

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

\_\_\_\_\_  
In the matter of: ) PSD Appeal No. \_\_\_\_\_  
 )  
Gateway Generating Station )  
 )  
 )  
PSD Permit Number UNKNOWN )  
\_\_\_\_\_ )

**PETITION FOR REVIEW**

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## EXHIBIT LIST

A copy of the Gateway Authority To Construct (“ATC”), dated July 24, 2001, is attached as Exhibit 1.

On June 4, 2008 the Bay Area Air Quality Management District (District) issued a “Public Notice” and “Engineering Evaluation For Proposed Amended Authority To Construct (ATC) And Draft PSD Permit” (Exhibit 2)

series of public requests in this and the Russell City Energy Center after the Remand attached (Exhibit 3)

ATC “renewals” (Exhibit 4)

### **EPA REGION IX POLICY ON PSD PERMIT EXTENSIONS**

Guidance Document: 1-88 (Exhibit 5)

The Petition to Amend Air Quality Conditions in the Gateway Generating Station Project Final Decision, submitted to the California Energy Commission, dated January 15, 2008, which includes the Application to the Bay Area Air Quality Management District for Modifications to the Authority to Construct for the Gateway Generating Station, Antioch, California (Exhibit 6),

The Petition for Conditional Approval of Ownership Addition,  
Request for Updated Construction Milestones, *and*  
Petition for Approval of Equipment Enhancements (to CEC) (Exhibit7)

CPUC Resolution E-4054. Pacific Gas & Electric (PG&E) (Exhibit 8)

Public comments provided regarding the Amendment by Bob Sarvey (Exhibit 9)

## **PETITION FOR REVIEW AND REQUEST FOR ORAL ARGUMENT**

### **INTRODUCTION**

Pursuant to 40 C.F.R. § 124.19(a), Rob Simpson petitions for review of the Prevention of Significant Deterioration (“PSD”) Permit related to Gateway Generating Station (Gateway) issued by The Bay Area Air Quality Management District (“District”). A copy of the Gateway Authority To Construct (“ATC”) dated July 24, 2001, is attached as Exhibit 1. The PSD permit is not identified.

Rob Simpson contends that the District committed numerous procedural and substantive errors in issuing and renewing the Gateway PSD Permit.

Despite serious errors in the initial permit, a five year suspension in construction, failure to provide opportunity for public participation, major modifications from permitted construction and operations, and lack of Best Available Control Technology (BACT) reanalysis, the District extended the permit biannually since it was issued. The Board should remand the permit and require the District to correct these flaws.

Rob Simpson requests oral argument in this matter. Oral argument would assist the Board in its deliberations on the issues presented by the case because the administrative record is unclear; the issues raised are generally a source of significant public interest and are of a nature such that oral argument would materially assist in their resolution.

## **Background**

The Gateway ATC Permit authorized construction of a new 530-megawatt natural gas fired electric utility generating unit. The facility is located at 3201 Wilbur Avenue, east of the city of Antioch, in Contra Costa County, California. The project received an Authority To Construct (ATC) purportedly combined with a PSD permit on July 24, 2001. Construction of the facility started late in 2001 and was suspended in February of 2002, with approximately 7 percent of construction completed, due to financial difficulties of the original owner Mirant Delta, LLC. In November of 2006 Pacific Gas and Electric (“PG&E”) completed an asset transfer agreement acquiring the project and changed the name of the facility to the Gateway Generating Station. PG&E restarted construction on February 5, 2007, five years after the suspension. On December 18, 2007 PG&E filed Permit Application No. 17182 “a Major Modification to a Major Source”. On June 4, 2008 the Bay Area Air Quality Management District (District) issued a “Public Notice” and “Engineering Evaluation For Proposed Amended Authority To Construct (ATC) And Draft PSD Permit” (Exhibit 2) and received public comments. On July 29, 2008, the Environmental Appeals Board (“EAB”) issued a (Remand) of the District-issued PSD permit for the Russell City Energy Center (RCEC) 08-01, citing “The District’s complacent compliance approach”. On November 1, 2008 PG&E commenced operations of the facility consistent with the amendment. The District did not respond to public comments or publish a final PSD permit or Authority to Construct consistent with the amendment.

