

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

4 _____) PSD Appeal No. 09-02
5 In the Matter of:)
6 Gateway Generating Station)
7 _____)

8 **PACIFIC GAS AND ELECTRIC COMPANY’S**
9 **OPPOSITION TO CARE’S MOTION TO INTERVENE**

10 On July 16, 2009, CALifornians for Renewable Energy, Inc. (“CARE”) and
11 Robert Sarvey, Treasurer of CARE, filed a request to intervene in this matter.
12 Given the status of this matter, CARE’s request is not timely. Moreover, CARE’s
13 apparent effort to cure Petitioner Rob Simpson’s lack of standing to bring the
14 instant appeal is unavailing. Accordingly, we respectfully request that the EAB
15 deny CARE’s motion to intervene, and promptly resolve the jurisdictional issues
16 recently briefed by all parties.

17 I. This Matter is Now Ripe for Resolution

18 After reviewing the Petition for Review (“Petition”) and a Motion for Stay filed
19 by PG&E and joined by BAAQMD, the EAB stated that it was “reluctant to
20 postpone a determination with respect to the Board’s jurisdiction” (see EAB
21 June 18, 2009 Order [“Order”], p. 5) and so declined to issue a stay in this matter.
22 Instead, the EAB stated that, “it appears as though the EAB lacks jurisdiction over
23 this matter” (Order, p. 4), ordered BAAQMD to submit a brief on certain
24 jurisdictional questions no later than July 2, and ordered Petitioner Simpson to file
25 a reply no later than July 17. BAAQMD, PG&E, and EPA all submitted briefs on
26 July 2, in accordance with the EAB’s Order. Petitioner Simpson filed a Reply Brief
27 on July 17, 2009.

1 Based on the terms of the EAB's Order, this matter is now ready for
2 resolution of the jurisdictional issues. The EAB requested briefing to evaluate
3 whether Petitioner Simpson had met his burden to present the basis for an appeal
4 and whether he meets the threshold jurisdictional requirements of timeliness and
5 standing. (See Order, p. 5, *citing* 40 C.F.R. §124.19(a).) CARE's Motion for
6 Intervention does not even attempt to address these jurisdictional issues, and was
7 filed on the day before Petitioner's deadline for filing a reply. Allowing CARE and
8 Mr. Sarvey to intervene at this time would necessarily cause further delay in
9 resolving the threshold jurisdictional issues in this matter, in direct contravention of
10 the EAB's previously stated intent. Accordingly, the request should be denied.

11 II. CARE Cannot Rectify Petitioner's Lack of Standing

12 Petitioner Simpson argues that he "did not receive notice of the opportunity
13 for public participation until after close of the public comment period" on the
14 withdrawn permit amendment application (Petition, p. 8) and that there was not an
15 opportunity for public participation when BAAQMD issued the initial Gateway
16 permit (Petition, 5). However, CARE admits in its Motion to Intervene that it
17 submitted public comments in 2001 for the initial permit (CARE's Motion, p. 1)¹ and
18 that Mr. Sarvey, CARE's Treasurer, submitted comments on the July 2008
19 Amendment that was later withdrawn (CARE's Motion, p. 4). In its motion, CARE
20 essentially is alleging that Mr. Simpson, as a member of CARE in good standing,
21 should be able to take advantage of CARE's and Mr. Sarvey's previous public

22 ¹ Although CARE alleges that it submitted comments in connection with the 2001 permit, it fails to
23 provide any specificity regarding those comments. The EAB has previously stated that the
24 purpose underlying the requirement that ascertainable issues be raised during the public
25 comment period "is to alert the permit issuer to potential problems with a draft permit and to
26 ensure that the permit issuer has an opportunity to address the problems before the permit
27 becomes final." See *City of Phoenix*, 9 E.A.D. at 526, *citing In re Broward County*, 4 E.A.D. 705,
28 714 (EAB 1993), *In re NPC Servs., Inc.*, 3 E.A.D. 586 (CJO 1991). "[A]lerting the permit issuer to
problems during the public comment period serves to promote the longstanding policy that most
permit issues should be resolved at the Regional level." See *City of Phoenix*, 9 E.A.D. at 526.
CARE neither describes the details of its comments during the permitting process, nor does it
explain how BAAQMD failed to address the potential problems with the permit. By these
omissions, CARE has failed to meet the EAB's threshold standing requirements.

