

**BAY AREA
AIR QUALITY
MANAGEMENT
DISTRICT**

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FACSIMILE TRANSMITTAL SHEET

DATE:
9/2/2009

FROM:
Alexander G. Crockett, Esq.

TO:

FAX:
(202) 233-0121

Honorable Judges of the
Environmental Appeals Board
United States Environmental
Protection Agency
c/o Clerk of the Board, Environmental
Appeals Board

COMPANY/FIRM:
In re Gateway Generating Station
PSD Appeal No. 09-02

PHONE NUMBER:

REFERENCE:

TOTAL NO. OF PAGES INCLUDING COVER:

SUBJECT:
Correspondence of September 2, 2009

HANDLING:
X Hard copy will be mailed
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URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY PER YOUR REQUEST

NOTES/COMMENTS:

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ENVIRONMENTAL APPEALS BOARD
September 2, 2009

BY FAX & FEDEX

Honorable Judges of the Environmental Appeals Board
United States Environmental Protection Agency
c/o Clerk of the Board, Environmental Appeals Board
1341 G Street, N.W., Suite 600
Washington, DC 20005

Re: *In re Gateway Generating Station*, PSD Appeal No. 09-02.

Dear Environmental Appeals Judges:

Respondent the Bay Area Air Quality Management District ("District") submits this letter to bring to the Board's attention recent relevant factual information that has arisen since the completion of briefing in the above-referenced matter.

Specifically, the District wishes to bring to the Board's attention the issuance of a Finding and Notice of Violation ("FNOV") by EPA Region IX to Pacific Gas & Electric Co. ("PG&E") regarding the Gateway Generating Station. A copy of this FNOV, dated August 12, 2009, is attached hereto. As stated in the FNOV, EPA Region IX has made a finding that PG&E is in violation of the Clean Air Act by "operating GGS, a major new source of air pollution, without obtaining a valid PSD permit." (See FNOV at p. 4, ¶ 16.)

The fact that EPA Region IX has issued this FNOV is relevant here because it further demonstrates that the claims that Petitioners have raised in this matter – claims that the facility did not have a current, valid PSD permit when it recommenced construction – are moot since there is no dispute between the Petitioner and the permitting agencies on this point.¹ As the Air District has explained in its filings in this matter, the appeals procedure set forth in 40 C.F.R.

¹ As the District has explained in its earlier briefing, the District defers to EPA Region IX's interpretation of legal issues regarding PSD permits under the Delegation Agreement between the two agencies. The District therefore adopts EPA Region IX's current interpretation on the status of the PSD permit.

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Honorable Judges of the Environmental Appeals Board

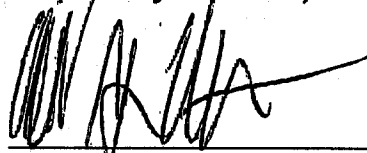
September 2, 2009

Page 2

section 124.19 exists so that the Environmental Appeals Board can adjudicate permitting issues that arise between petitioners dissatisfied with agency permitting decisions and the agencies that have made those decisions. Where, as here, there is no dispute between the agency and the petitioner on the matter at hand, the petition is moot and there is nothing for the Board to adjudicate in a Section 124.19 appeal. In such a situation, the Board should dismiss the petition as moot under the various authorities that the District has cited in its papers. As the District has explained, claims of PSD non-compliance raised in a Petition such as this one are a matter that should appropriately be handled through the Clean Air Act enforcement mechanism, as EPA Region IX is currently doing, and not in a permit appeal under Section 124.19.

The District would be happy to submit a brief to explain the importance of this recent factual development in more detail if the Environmental Appeals Board so desires.

