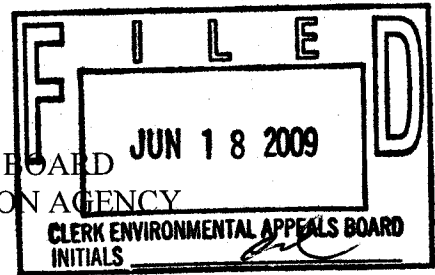


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:

Gateway Generating Station

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) PSD Appeal No. 09-02
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ORDER

On May 11, 2009, Rob Simpson ("Petitioner") petitioned the Environmental Appeals Board ("Board"), pursuant to 40 C.F.R. § 124.19, for review of "the Prevention of Significant Deterioration ("PSD") Permit related to Gateway Generating Station issued by The Bay Area Air Quality Management District ('BAAQMD')." A copy of an "Authority to Construct " issued by BAAQMD on July 24, 2001, was attached (Ex. 1 to Petition for Review). No other permit was identified.

Petitioner acknowledges that "[t]he PSD permit is not identified" and states that "[t]he present status of the permit is indiscernible." Petition at 5, 9. Nevertheless, Petitioner argues that the Board should "remand the PSD permit" because: (1) of the lack of public participation in the permitting process; (2) the facility was not constructed and is not operated in a manner consistent with the Authority to Construct originally issued and is not in conformity with the Clean Air Act; (3) there is no evidence that a PSD permit was ever issued; (4) "major modifications have occurred in the construction and operation of the facility that allow it to

pollute even more than the 2000-2001 determinations with respect to the best available control technology ("BACT"); and (5) the permit does not utilize BACT. Petition at 9-17.¹ With respect to jurisdictional requirements, Petitioner asserts that "the Permit" has never been properly noticed and that under *In re Russell City Energy Center*, PSD Appeal No. 08-01 (EAB July 29, 2008), 14 E.A.D. ___, "[t]he time period for review should not be considered expired until after the public notice period, which has not yet occurred." Petition at 7; *see also* Petition at 10 ("The District has offered no evidence that they ever issued any public notice for the ["Authority to Construct"] or PSD permit."). Additionally, Petitioner argues that he satisfies procedural requirements because the Petitioner challenges "changes from the draft permit to the final decision." It is unclear to which "final decision" or PSD permit Petitioner refers.

To assist the Board in deciding whether the matters raised by Petitioner should be reviewed, the Board requested that the BAAQMD submit a response to the Petition by May 27, 2009, if that response would seek summary disposition, and by June 11, 2009, for any response not seeking summary disposition. *See* Board's Letter to Jack Broadbent, Bay Area Air Quality Management District, Requesting Response to Petition for Review (May 12, 2009).

¹ Among other things, Petitioner alleges that although construction began in late 2001 under the original Authority to Construct, construction was suspended in early 2002 and restarted in 2007, after a sale of the facility to Pacific Gas & Electric ("PG&E"). Petition at 6. Although BAAQMD issued a "Public Notice" and "Engineering Evaluation for Proposed Amended Authority to Construct (ATC) And Draft PSD Permit" on June 4, 2008, PG&E withdrew its application for modification to the permit on February 13, 2009. Thus, BAAQMD never responded to public comments or issued a final PSD permit or Amended Authority to Construct based on the June 4, 2008, draft permit. *Id.*; PG&E Reply to Petitioner's Response to Motion for Stay at 5 & Ex. A.

On May 27, 2009, Pacific Gas and Electric ("PG&E"), as the owner of Gateway Generating Station and the permittee, filed a Motion for leave to intervene as well as a Motion to Stay the above-captioned matter for 90 days, pending discussions with EPA Region 9 regarding allegations of noncompliance with PSD regulations in connection with the Gateway facility. PG&E alleges that the facility's PSD permit was issued on July 24, 2001, as part of a single, comprehensive "Authority to Construct" permit and that the terms of that permit have not been amended since the permit was issued.² Motion to Stay at 1. Moreover, PG&E asserts that the facility has completed construction and is now in operation. *Id.* PG&E makes no argument with respect to jurisdiction, but reserves the right to do so.

Also on May 27, 2009, BAAQMD filed a "Joinder in PG&E's Motion to Stay Proceedings," in which it indicated that the Petitioner's allegations constituted "enforcement issues best addressed by EPA Region 9 through the Clean Air Act enforcement mechanism, not permitting issues that should be addressed in an appeal to the Environmental Appeals Board under 40 C.F.R. Section 124.19." Joinder in Motion to Stay at 1. BAAQMD makes no further representations with respect to jurisdiction. In a subsequent filing, BAAQMD argues there is no current, valid PDS permit from which to appeal and urges that a stay until the enforcement action is completed may obviate the need for EAB to expend resources adjudicating the questions raised in this petition. BAAQMD Reply in Support of Motion to Stay Proceedings at 2-3 (Jun. 15,

² Although PG&E asserts that the Authority to Construct includes the facility's PSD permit, it is not clear from the face of the document whether that is the case. The BAAQMDs submissions regarding the stay motion to date also do not clarify whether the 2001 Authority to Construct included a PSD permit.