## **THRESHOLD PROCEDURAL REQUIREMENTS**

### **PETITIONER MUST BE EXCUSED FOR FAILURE TO PARTICIPATE IN THE PERMIT PROCESS BECAUSE THE DISTRICT DID NOT ISSUE REQUIRED PUBLIC NOTICE(S) OF THE PERMIT OR EXTENSIONS**

The Board had previously determined in the Remand:

Mr. Simpson may raise his notice claims for Board consideration despite Mr. Simpson's "failure" to meet the ordinary threshold for standing under 40 C.F.R. § 124.19(a), which limits standing to those who participate in a permit proceeding by filing comments on the draft permit or participating in a public hearing on a draft permit. Denying Board consideration of fundamental notice claims would deny parties the opportunity to vindicate before the Board potentially meritorious claims of notice violations and preclude the Board from remedying the harm to participation rights resulting from lack of notice. Such denial would be contrary to the CAA statutory directive emphasizing the importance of public participation in PSD permitting and section 124.10's expansive provision of notice and participation rights to the public (Remand).

Also:

Obviously, a person who does not receive notice of a draft permit (and is otherwise unaware of its issuance) will not be able to participate to the extent of filing comments on the draft permit, and thereby satisfy the procedural threshold imposed by section 124.19(a), entitling that person to standing before the Board (Remand).

The time period for review should not be considered expired until after the public notice period, which has not yet occurred.

"The 30-day period within which a person may request review under this section begins with the service of notice of the Regional Administrator's action unless a later date is specified in that notice" (40 C.F.R. § 124.19(a)).

Petitioner demonstrated an interest in permitting activities and requested to be placed on the District's "mailing list of persons interested in permitting actions" 40cfr124.10(c)(1)(ix)(A)-(C), prior to the issuance of the public notice for the Amendment to the project.

In order to correct serious and fundamental deficiencies in the District's public notice of the draft permit and to remedy the resulting harm to the PSD program's public participation process, the Board finds it necessary to remand the Permit to the District to ensure that the District fully complies with the public notice and comment provisions of section 124.10.30. On remand, the District must scrupulously adhere to all relevant requirements in section 124.10 concerning the initial notice of draft PSD permits (including development of mailing lists), as well as the proper content of such notice (Remand).

Petitioner did not receive notice of the opportunity for public participation until after close of the public comment period, and that notice was provided by Bob Sarvey, not the District.

Petitioner raised this issue with the District and was repeatedly assured that the PSD permit would be renoticed. In late April 2009, as a result of repeated inquiries to the District, Petitioner was informed that the Amendment was withdrawn and that Gateway had commenced operations under the original 2001 permit. If the petitioner had not been deceived by the District as to renoticing the Draft permit he could have acted sooner.

**PETITIONER SATISFIES THRESHOLD PROCEDURAL REQUIREMENTS BECAUSE THIS PETITION CHALLENGES "CHANGES FROM THE DRAFT PERMIT TO THE FINAL DECISION".**

Major modifications have occurred in the construction and operation of the facility that allow it to pollute more than the 2000-2001 BACT determinations. Petitioner also challenges the validity of "renewals" of the permit given the 5-year lapse in construction and lack of opportunity for public participation.

## ARGUMENT

### **I. THE BOARD SHOULD REMAND THE PSD PERMIT BECAUSE THE DISTRICT DID NOT PROVIDE FOR PUBLIC PARTICIPATION IN ITS PERMITTING OR EXTENSIONS.**

Petitioner's knowledge of the proceeding is limited by the District's secretive and deceptive permitting actions and failure to provide a copy of the administrative record for permitting action(s) Petitioner has had ongoing difficulty obtaining "public records" from the District as demonstrated in the series of public requests in this and the Russell City Energy Center (after the Remand) attached (Exhibit 3) . The present status of the permit is indiscernible. If the content of this petition is insufficient to earn a remand of any PSD permit for this facility, Petitioner requests that the Board compel the District to respond to petitioners Public Records request so that he could be informed in order to participate in this action.