Respectfully submitted,



Alexander G. Crockett, Esq.
Assistant Counsel

Attachment (Finding and Notice of Violation)

cc: Mr. Rob Simpson
David R. Farabee, Esq.
Ann H. Lyons, Esq.
Mr. Michael E. Boyd

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY****REGION IX****75 Hawthorne Street****San Francisco, CA 94105-3901****AUG 18 2009****CERTIFIED MAIL # 7006 2150 00001 4941 2215
RETURN RECEIPT REQUESTED****IN REPLY: AIR-5****REFER TO: Docket No. R9-09-011**

Mr. Randy S. Livingston
Vice President - Power Generation
Pacific Gas and Electric Company
P.O. Box 770000, Mail Code N11E
San Francisco, CA 94177

Re: PG & E Gateway Generating Station. Finding and Notice of Violation

Dear Mr. Livingston:

Enclosed is a copy of a Finding and Notice of Violation ("NOV") issued pursuant to section 113(a)(1) of the Clean Air Act, 42 U.S.C. §§ 7401-7671q (the "Act"), notifying you that the United States Environmental Protection Agency ("EPA"), Region IX, finds that Pacific Gas and Electric Company's (PG&E) Gateway Combined Cycle Generating Station located in Contra Costa County, California (the "Facility") is in violation of the Clean Air Act ("Act").

You should be aware that section 113(a)(1) of the Act authorizes EPA to issue an order requiring compliance with the requirements of the Act, issue an administrative penalty order, or commence a civil action seeking an injunction and/or a civil penalty. Furthermore, section 113(c) of the Act provides for criminal penalties in certain cases.

In addition, section 306 of the Act, 42 U.S.C. § 7606, the regulations promulgated thereunder (2 C.F.R. Part 180), and Executive Order 11738 provide that facilities to be utilized in federal contracts, grants, and loans must be in full compliance with the Act and all regulations promulgated pursuant to it. A violation of the Act may result in the PG&E Facility being declared ineligible for participation in any federal contract, grant, or loan.

If you wish to discuss the enclosed NOV, you may request a conference with EPA within ten (10) working days of receipt of this NOV. The conference will afford PG&E an opportunity to present information bearing on the finding of violation, the nature of the violations, and any efforts it may have taken or proposes to take to achieve compliance.

If you have any questions pertaining to this NOV, please contact Steve Frey of the Air Enforcement Office at (415) 972-3796, or have your attorney contact Allan Zabel, Office of Regional Counsel, at (415) 972-3902.

Thank you for your cooperation in this matter.

Sincerely,



Deborah Jordan
Director, Air Division

Enclosure

cc: • Mr. Jack Broadbent (BAAQMD)
Mr. Jim Ryden (CARB)
Mr. Dave Farabee (e-mail)

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901

AUG 13 2009

IN REPLY: AIR-5
REFER TO: Docket No. R9-09-11Mr. Jack Broadbent
Executive Officer/Air Pollution Control Officer
Bay Area Air Quality Management District District
939 Ellis Street
San Francisco, CA 94109

Dear Mr. Broadbent:

Enclosed for your information is a copy of a Finding and Notice of Violation ("NOV") that the United States Environmental Protection Agency ("EPA"), Region IX, issued to Pacific Gas and Electric (PG&E) for violations of the Clean Air Act ("Act") at its Gateway Combined Cycle Generating Station located in Contra Costa County, California.

The purpose of the NOV is to notify PG&E that EPA finds that it has violated certain provisions of the California State Implementation Plan. The violations are set forth more specifically in the enclosed NOV. The NOV has been issued pursuant to section 113(a)(1) of the Act, 42 U.S.C. §§ 7401-7671g.

The Act also provides that after 30 days from the issuance of an NOV, EPA may determine if any further action will be taken pursuant to section 113 of the Act.

If you have any questions concerning this NOV, please contact Steve Frey, Air Enforcement Office, at (415) 972-3796, or rev.steve@epa.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Deborah Jordan".

