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

APR 14 2009
ENVIR. APPEALS BOARD

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).

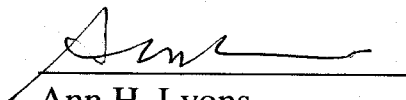
The Petition in this instance fails to meet these minimum criteria and must be dismissed.

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 2, 2009

Respectfully Submitted,



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:

Rob Simpson
27126 Grandview Avenue
Hayward, CA 94542

David Farabee
Pillsbury Winthrop
50 Fremont Street
P.O. Box 7880
San Francisco, CA 94120-7880

Brian Bunger
Alexander Crockett
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109

William Manhein
David Kraska
Law Department
Pacific Gas and Electric Company
P.O. Box 7442
San Francisco, CA 94120

Dated: 7/2/09


Heidi Reeves



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street

San Francisco, CA 94105-3901

October 28, 1997

Ellen Garvey
Air Pollution Control Officer
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109

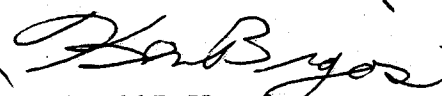
Dear Ms. Garvey:

In response to your January 30, 1997 request, I have enclosed a revised EPA-BAAQMD Prevention of Significant Deterioration (PSD) delegation agreement for your signature. As you requested, condition number 12 has been added to the existing agreement in order to delegate the following EPA-administered PSD permits to BAAQMD for your administration:

<u>Facility</u>	<u>EPA File Number</u>
Calpine Gilroy Cogen	SFB 84-04
IBM Corporation	SFB 82-01
Cardinal Cogen	SFB 82-04
Tosco Corporation	SFB 78-07
Martinez Cogen Limited Partnership [formerly Foster Wheeler (Tosco)]	SFB 83-01
Tosco SF Area Refinery at Rodeo [formerly Unocal Corporation - San Francisco Refinery]	SFB 85-03

Additionally, as you requested in a June 24, 1997 letter, Kaiser Cement Corporation, (SFB 78-03) has been deleted from the list of sources specified for delegation in your January 30 letter. If the enclosed agreement is acceptable to you, please sign and return both copies. We will then return a signed original for your records. If you have any questions, please contact Matt Haber at (415) 744-1254.

Sincerely,

for 
David P. Howekamp
Director, Air Division

enclosure

U.S. EPA-BAY AREA AQMD AGREEMENT
FOR DELEGATION OF AUTHORITY FOR PREVENTION OF
SIGNIFICANT DETERIORATION OF AIR QUALITY PROGRAM (40 CFR 52.21)

The undersigned, on behalf of the Bay Area Air Quality Management District (BAAQMD) and the United States Environmental Protection Agency (U.S. EPA), hereby agree to the delegation of authority of the administrative and enforcement elements of the stationary source provisions of 40 CFR 52.21, Prevention of Significant Deterioration (PSD), from the U.S. EPA to the BAAQMD, subject to the terms and conditions below. EPA has determined that the PSD portion of District Rule 2 of Regulation 2 (adopted March 7, 1984, with minor revisions adopted subsequently, as amended on November 1, 1989) generally meets the requirements of 52.21; therefore, District Authorities to Construct (ATCs or permits) issued in accordance with the provisions of Rule 2 of BAAQMD Regulation 2 will be deemed to meet Federal PSD permit requirements pursuant to the provisions of this delegation agreement. This delegation is executed pursuant to 40 CFR 52.21(u), Delegation of Authority, and supersedes the agreement dated January 4, 1991.

Permits

1. District permits issued pursuant to this agreement must meet the requirements of District Rule 2 Regulation 2. District ATCs must be issued prior to the beginning of actual construction, as that term is defined at 40 CFR 52.21(b)(11), as required by 40 CFR 52.21(i)(1).

2. EPA reserves permitting authority for PSD sources with stack heights greater than 65 meters or sources which use a dispersion technique as defined by EPA, unless the District permits would comply with EPA's final stack height regulation (50 FR 27892, July 8, 1985).
3. EPA reserves authority for performing the review of the visibility impacts of new or modified major stationary sources that may adversely impact visibility in mandatory Class I areas, unless the District permits would comply with EPA's final regulations regarding visibility review (50 FR 28544, July 12, 1985).
4. It is the understanding of the parties that, consistent with the provisions of 40 CFR 52.21, the provisions of Rule 2 of Regulation 2, and pursuant to Section 41700 of the California Health and Safety Code, actual emission decreases are creditable only to the extent that the reductions have approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.
5. The District will request EPA guidance on any matter involving the interpretation of Sections 160-169 of the Clean Air Act or 40 CFR 52.21 to the extent that implementation, review, administration or enforcement of these sections has not been covered by determinations or guidance sent to the District.
6. Pursuant to its authority under the Clean Air Act and upon reasonable notice, EPA may review the permits issued by the District under this agreement to ensure that the District's implementation of PSD permitting under Rule 2 Regulation 2 is consistent with the

contemporaneous time frame and actual emissions baseline requirements of federal regulations (40 CFR 52.21(b)(3)).