The District issues PSD Permits pursuant U.S. EPA -Bay Area Air Quality Management District Agreement for Delegation of Authority to Issue and Modify Prevention of Significant Deterioration Permits Subject to 40 CFR 52.21, which includes:

For all applications for new or modified PSD permits other than those set forth in paragraph 1 above, the existing District regulations continue to generally meet the requirements of 40 CFR 52.21 for issuing PSD permits; therefore District permits issued in accordance with the provisions of Regulation 2 -Rule 2 shall be deemed to meet federal PSD permit requirements pursuant to the provisions of this delegation agreement.

Source:

[http://www.epa.gov/region/air/permit/pdf/baaqmd-delegation\\_agreement.pdf](http://www.epa.gov/region/air/permit/pdf/baaqmd-delegation_agreement.pdf)

The District did not process the initial permit or extensions of the 2001 ATC

consistent with Regulation 2-Rule 2. They did apparently issue ATC “renewals” (Exhibit 4), pursuant to their Rule 2-1-407.3, which did not provide for public participation or provide any reference to the PSD permit. The District has offered no evidence that they ever issued any public notice for the ATC or PSD permit.

The permit and renewals did not incorporate any of the requirements contained in EPA Region IX Policy On PSD Permit Extensions Guidance Document: 1-88 (Exhibit 5), which states, “The import of this policy is to ensure that the proposed permit meets the current EPA requirements, and that the public is kept apprised of the proposed action (i.e. through the 30-day public comment period).” Additionally, regarding public participation, it states,

EPA will require the same public comment procedure for extension requests as for permit modifications including a 30-day public comment period. Requests for public hearings and petitions for permit appeals shall follow the applicable procedures of 40 CFR Part 124.

## **II. THE BOARD SHOULD REMAND THE PSD PERMIT BECAUSE THE APPLICANT VIOLATES THE CONDITIONS OF THE PERMIT WITHIN FEDERAL AND STATE LAW; THE PROJECT IS NOT CONSTRUCTED OR OPERATED CONSISTENTLY WITH THE ATC OR THE ORIGINAL PSD ANALYSIS**

Petitioner last inquired as to the status of the Amendment in April 2009. The District informed petitioner that the Amendment had been withdrawn that the facility was operating under the original permit. Because the facility is constructed and apparently operated consistent with the (withdrawn) amendment and not the original ATC or PSD analysis, it does not conform with the Clean Air Act, District Rules or original permit conditions.

### **District rule 2-1-305 Conformance with Authority to Construct:**

A person shall not put in place, build, erect, install, modify, modernize, alter or replace any article, machine, equipment, or other contrivance for which an authority to construct has been issued except in a manner substantially in conformance with the authority to construct. If the APCO finds, prior to the issuance of a permit to operate, that the subject of the application was not built substantially in conformance with the authority to construct, the APCO shall deny the permit to operate.

**District rule : 2-1-307 Failure to Meet Permit Conditions:**

A person shall not operate any article, machine, equipment or other contrivance, for which an authority to construct or permit to operate has been issued, in violation of any permit condition imposed pursuant to Section 2-1-403.

**III. THE BOARD SHOULD REMAND THE PSD PERMIT BECAUSE THE DISTRICT HAS OFFERED NO EVIDENCE THAT THEY EVER ISSUED A PSD PERMIT FOR THIS FACILITY.**

The District gave no indication in any of the (unpublished) permits or renewals that the permit was in fact a PSD permit or included a PSD permit. The District has offered no evidence that it ever provided public notice or issued a PSD permit for this facility beyond the following statement sent to the petitioner by email from Alexander Crockett (District Assistant Counsel)

“I had a copy of the permit document scanned for you – it’s attached. It was issued to Mirant Delta, who initially owned the project before selling it (and transferring the permits) to PG&E. Also, as you’ll see it states only that it is an Authority to Construct and does not mention the fact that it’s the federal PSD permit as well. That is a relic from the old days where the District was less conscientious about acknowledging the distinction between the federal and state-law permits. But it was issued to serve as the federal PSD permit as well as the state-law Authority to Construct. EPA Region IX is reviewing the situation to confirm that there are no federal PSD compliance issues.”