Deborah Jordan
Director, Air Division

Enclosure

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

REGION IX

75 Hawthorne Street

San Francisco, CA 94105-3901

AUG 13 2009

IN REPLY: AIR-5

REFER TO: Docket No. R9-09-11

Mr. Jim Ryden
Chief, Enforcement Division
California Air Resources Board
P.O. Box 2815
Sacramento, CA 95812

Dear Mr. Ryden:

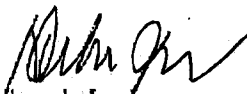
Enclosed for your information is a copy of a Finding and Notice of Violation ("NOV") that the United States Environmental Protection Agency ("EPA"), Region IX, issued to Pacific Gas and Electric (PG&E) for violations of the Clean Air Act ("Act") at its Gateway Combined Cycle Generating Station located in Contra Costa County, California.

The purpose of the NOV is to notify PG&E that EPA finds that it has violated certain provisions of the California State Implementation Plan. The violations are set forth more specifically in the enclosed NOV. The NOV has been issued pursuant to section 113(a)(1) of the Act, 42 U.S.C. §§ 7401-7671q.

The Act also provides that after 30 days from the issuance of an NOV, EPA may determine if any further action will be taken pursuant to section 113 of the Act.

If you have any questions concerning this NOV, please contact Steve Frey, Air Enforcement Office, at (415) 972-3796, or stev.frey@epa.gov.

Sincerely,


Deborah Jordan
Director, Air Division

Enclosure

1 UNITED STATES
2 ENVIRONMENTAL PROTECTION AGENCY
3 REGION IX

3 In the Matter of:)
4 PACIFIC GAS AND ELECTRIC COMPANY) Docket No. R9-09-11
5 Proceeding under Section 113(a)) FINDING AND
6 of the Clean Air Act,) NOTICE OF VIOLATION
6 42 U.S.C. § 9613(a))
7

8 STATUTORY AND REGULATORY AUTHORITY

9 1. This Finding and Notice of Violation ("FNOV") is issued
10 to the Pacific Gas and Electric Company ("PG&E") for violations
11 of the Clean Air Act at PG&E's Gateway Generating Station ("GGS")
12 located in Contra Costa County near Antioch, California. This
13 FNOV is issued pursuant to Section 113(a)(1) of the Act, 42
14 U.S.C. § 7413(a)(1). Section 113(a)(1) of the Act requires the
15 Administrator of the United States Environmental Protection
16 Agency ("EPA") to notify any person in violation of an applicable
17 state implementation plan ("SIP") or a permit when the
18 Administrator finds that person to be in such violation. The
19 authority to issue this FNOV has been delegated to the Regional
20 Administrator of EPA, Region IX, and re-delegated to the Director
21 of the Air Division of EPA, Region IX.

22 2. The Administrator of the Environmental Protection
23 Agency ("EPA"), pursuant to authority under Section 109 of the
24 Clean Air Act (the "Act"), 42 U.S.C. § 7409, promulgated National
25 Ambient Air Quality Standards ("NAAQS") for certain criteria
26 pollutants, including PM₁₀, carbon monoxide, and nitrogen
27 dioxide. 40 C.F.R. §§ 50.6, 50.8, and 50.11.

28 3. Pursuant to Section 107(d) of the Act, 42 U.S.C.

1 § 7407(d), the Administrator promulgated lists of attainment
2 status designations for each air quality control region ("AQCR")
3 in every State. These lists identify the attainment status of
4 each AQCR for each of the criteria pollutants. The carbon
5 dioxide, PM₁₀, and nitrogen dioxide attainment status
6 designations for the California AQCRs are listed at 40 C.F.R.
7 § 81.305.

8 4. The Bay Area Air Quality Management District ("BAAQMD")
9 has primary jurisdiction over major stationary sources of air
10 pollution sources in the San Francisco Bay Area Intrastate AQCR.
11 40 C.F.R. 81.21. This jurisdiction includes GGS.