2009).

Petitioner filed a response to the motion to stay on May 28, 2009, in which he opposes the stay because Petitioner is not a participant in the enforcement-related discussions and therefore those discussions cannot be for the purpose of negotiating settlement of this matter. *See* Response [to] Motion to Stay Proceedings at 1.³

Based on our review of the Petition and subsequent filings thus far, it appears as though the EAB lacks jurisdiction over this matter. The only permit identified as relating to construction of the Gateway facility is the Authority to Construct, which was issued in 2001, nearly eight years ago. It is unclear whether that permit included or otherwise constituted a valid PSD permit. No other final decision by the BAAQMD has been identified. The Board's jurisdiction over PSD appeals derives from 40 C.F.R. part 124. Specifically, section 124.19 provides that a person may petition the Board to review any condition of a final PSD permit provision "[w]ithin 30 days after [the] final permit decision has been issued[.] 40 C.F.R. § 124.19(a). A prerequisite to appeal is that the petitioner must have filed comments or participated in the public hearing on the draft permit prior to the final permit decision. *Id.* Petitioner references *In re Russell City Energy Center*, PSD Appeal No. 08-01 (EAB July 29, 2008), 14 E.A.D. ___, a case in which we remanded a final PSD permit for failure to comply with public notice provisions of the Clean Air

³ While the stay motion was pending, Petitioner also filed a Motion to Compel and Request for Sanctions (June 9, 2009), which requests the Board to compel BAAQMD to produce "the Administrative record including a permit number and certified index" for the as-of-yet unidentified PSD permit.

Act despite Petitioner's failure to meet jurisdictional thresholds. Unlike *Russell City*, in this case, it is questionable whether a final PSD permit decision was ever issued, and even if one was included in the 2001 Authority to Construct, it is unclear whether Petitioner ever sought to participate or was denied participation in that permit proceeding and whether in any event any such appeal would be timely at this late date.

The petitioner bears the burden to set forth, in the petition, the basis for appeal and the threshold jurisdictional requirements. 40 C.F.R. § 124.19(a) (requiring Petitioners to state in the petition the grounds for review and to include a demonstration that any issues being raised were raised during the public comment period to the extent required); *see also In re Beeland Group, LLC, Beeland Disposal Well #1*, UIC Appeal Nos. 08-01, 08-02 & 08-03, slip op. at 8-9 (EAB Mar. 6, 2008), 14 E.A.D. ____ (explaining that a petitioner must demonstrate that the threshold procedural requirements for permit appeals are met, including timeliness, standing, preservation of issues for review, and articulation of the challenged permit condition with sufficient specificity); *In re BP Cherry Point*, 12 E.A.D. ____ (EAB 2005) (explaining that the petitioner bears the burden of demonstrating that review is warranted).

Although BAAQMD and PG&E seek to stay these proceedings, including jurisdictional arguments, while enforcement-related discussions take place with the Region, Petitioner is not a participant in those discussions and, therefore, opposes the stay. Under the circumstances of this petition, the Board is reluctant to postpone a determination with respect to the Board's jurisdiction, particularly where the enforcement action will not settle the jurisdictional question.

Accordingly, having duly considered the motions before the Board and the submissions

of the parties to date, the Board determines as follows:

- (1) PG&E's Motion to Intervene is granted;
- (2) PG&E's and BAAQMD's Motion to Stay for 90 days pending "discussions regarding allegations of potential noncompliance with federal PSD regulations" is denied;
- (3) BAAQMD's deadline for full response to the Petition is stayed pending briefing from BAAQMD, the permittee and Region IX on the jurisdictional issues that follow:

- a) whether any appeal from the original Authority to Construct would be timely;
- b) whether the EAB would have jurisdiction over an appeal from the Authority to Construct; and
- c) whether there is any other jurisdictional basis for this appeal.⁴

The above-described briefs must be filed no later than **July 2, 2009**. Petitioner may file a reply no later than **July 17, 2009**.

So ordered.

Dated: June 18, 2009

ENVIRONMENTAL APPEALS BOARD

Kathleen A. Steen for Anna L. Wolgast
Anna L. Wolgast
Environmental Appeals Judge

⁴ The Board will reserve judgment on Petitioner's Motion to Compel and Request for Sanctions pending briefing and a determination on the threshold jurisdictional questions.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order** in *Gateway Generating Station*, PSD Appeal No. 09-02, were sent to the following persons in the manner indicated.

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