Petitioner agrees that it “is a relic” including the BACT analysis.

**IV. THE BOARD SHOULD REMAND THE PERMIT BECAUSE MAJOR MODIFICATIONS HAVE OCCURRED IN THE CONSTRUCTION AND OPERATION OF THE FACILITY THAT ALLOW IT TO POLLUTE EVEN MORE THAN THE 2000-2001 BACT DETERMINATIONS.**

The Petition to Amend Air Quality Conditions in the Gateway Generating Station Project Final Decision, submitted to the California Energy Commission,

dated January 15, 2008, *which includes the Application to the Bay Area Air Quality Management District for Modifications to the Authority to Construct for the Gateway Generating Station, Antioch, California* (Exhibit 6), *states*, “The proposed increase in annual CO emissions will exceed 100 tons per year, so the Project will be a major modification of the existing major source under District New Source Review regulations” (2). *It also states*, “PSD air quality analysis requirements (Rule 2-2-305.2) are applicable because the CO emissions increases resulting from the proposed modifications will be above the PSD *de minimis* level (see Section III)” (13). *The petition states*, “The GGS gas turbine units and heat recovery steam generators will be subject to the requirements of Title IV of the federal Clean Air Act. The requirements of the Acid Rain Program are outlined in 40 CFR Part 72. The specifications for the type and operation of continuous emission monitors (CEMs) for pollutants that contribute to the formation of acid rain are given in 40 CFR Part 75. District Regulation 2, Rule 7 incorporates by reference the provisions of 40 CFR Part 72. Pursuant to 40 CFR Part 72.30(b)(2)(ii), GGS must submit an Acid Rain Permit Application to the District at least 24 months prior to the date on which each unit commences operation. The required Acid Rain Permit Application was submitted to the District and to EPA in December 2006” (17).

*The District indicated that they had not issued a title IV permit for the facility, yet the facility commenced operation prior to the end of the 24th month.*

“When the project was originally permitted, the gas turbines were subject to the requirements of Subpart GG. However, since the facility did not commence construction as defined under the NSPS before February 18, 2005, the requirements of Subpart KKKK are now applicable” (4).

“The previous owner of the project, Mirant, commenced construction under a valid ATC in 2001, but suspended construction in 2002. Because substantial use had been made of the ATC, the BAAQMD renewed the ATC in accordance with Rule 2-1-407.3. However, the NSPS defines “commence” as “undertak[ing] a continuous program of construction...or...entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of

construction...” (40 CFR 60.2) A suspension in construction of longer than 18 months is generally used by EPA to determine that construction has not been continuous” (18).

“Since the net increase in emissions of this pollutant exceeds the applicable significance threshold, a revised ambient air quality analysis is required for CO. Because changes are being proposed to the emission rates during gas turbine startup and commissioning, new startup modeling has also been carried out” (20).

The District's Engineering Evaluation For Proposed Amended Authority To Construct (ATC) And Draft PSD Permit, dated June 2008 (Exhibit 2), states:

Permit Application No. 17182 is considered a major modification to a major source per Regulation 2-2-405 due to an increase in carbon monoxide emissions from the proposed amended Authority to Construct and proposed draft PSD permit. The document is required to be subject to a 30 day public comment period in accordance with Regulation 2-2-405 and the PSD regulations and the PSD delegation agreement.