12 5. Section 161 of the Act, 42 U.S.C. § 7471, requires that
13 each state implementation plan ("SIP") contain provisions to
14 implement the Act's Prevention of Significant Deterioration
15 ("PSD") program for areas of that state which are designated as
16 being in attainment with any NAAQS for a criteria pollutant. The
17 PSD program applies to major new sources of air pollution.

18 6. The PSD permitting program for the San Francisco Bay
19 Area Intrastate AQCR is the federal PSD program, which is set
20 forth at 40 C.F.R. § 52.21 ("PSD Program").

21 7. The PSD Program requires, among other things, that the
22 owner or operator of a new major stationary source of air
23 pollution obtain a PSD permit, which complies with the
24 requirements of 40 C.F.R. § 52.21, prior to constructing a new
25 major source of air pollution. The PSD permit must require,
26 among other things, that the best available control technology
27 ("BACT") be installed at the source being constructed or
28 modified. The definition of a major modification is set forth in

1 40 C.F.R. § 52.21.

2 FINDINGS OF FACT AND LAW

3 8. PG&E generates electricity at GGS, which is a nominal
4 530 megawatt, natural gas-fired, combined cycle, combustion
5 turbine power plant. At all times relevant to this FNOV, GGS has
6 been and continues to be a major source of air pollution. GGS is
7 located in Contra Costa County near Antioch, California, which is
8 under the jurisdiction of BAAQMD and EPA.

9 9. On July 24, 2001, PG&E's predecessor in interest,
10 Delta, LLC ("Mirant"), obtained a PSD permit from the BAAQMD as
11 part of a single, comprehensive Authority to Construct. BAAQMD
12 issued that PSD permit pursuant to the authority set forth in 40
13 C.F.R. 52.21 and a delegation of authority from EPA dated April
14 26, 1986. Such delegation of authority to issue PSD permits and
15 implement the PSD Program is allowed under 40 C.F.R. 52.21(u).

16 10. The delegation of authority to BAAQMD to implement the
17 PSD Program was revoked on March 3, 2003. A partial re-
18 delegation of authority to BAAQMD to implement the PSD Program
19 was issued on June 21, 2004.

20 11. At some point during the time period between February
21 2002 and September 2002, Mirant ceased construction of GGS. This
22 cessation of construction lasted more than 18 months.

23 12. Pursuant to the PSD Program, 40 C.F.R. 52.21(r), where
24 construction of a major new source pursuant to a PSD permit is
25 discontinued for 18 months or more, the PSD permit automatically
26 expires unless an extension is granted by the Administrator of
27 EPA or someone who currently possesses a valid delegation of
28 authority from the Administrator to grant such an extension.

1 13. Between the time the PSD permit for GGS was issued to
2 Mirant and the latest time that PSD permit would have
3 automatically expired due to discontinued construction of GGS, no
4 valid extension of the PSD permit was requested from or issued by
5 the Administrator of EPA or someone who currently possessed a
6 valid delegation of authority from the Administrator to grant
7 such an extension. Therefore, the PSD permit automatically
8 expired when construction of GGS had ceased for 18 months.

9 14. PG&E took over ownership of GGS from Mirant on November
10 30, 2006, and restarted construction of GGS in January 2007. At
11 the time PG&E took over ownership of GGS and restarted
12 construction of GGS, the PSD permit for the construction and
13 operation of GGS had expired. PG&E has not applied for a new PSD
14 permit.

15 15. PG&E failed to obtain a valid PSD permit prior to
16 restarting construction of and operating GGS. PG&E's failure to
17 have a valid PSD permit continues to this time.

18 FINDING OF VIOLATIONS

19 16. PG&E violated the SIP and the Act by restarting
20 construction of and operating GGS, a major new source of air
21 pollution, without obtaining a valid PSD permit.

