

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

In the matter of
Gateway Generating Station

)
) PSD Appeal No. 09-02
)
)

BAAQMD BRIEF ON JURISDICTIONAL ISSUES

Pursuant to the Environmental Appeals Board's Order of June 18, 2009, Respondent Bay Area Air Quality Management District ("District") submits this Brief on Jurisdictional Issues. For the reasons explained herein, the District submits that the Environmental Appeals Board lacks jurisdiction over the Petition filed in this matter under 40 C.F.R. section 124.19. The Petition should therefore be dismissed.

I. SUMMARY

The Board was correct in observing that "it appears as though the EAB lacks jurisdiction over this matter." (Order at p. 4.) The Board does indeed lack jurisdiction, for several reasons. For one, as the Board observed, the Petition is untimely in that it was not filed until many years after the permit was issued. In addition, the initial permit term expired when construction on the facility ceased for over 18 months, and so even if the Board can overlook the lack of timeliness, any issues concerning the validity of the permit at this point are moot. For both these reasons, the Board lacks jurisdiction to review the permit at this point in time under 40 C.F.R. section 124.19. The Petition does not allege any other basis for jurisdiction because it does not identify any other final PSD permitting action for the Board to adjudicate.

The Board should therefore dismiss the Petition for lack of jurisdiction. At this late stage, the appropriate vehicle for addressing the claims of non-compliance with the Clean Air Act's PSD requirements raised in the Petition is through the Act's enforcement mechanism, not

through an appeal of a nearly eight-year-old permit. EPA Region 9 has already begun the enforcement process, and this Board should dismiss the Petition here and let the issues it raises be resolved in that forum.

II. FACTUAL BACKGROUND

As detailed in the Petition for Review, the District issued a PSD Permit for the Gateway Generating Station on July 24, 2001.¹ (See Petition at p. 6 and Exh. 1.) The PSD Permit was issued under a Delegation Agreement with EPA Region 9, and was issued along with a District “Authority to Construct” permit under an integrated state/federal permitting system. This integrated PSD/Authority to Construct permit system has been described by this Board in *In re Russell City Energy Center*, PSD Appeal No. 08-01, 14 E.A.D. __ (July 29, 2008). The Delegation Agreement provides that under this integrated system “permits issued in accordance with the PSD provisions of [the District’s New Source Review Rule, District Regulation 2, Rule 2, are] deemed to meet the federal PSD permit requirements” (*U.S. EPA – Bay Area Air Quality Management District Agreement for Delegation of Authority to Issue and Modify Prevention of Significant Deterioration Permits Subject to 40 CFR 52.21* (“Delegation Agreement”), Exh. A to Declaration of Alexander G. Crockett, Esq., submitted concurrently herewith (“Crockett Dec’l”), at ¶ I.1.)² The transmittal letter for the integrated permit document did not explicitly cite the PSD element of the District’s permitting action, but the fact that the document was issued to serve as the PSD permit is clear in the actual permit conditions themselves, many of which cite “PSD” as their legal basis, as well as from numerous discussions

¹ The facility was originally owned by Mirant Delta, LLC, and was known as Contra Costa Power Plant Unit 8. (See Petition at p. 6; Exh. 1.) The facility was subsequently transferred to PG&E and renamed the Gateway Generating Station. (See Petition at p. 6.) For simplicity, the District refers to the facility generally as “Gateway” throughout this document.

² Exhibit 1 to the Crockett Declaration is the current version of the Delegation Agreement. The Agreement has existed in several versions over different time periods relevant to this Petition, and each version has included language about permits issued in accordance with the PSD provisions of the District’s NSR regulations being deemed to meet federal PSD permit requirements. Paragraph I.1. of the agreement explains that the quoted language regarding the delegated permitting system is applicable back to the original delegation in 1986.

of the PSD elements of the integrated permitting process throughout the record for this permitting action. (See discussion in Section III.B., *infra*, for further details.)

The project owner commenced construction after it received its Authority to Construct/PSD Permit, but subsequently stopped work for a period of greater than 18 months. (See Petition at p. 6.³) The District periodically issued extensions of the District Authority to Construct during the period when construction had ceased (see Petition at pp. 9-10 & Exh. 4), and intended that they would be effective to extend the PSD Permit as well in accordance with the provision in the Delegation Agreement cited above.