7. Pursuant to provisions of Section 7(a) of the Endangered Species Act of 1973 (16 U.S.C. 1536(a)), EPA may not delegate and hereby retains its responsibilities to ensure that PSD permitting actions by the District are not likely to jeopardize the continued existence of endangered or threatened species, or adversely modify their critical habitats.
8. Pursuant to the provisions of 40 CFR 52.21(u)(2), the District shall consult with the appropriate State or local agency primarily responsible for managing land use prior to making any determinations under this Agreement.
9. The District shall conduct an annual review of the NO₂ increment status for each Section 107 area designated as attainment over which it has jurisdiction and shall prepare a summary report of that review. Such review shall be made in accordance with current U.S. EPA guidance as provided to the District. Emissions from the following sources consume NO₂ increment: (1) any new major stationary source or modification of a major stationary source on which construction begins after February 8, 1988; and (2) minor, area, and mobile sources, after the minor source baseline date as defined by 40 CFR 52.21. The initial review of the NO₂ increment status shall address the consumption of NO₂ increment between February 8, 1988, and the effective date of this Agreement.
10. District permits issued pursuant to this agreement which meet the requirements of 40 CFR 52.21 will be considered valid by EPA. The determination of compliance or

noncompliance with 40 CFR 52.21 shall be made by EPA. The District shall issue a permit to applicants using District Rule 2, Regulation 2.

11. The primary responsibility for enforcement of the PSD regulations in the District will rest with the District. The District will enforce the provisions that pertain to the PSD program, except in those cases where the rules and policy of the District are more stringent. In that case, the District may elect to implement the more stringent requirements. Nothing in this agreement shall prohibit EPA from enforcing the PSD provisions of the Clean Air Act, the PSD regulations or any PSD permit issued by the District pursuant to this agreement. In the event that the District is unwilling or unable to enforce a provision of this delegation with respect to a source subject to the PSD regulations, the District will immediately notify the Regional Administrator. Failure to notify the Regional Administrator does not preclude EPA from exercising its enforcement authority.
12. The primary responsibility for administration and enforcement of the following EPA-issued permits is delegated to BAAQMD:

<u>Facility</u>	<u>EPA File Number</u>	<u>Permit Issuance Date</u>
Calpine Gilroy Cogen	SFB 84-04	August 1, 1985
Cardinal Cogen	SFB 82-04	June 27, 1983
IBM Corporation	SFB 82-01	June 9, 1982
Martinez Cogen Limited Partnership	SFB 83-01	December 13, 1983
Tosco Corporation	SFB 78-07	December 18, 1978
Tosco SF Area Refinery at Rodeo	SFB 85-03	March 3, 1986

District-issued modifications to these permits which meet the requirements of 40 CFR 52.21 will be considered valid by EPA. The District shall issue any permit modifications

to the above listed sources pursuant to this agreement and using District Rule 2 Regulation 2, which incorporates the requirements of 40 CFR 52.21.

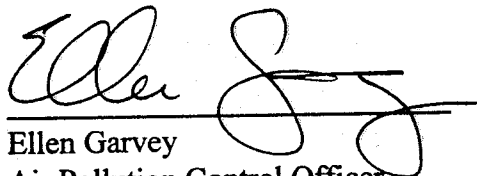
General Conditions

1. This delegation may be amended at any time by the formal written agreement of both the BAAQMD and the U.S. EPA, including amendment to add, change, or remove conditions or terms of this agreement.
2. If the District adopts revisions to District Regulation 2, Rule 2, EPA may take steps to revoke the delegation in whole or in part pursuant to condition 3 below or the parties may amend the agreement pursuant to condition 1 above. Any substantive amendments to District Regulation 2, Rule 2 that are adopted by the District shall not be applied under this agreement until the agreement is amended so to provide.
3. If the U.S. EPA determines that the BAAQMD is not implementing the PSD program in accordance with the terms and conditions of this delegation, the requirements of 40 CFR 52.21, 40 CFR 124, or the Clean Air Act, this delegation, after consultation with the BAAQMD, may be revoked in whole or in part. Any such revocation shall be effective as of the date specified in a Notice of Revocation to the BAAQMD.
4. The permit appeal provisions of 40 CFR 124 shall apply to all appeals to the Administrator on permits issued by the BAAQMD under this delegation. For purposes of implementing the federal permit appeal provisions under this delegation, if there is a public comment requesting a change in a draft preliminary determination or draft permit conditions, the

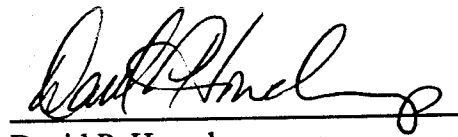
final permit issued by the BAAQMD shall contain a statement that for Federal PSD purposes and in accordance with 40 CFR 124.15 and 124.19, (1) the effective date of the permit is 30 days after the date of the final decision to issue, modify, or revoke and reissue the permit; and (2) if an appeal is made to the Administrator, the effective date of the permit is suspended until such time as the appeal is resolved. The BAAQMD shall inform EPA Region IX in accordance with conditions of this delegation when there is public comment requesting a change in the preliminary determination or in a draft permit condition. Failure by the BAAQMD to comply with the terms of this paragraph shall render the subject permit invalid for Federal PSD purposes.

- 5. This delegation of authority shall terminate upon the date EPA promulgates final disapproval of District Rule 2 Regulation 2 as it applies to PSD implementation in a Notice of Revocation.
- 6. This delegation of authority becomes effective upon the date of the signatures of both parties to this Agreement.

10/30/97
Date


Ellen Garvey
Air Pollution Control Officer
BAAQMD

11/10/97
Date


David P. Howekamp
Director, Air Division
U.S. EPA, Region IX