22 ENFORCEMENT

23 17. Section 113(a)(1) of the Act provides that at any time
24 after the expiration of 30 days following the date of the
25 issuance of this FNOV, EPA may, without regard to the period of
26 violation:

27 - issue an order requiring compliance with the
28 requirements of the SIP or permit, or

1 - issue an administrative penalty order pursuant to
2 Section 113(d) of the Act for civil administrative
3 penalties of up to \$32,500 per day of violation, or
4 - bring a civil action pursuant to Section 113(b) for
5 injunctive relief and/or civil penalties of not more
6 than \$32,500 per day for each violation.

7 42 U.S.C. § 7413(a)(1), as amended by the Federal Civil Penalties
8 Inflation Adjustment Act of 1990, Pub. L. 101-410, as amended, &
9 40 C.F.R. § 19. Furthermore, for any person who knowingly
10 violates any SIP or permit requirement more than 30 days after
11 the date of the issuance of a FNOV, Section 113(c) of the Act
12 provides for criminal penalties, imprisonment, or both. 42
13 U.S.C. § 7413(c)(3).

14 In addition, under Section 306(a) of the Act, the
15 regulations promulgated thereunder (40 C.F.R. Part 32), and
16 Executive Order 11738, facilities to be used in federal
17 contracts, grants, and loans must be in full compliance with the
18 Act and all regulations promulgated pursuant to it. Violation of
19 the Act may result in the GGS being declared ineligible for
20 participation in any federal contract, grant, or loan.

21 PENALTY ASSESSMENT CRITERIA

22 18. Section 113(e)(1) of the Act states that the
23 Administrator or a court, as appropriate, shall, in determining
24 the amount of any penalty to be assessed, take into consideration
25 (in addition to such other factors as justice may require) the
26 size of the business, the economic impact of the penalty of the
27 business, the violator's full compliance history and good faith
28 efforts to comply, the duration of the violation as established

1 by any credible evidence (including evidence other than the
2 applicable test method), payment by the violator of penalties
3 previously assessed for the same violation, the economic benefit
4 of noncompliance, and the seriousness of the violation. 42
5 U.S.C. § 7413(e)(1).

6 Section 113(e)(2) of the Act allows the Administrator or a
7 court to assess a penalty for each day of violation. 42 U.S.C.
8 § 7413(e)(2). For the purpose of determining the number of days
9 of violation, where EPA makes a prima facie showing that the
10 conduct or events giving rise to a violation are likely to have
11 continued or recurred past the date of the issuance of a FNOV,
12 EPA shall presume the days of violation to include the date of
13 issuance of the FNOV and each and every day thereafter until the
14 violator establishes that continuous compliance has been
15 achieved, except to the extent that the violator can prove by a
16 preponderance of the evidence that there were intervening days
17 during which no violation occurred or that the violation was not
18 continuing in nature.

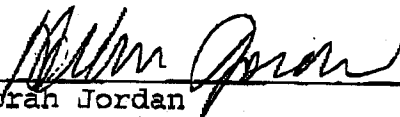
19 OPPORTUNITY FOR CONFERENCE

20 19. PG&E may, upon request, arrange to have a conference
21 with EPA to discuss this matter. A conference would enable PG&E
22 to present evidence bearing on the finding of violation, the
23 nature of the violation, and any efforts that it may have taken
24 or proposes to take to achieve compliance. If PG&E wishes to
25 take advantage of this opportunity, it must make a request for a
26 conference within ten (10) days of receipt of this FNOV. PG&E,
27 if it chooses to request a conference, may choose to be
28 represented by counsel at the conference. Any request for a

1 conference or other inquiries concerning this FNOV should be made
2 in writing to:

3 Allan Zabel
4 Office of Regional Counsel
5 U.S. Environmental Protection Agency, Region 9
6 75 Hawthorne Street (ORC-2)
7 San Francisco, CA 94105
8 (415) 972-3902

8 Date 8-12-09


9 Deborah Jordan
10 Director, Air Division
11 EPA Region IX

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