expectations for petitions for review); *In Re Knauf Fiber Glass, GmbH*, 8 EAD 121, 127 (EAB 1999)(noting strictness of standard of review and Board's expectations of Petitions); *In Re Envotech, L.P.*, 6 E.A.D. 260, 266 (EAB 1996) (dismissing as untimely permit appeals received after the filing deadline).

The Petition here was filed almost eight years after the District issued the combined local and federal PSD permit. During those eight years, the facility has been constructed and is operating in accordance with the federal PSD conditions in the permit. Consistent with this Board's rules and longstanding precedent, the Petition should be dismissed.

The Petition in this matter relies exclusively on the Board's decision to remand a PSD permit issued by the Bay Area Air Quality Management District for the Russell City Energy Project to establish timeliness. *In re Russell City Energy Center*, PSD Appeal No. 08-01, slip op. (EAB, July 29,

2008). Petitioner's reliance on the *Russell City* decision is misplaced. The Petition in the *Russell City* matter was filed approximately two months after the District issued a final PSD permit. Petitioner Rob Simpson in the *Russell City* appeal asserted that the District had not properly noticed a draft permit in accordance with 40 C.F.R. 124.10. The Board agreed and remanded the permit for proper notice.

Petitioner Simpson is now seeking review of a PSD permit eight years after it was issued. Although Petitioner makes several unsubstantiated and conclusory allegations of improper notice, Petitioner has not submitted any specific information regarding the District's notice of the Gateway Generating Station (known in 2001 as Mirant's Contra Costa Unit 8) permit.

This Board's decision in *Russell City* does not provide precedent for allowing an individual to reach back in time eight years to challenge a pre-construction permit after the facility has finished construction and commenced operation. While there may be other remedies available for violations during the construction period or during operation, an appeal to this Board is not one of them. The purpose for the regulation allowing only 30 days for filing an appeal is to allow applicants who meet the federal PSD requirements to begin their projects.

B. There is no other basis for jurisdiction.

In response to this Board's third question, EPA is not aware of any other jurisdictional basis for an appeal. Moreover, even if there were some other jurisdictional basis for an appeal, the Petition provides no basis for relief because it fails to comply with this Board's minimum pleading requirements to demonstrate clear error by the permitting authority. This Board has summarized that:

In order to succeed on the merits, the Petitioner must demonstrate that the actions of the permitting authority were based on (1) a finding of fact or conclusion of law that is clearly erroneous; or (2) an exercise of discretion or an important policy consideration that the Board should, in its discretion, review. 40 C.F.R. § 124.19(a); see also *In re Sutter Power Plant*, 8 E.A.D. 680, 686-87 (EAB1999); *In re Steel Dynamics, Inc.*, 9 E.A.D. 740, 743-44 (EAB 2001). We have noted repeatedly that the "power of review should be only sparingly exercised" and that "most permit conditions should be finally determined at the [permitting authority] level." *See, e.g., Knauf I*, 8 E.A.D. at 127 (quoting 45 Fed. Reg. 33,290, 33,412 (May 19, 1980) (preamble to the rulemaking that established part 124)). Accordingly, for each issue raised in a petition, the petitioner bears the burden of demonstrating that review is warranted. *See Steel Dynamics*, 9 E.A.D. at 744.

In Re B.P. Cherry Point, 12 E.A.D. 209, 217 (EAB 2005).

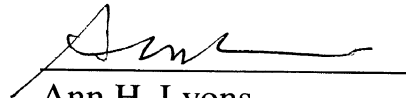
The Petition in this instance fails to meet these minimum criteria and must be dismissed.

CONCLUSION

For the reasons set forth above, EPA respectfully requests this Board to grant the District's and PGE's requests for summary disposition and to dismiss the Petition.

Date: July ¹/₂, 2009

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Ann H. Lyons", is written over a horizontal line.

Ann H. Lyons
Assistant Regional Counsel
U.S.E.P.A., Region 9

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2009, I filed the following documents by placing an original in the USEPA Pouch Mail to the Environmental Appeals Board (on July 1, 2009) and by filing an electronic PDF file at the Central Data Exchange.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 9's
BREIF IN SUPPORT OF SUMMARY DISPOSITION

I also deposited a true and correct copy of the document listed above in the U.S Mail on July 2, 2009, to:

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Dated: 7/2/09


Heidi Reeves