The amendment of the Authority to Construct consists of:

- Replacing the wet cooling tower and replacing it with a dry cooling system.
- Reducing hourly emission rates of NOx (as NO2), CO, and PM10 during normal operations to levels consistent with current Best Available Control Technology (BACT) levels for similar projects.
- Increasing startup emissions estimates based on data from facilities using identical turbines.
- Reducing the maximum hourly emissions of CO during startup to 900 lb/hour.
- Increasing the daily CO permit limit for the facility.
- Increasing annual CO permit limits for the facility based on data from facilities using identical turbines.
- Increasing the allowable commissioning emissions for the gas turbines and heat recovery steam generators (HRSGs).
- Replace the natural gas fired preheater with a smaller unit that is exempt from District permit requirements.
- Add a 300 HP Diesel Fire Pump engine to the facility. (1)

**TABLE 1. MAXIMUM ANNUAL REGULATED CRITERIA AIR POLLUTANT EMISSIONS FOR THE FACILITY.**

	NO <sub>2</sub> (ton/yr)	CO (ton/yr)	POC (ton/yr)	PM <sub>10</sub> (ton/yr)	SO <sub>2</sub> (ton/yr)
<b>Original Limits</b>	174.3	259.1	46.6	112.2	48.5
<b>New Limits</b>	174.3	554.3	46.6	101.7	37.0

(4)

The Petition for Conditional Approval of Ownership Addition, Request for Updated Construction Milestones, Petition for Approval of Equipment Enhancements to

the CEC (Exhibit 7) States:

**Air Quality:** The oil water separator is expected to require an authority to construct permit from the BAAQMD because the above-ground components of the separator are considered to be a source of emissions. The oil water separator will not extend the 22-month construction period assumed for Unit 8 or result in additional site disturbance. Any construction impact on air quality therefore will be mitigated by existing conditions of certification.

PG&E has repeatedly acknowledged awareness of the necessity of an amendment as they built a facility that was not what had been permitted by the previous owner. They used this as the basis for approval of additional funding from ratepayers through the California Public Utilities Commission (CPUC).

CPUC Resolution E-4054. Pacific Gas & Electric (PG&E) (Exhibit 8) states the following: “This Resolution conditionally approves PG&E’s request for approval of an increase of \$75.5 million in the capital costs and resulting revenue requirement increase of \$13.2 million” (1). It also states, ““The ATA also stipulated that all biological issues associated with constructing and operating the facility must be resolved with the appropriate federal and state resources agencies” (2).

“In a July 19, 2006 order amending its prior decision in order to add PG&E as an owner of CC8, the CEC adopted the following staff recommendations:

PG&E and Mirant will obtain Energy Commission approval of an amendment reflecting a new mitigation program which mitigates the cooling system impacts to a less than significant level and is acceptable to the federal and state resource agencies and obtain all required permits prior to the start of operation. (The previously drafted Biological Opinions from the USFWS and the National Marine Fisheries Service would not satisfy this requirement. (3)

PG&E notes that the Settling Parties were fully aware, and made the Commission aware, that other regulatory agencies might modify CC8’s environmental permits in a way which could lead to an increase in costs either because of a change in design or delay in construction. (7)

**V. THE BOARD SHOULD REMAND THE PERMIT BECAUSE IT DOES NOT UTILIZE BEST AVAILABLE CONTROL TECHNOLOGY (BACT).**

EPA Region IX Policy On PSD Permit Extensions Guidance Document: 1-88

(Exhibit 5) states:

**“BACT Analysis** A BACT reanalysis is required in all permit extension requests, as in an application for a new PSD permit. It should also be noted that, according to a recent EPA policy, any new BACT determination being prescribed for any regulated pollutant must also consider the impact of the proposed BACT on the emissions of unregulated or toxic pollutants. “

The permit appears to rely on the BACT analysis from 2001.

The BACT determinations for the Gateway project PSD and ATC do not meet BACT requirements established as far back as July 18, 2003. Part of Federal Regulations require that the PSD permit be renewed every 18 months with the BACT determinations adjusted accordingly and the public comment period allowed for each PSD extension.

	2001 BACT Determination	2009 District BACT
NOx	2.5 ppm average over 1 hour	2 PPM averaged over 1 hour
CO	6 ppm averaged over 1 hour	4 PPM averaged over 1 hour

The Greenhouse Gas and Particulate Matter (PM) output of this facility is significantly higher than current technology would offer.

Public comments provided regarding the Amendment by Bob Sarvey (Exhibit 9). Mr Sarvey identified significant flaws in the draft permit amendment and demonstrated that the plan, even with the amendment, does not comply with the Clean Air Act. Mr Sarvey indicated to the Petitioner that he had not received a response to his comments.

