

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

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ENVIR. APPEALS BOARD

In the matter of
Gateway Generating Station

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) PSD Appeal No. 09-02
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OPPOSITION TO MOTION TO COMPEL AND REQUEST FOR SANCTIONS

The Bay Area Air Quality Management District ("District") hereby submits this Opposition to Petitioner's Motion To Compel And Request For Sanctions. Petitioner's motion should be denied because the District is not refusing to provide relevant portions of the administrative record along with its response to the Petition as the Board has requested. There is nothing to compel and no misconduct to sanction.

FACTUAL BACKGROUND

On May 5, 2009, Petitioner filed his Petition contending that PG&E constructed and is operating the Gateway Generating Station without a current, valid Federal PSD Permit in violation of the Clean Air Act. (*See* Petition for Review, Docket Entry #1.)

On May 12, 2009, the Environmental Appeals Board requested that the District respond to the Petition. The Board's request provided for two alternative response procedures. First, the Board requested that if the District contends that the Petition should be summarily dismissed on jurisdictional grounds that the District file its response by May 27, 2009, and include relevant portions of the administrative record. Alternatively, the Board requested that if the District does not contend that the Petition should be summarily dismissed on jurisdictional grounds that the District file its response on the merits by June 11, 2009, and include relevant portions of the administrative record as well as a certified index of the entire administrative record. (*See* Letter from Eurika Durr, Clerk of the Board, to Jack P. Broadbent, May 12, 2009, Docket Entry #14, at pp. 1-2.)

The District intends to respond under the first of these alternatives. The District contends that the Petition presents claims of non-compliance with the Clean Air Act that should be addressed in the enforcement context, not through a permit appeal to the Environmental Appeals Board under 40 C.F.R. section 124.19. The District contends that the Board lacks jurisdiction over these matters under Section 124.19 because there is no live permitting dispute for the Board to adjudicate at this point. The District is prepared to brief this issue in detail in a Response Seeking Summary Dismissal, and intends to include with its filing relevant portions of the administrative record.

On May 27, 2009, however, PG&E moved for leave to intervene as the real party in interest (*see* Motion for Leave to Intervene, Docket Entry #17), and moved for a stay of proceedings to give time for PG&E and EPA Region 9 to discuss settlement of claims of non-compliance with the PSD requirements of the Clean Air Act – the very same allegations that Petitioner makes in his Petition. (*See* Motion to Stay Proceedings, Docket Entry #18, at p.1 line 26 – p.2 line 6.) The District joined in PG&E’s motion for a stay, because it agrees that when EPA Region 9 and PG&E resolve the issues of non-compliance asserted in the Petition it will obviate the need for further proceedings here. (*See* Joinder in Motion to Stay Proceedings, Docket Entry #16, at p. 1.) The District stated that if the Board declined to stay proceedings, it was prepared to file its response seeking summary dismissal on jurisdictional grounds. (*See id.*) The Board has not yet ruled on the motion to stay proceedings as of the date of mailing of this Opposition.

Petitioner has now filed this motion asking the Board to compel the District to “produce the Administrative record,” citing the Board’s request to the District stating “Please include relevant portions of the administrative record with your response” in the case of a response seeking summary dismissal, and “Please include with your response relevant portions of the administrative record, together with a certified index of the entire administrative record” in the case of a response on the merits (Motion at p. 1.) Petitioner also suggests in his motion that the Board impose sanctions “as the Board sees fit.” (*Id.*)

**THE DISTRICT OPPOSES PETITIONER'S MOTION
AS GROUNDLESS AND UNTIMELY**

Petitioner's Motion to Compel should be denied because it is groundless and untimely. The District is fully prepared to comply, and intends to comply, with the Board's request to provide relevant portions of the administrative record at the point when it files a Response Seeking Summary Dismissal, but that time has not come yet. The Board has before it a motion to stay proceedings pending resolution of the PSD non-compliance issues raised in the Petition by EPA Region 9 and PG&E, and if the Board grants the stay then the District will not have to file its Response Seeking Summary Dismissal (at least not at this point). There is therefore nothing to "compel" at this time, pending the Board's determination of whether to stay proceedings and whether a response will be required at this time. Moreover, there will be no need to "compel" the District to comply with the Board's request in the future at the time it files its Response Seeking Summary Dismissal – either in the near future if the Board declines to stay proceedings, or at some later time following the stay if the Board decides to grant one – because the District is not going to refuse to comply.¹ The Motion should therefore be denied.

The District also opposes Petitioner's Request for Sanctions. The Environmental Appeals Board does not have jurisdiction to impose sanctions under 40 C.F.R. section 124.19, but even if it did the District has not engaged in any sanctionable conduct here. The District is fully prepared to respond to the Board's requests, but has not yet done so because the Board has before it a motion to stay proceedings, which if granted would make the District's response

¹ The District also notes that it is in the process of responding to Petitioner's very broad request under the California Public Records Act to review all documents within the District's possession that may relate in any way to the Gateway facility. The District has already provided Petitioner with much relevant documentation regarding this facility based on Petitioner's earlier inquiries regarding the facility (some of which he has filed in this proceeding as exhibits). In response to this broad Public Records Act request, the District is searching all of its records (including paper records, electronic files, all staff email archives, *etc.*) to ensure that it provides a comprehensive response. That search is ongoing, and the District will be providing Petitioner access to the records when it is complete. This is a state-law issue and not part of an Environmental Appeals Board appeal under 40 C.F.R. section 124.19, but the District provides this information since Petitioner has alluded to these issues in his filings.

unnecessary at this point. Petitioner's request provides no reason as to how this eminently reasonable approach to addressing this Petition could be a reason to sanction the District.

Finally, the District also objects to Petitioner's inflammatory characterizations of the District's actions and motives, in this motion and throughout this proceeding. The District does not intend to dignify them with a response, but notes for the record that it categorically disagrees.

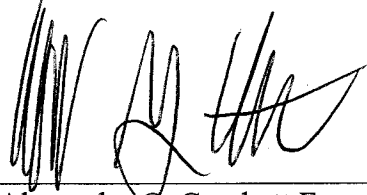
CONCLUSION

For all of the foregoing reasons, the District respectfully request that the Environmental Appeals Board deny Petitioner's motion to compel and request for sanctions.

Dated: June 15, 2009

Respectfully Submitted

BRIAN C. BUNGER, ESQ.
DISTRICT COUNSEL
BAY AREA AIR QUALITY
MANAGEMENT DISTRICT



By: Alexander G. Crockett Esq.
Assistant Counsel

PROOF OF SERVICE

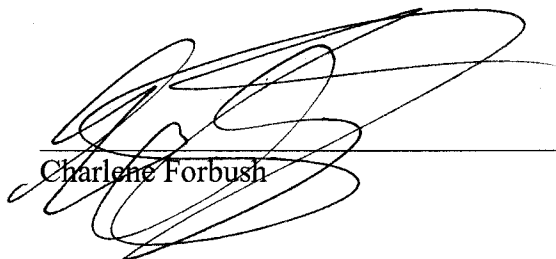
I, Charlene Forbush, declare as follows: I am over the age of 18, not a party to this action, and employed in the City and County of San Francisco, California, at 939 Ellis Street, San Francisco, CA, 94109. On the date set forth below, I served this document, "Opposition To Motion To Compel And Request For Sanctions", by placing copies of it in sealed envelopes, with First Class postage thereon fully paid, and depositing said envelopes in the United States Mail at San Francisco, California, addressed to the persons set forth below:

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I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on June 15, 2009, at San Francisco, California.



Charlene Forbush