1 comments, even though Mr. Simpson made no such comments of his own at the
2 time (CARE's Motion, 1). In other words, it appears that CARE's purpose in
3 seeking to intervene is to attempt to help Simpson meet the pertinent standing
4 requirements, such as participating in a public hearing or submitting comments on
5 a proposed permit, prior to filing with the EAB. (See 40 C.F.R. §124.19(a).)
6 However, even assuming that CARE might have participated in the 2001 permitting
7 action as necessary to have standing, CARE does not have the ability to confer
8 proper standing to Mr. Simpson, as standing is personal and not transferable.
9 Section 124.19(a) allows only the person who filed comments on a draft permit or
10 who personally participated in the public hearing to petition the EAB. (See also,
11 *Allen v. Wright* (1984) 468 U.S. 737, 752 ("the standing inquiry requires careful
12 judicial examination of a complaint's allegations to ascertain whether the *particular*
13 plaintiff is entitled to an adjudication of the *particular* claims asserted"); *emphasis*
14 *added*.) Moreover, no allegation has been made that Mr. Simpson was a member
15 of CARE in 2001 or that he agreed with or even acknowledged CARE's comments
16 in 2001.

17 Further, CARE has not presented any explanation for why its participation
18 might make this appeal timely, considering that it apparently was aware of and
19 participated in the 2001 permitting process. In this regard, it is important to
20 remember that CARE is not a casual participant in proceedings such as these, nor
21 is it unfamiliar with the Board's procedural requirements.² In fact, CARE and its
22 principals have participated in EAB proceedings for approximately ten years. (See
23

24 ² As stated in its Articles of Incorporation, CARE's specific purposes are:
25 "1. To supply on a nonprofit basis professional legal assistance to planning conservation
26 groups, and neighborhood groups, in regards to new energy projects in the state of
27 California.
28 2. To engage on a nonprofit basis in research and information dissemination with respect to
legal rights in a healthy environment by giving legal advice, appearing before administrative
bodies, and enforcing environmental laws through court actions.
3. To employ legal counsel and associated staffing on a professional or contractual basis to
carry out these purposes." (See <http://www.calfree.com/Articles.html> (accessed 7/20/09).)

1 e.g., *in re Delta Energy Center* (99-76) and *in re Metcalf Energy Center* (01-07 and
2 01-08).)

3 III. Conclusion

4 CARE has not demonstrated that it should be granted the right to participate
5 in this matter. Its request was submitted immediately prior to Petitioner's deadline
6 for filing a reply brief, and its participation cannot create standing for Petitioner or
7 jurisdiction for the EAB where those are lacking. Allowing CARE's participation
8 would unnecessarily delay resolution of this matter.

9 For the reasons set forth above, PG&E respectfully requests that the EAB
10 deny the Motion to Intervene.

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12 DATED July 23, 2009.

Respectfully submitted,

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By 

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CERTIFICATE OF SERVICE

I the undersigned, hereby certify that on the 23 day of July, 2009, service of a true and complete copy of **Pacific Gas & Electric Company's Opposition to CARE's Motion to Intervene** was made upon the following parties:

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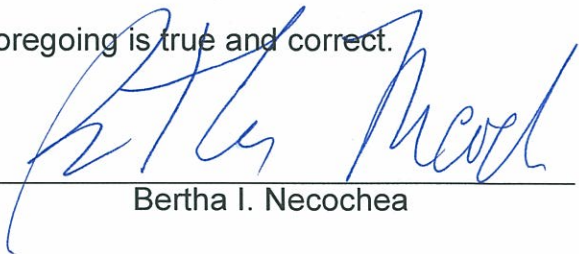
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by depositing the same in the U.S. Mail.

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



Bertha I. Necochea