It is notable that the similar facility, from the same era, in the same air basin, with a similar permitting scheme, that was the subject of the Remand to the District received hundreds of extensive comments on the reissue of the Draft permit, that are absolutely germane to this permit including:

“The proposed PSD permit fails to meet federal requirements regarding the use of best available control technology (“BACT”). (3 pages)

Pete Stark, Member of Congress

“The draft permit fails to meet federal PSD requirements relating to the need for best available control technology (“BACT”).” (220 pages)

Paul Cort, Staff Attorney, Earthjustice

“The District has failed to properly fulfill its duty, under the BACT requirements.” (404 pages)

Sanjay Narayan, Senior Attorney, Serria Club

the District should not issue the permit as proposed because it fails to meet federal PSD and nonattainment new source review (NSR) requirements. (75 pages)

Golden Gate University Environmental Law and Justice Clinic

Helen Kang, Deborah Behles, Ashling McAnaney,  
James Barringer and Ethan Wimert

the project does not propose to use the Best Available Control Technology (95 pages)

Simpson/CALifornians for Renewable Energy (CARE) Michael E. Boyd President  
Lynne Brown Vice-President

Petitioner requests the opportunity to more fully brief his BACT argument after he has been provided access to the administrative record for the permit and incorporates the Public comments from the RCEC Draft permit presently under review by the District into this present BACT argument. They are available at: [http://www.baaqmd.gov/pmt/public\\_notices/2009/15487/letters/index.htm](http://www.baaqmd.gov/pmt/public_notices/2009/15487/letters/index.htm).

The District indicated that they have not issued a permit to operate despite the fact over over 180 days have elapsed since start up. District rule 2-2-411 indicates that this may be “deemed a denial of the permit.”

**2-2-411 Permit to Operate, Final Action:** The APCO shall take final action to approve, approve with conditions, or disapprove a permit to operate a source subject to this Rule within 60 days after start-up of the new or modified source. However, failure to act within the 60 day period, unless the time period is extended with the written concurrence of the applicant, shall be deemed to be a denial of the permit. Such denial may be appealed to the Hearing Board in accordance with the provisions of Regulation 2-1-410.

## **Conclusion**

I tried to resolve these concerns without dependence on the Board. I outlined my concerns, without resolution, to the District Assistant Counsel, Alexander Crockett, District Air Quality Engineer, Brian Lusher, EPA Region 9, Attorney, Anne Lyons, EPA Region 9, Chief of Permits Gerardo Rios and CEC Compliance Project Manager, Ron Yasny, They all seemed aware and comfortable with the scheme, except, to his credit, Mr. Rios who indicated that he would look into it.

It appears that the District and applicant acknowledged the need for a current PSD permit in multiple proceedings. The District issued a draft permit, received comments on the Draft permit. Then they received the Remand for a similar project. They realized they could not permit this facility as planned and chose to quietly allow its operation, in spite of the Remand and lack of valid permit. They profited greatly, through purporting to obtain necessary permits.

The egregious nature of these actions extend well beyond “The District’s complacent compliance approach” identified in the Remand.. They are more akin to Racketeering and an ongoing criminal conspiracy to defraud the public and to

circumvent the Clean Air Act. They attempt to undermine to peoples ability “to petition the Government for a redress of grievances.”

The Board bestowed ample and clear guidance to the District in the Remand. The districts actions are not a result of ignorance. The District chose concealment rather than disclosure. They intentionally allow this facility to operate in violation of the Clean Air Act. I ask that the Board impose appropriate sanctions against the District and applicant for their actions.

The District has likely, never issued a PSD permit correctly. Unless the District can demonstrate that they have issued at least one PSD permit that conforms to the Clean Air Act, the EPA should revoke the Districts authority to issue PSD permits

The Board is requested to remand the permit.

Respectfully Submitted,

**Verification**

I am the Appellant herein, and am authorized to make this verification on my own behalf. The statements in the foregoing document are true of my own knowledge, except matters, which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 5<sup>th</sup> day of May 2009, at Hayward, California.

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