The project owner then re-started construction work on the facility in approximately February of 2007. (See Petition at p. 6.⁴) At the time, the District (and apparently the project owner as well) was under the impression that the extensions to the Authority to Construct that had been granted had been effective to extend the PSD Permit as well pursuant to the Delegation Agreement, and that the PSD Permit therefore remained in force and effect to authorize construction. Subsequently, the project owner also submitted an application for an amendment to the Authority to Construct and PSD Permit in December of 2007 requesting, *inter alia*, increases in the emissions limits included in the initial permit. (See Petition at p. 6 & Exh. 6, Attachment A.) The District began to process that amendment application (again, under the assumption that the PSD Permit had been validly extended pursuant to the Delegation Agreement and was still in effect), and issued proposed amendments for public review and comment. (See Petition at p. 6 & Exh. 2.) The project owner ultimately withdrew the application, however, on February 13, 2009. (See Letter from Thomas Allen, PG&E, to Brian Bateman, BAAQMD, Feb. 13, 2009, Exh. B to Crockett Dec'l.) The project owner cited its experience showing that it could comply with the conditions imposed in the original Authority to

³ The District has not confirmed the exact dates on which construction ceased and recommenced as listed in the Petition, but understands that the duration of the cessation was over 18 months as Petitioner alleges.

⁴ Again, the District has not verified the exact dates specified in the Petition, but does not understand them to be incorrect at this stage.

Construct and PSD permit, which indicated that the increases in emission limits it had requested were unnecessary. (*See id.*) The project owner therefore went ahead and completed construction, and began operating the facility, based on the California and Federal permit authorizations that were originally issued in 2001 and were purportedly extended by the District's issuance of Authority to Construct extensions periodically since that time.

Subsequent to PG&E's withdrawal of the permit application, in communications between the District and EPA Region 9, EPA Region 9 has informed the District that it does not consider the extensions of the Authority to Construct under District regulations to have been effective to extend the facility's Federal PSD Permit. (*See* Letter from Brian C. Bunger, Esq., BAAQMD District Counsel, to Nancy Marvel, Esq., EPA Region 9 Regional Counsel, May 21, 2009, attached as Exhibit C to Crockett Dec'l.) Given the District's obligation to follow EPA Region 9's guidance with regard to Federal PSD permitting matters (*see* Delegation Agreement, Crockett Dec'l. Exh. A, at ¶ VII.1.), the District is now following this interpretation, as of receiving notice of it. In light of this recent interpretation, it appears in hindsight that the PSD Permit for the facility expired when construction ceased for more than 18 months, and was not effectively extended by the Authority to Construct extensions that the District issued periodically during the time construction was on hold. Given that, under EPA Region 9's current interpretation, the PSD Permit had apparently expired by the time construction was restarted, it appears that construction occurred without a current, valid PSD Permit as required by the PSD Provisions of the Federal Clean Air Act, CAA § 165, 42 U.S.C. § 7475. EPA Region 9 has begun enforcement action regarding this apparent non-compliance and is currently in settlement negotiations with PG&E on this issue. (*See* Intervenor Pacific Gas and Electric Company's Motion For Stay, Docket Entry No. 18, at p. 1.)

Petitioner now seeks to bring this situation before the Environmental Appeals Board in the form of a PSD Permit appeal under 40 C.F.R. Section 124.19. His Petition comes several months after the facility completed construction; several years after the PSD Permit for the facility apparently expired, a point on which there is now no disagreement among Petitioner, the

District and EPA Region 9; and while EPA Region 9 is undertaking enforcement action to address the apparent Clean Air Act non-compliance concerns Petitioner raises.

III. THE EAB LACKS JURISDICTION BECAUSE THE PETITION IS UNTIMELY, AND ALSO BECAUSE THE ISSUES RAISED IN THE APPEAL ARE MOOT.

The Board's June 18, 2009, Order requested briefing on three issues. The District addresses each of them in turn below. In summary, the District agrees with the Board's initial assessment that it lacks jurisdiction over this matter under 40 C.F.R. Section 124.19. (*See* Order at p. 4.) The Board lacks jurisdiction over the Petition because it is untimely, having been filed nearly eight years after the permit was issued and after the facility has completed construction; and for the additional reason that it is moot, as the initial permit has long since expired and there have not been any further final permitting actions for the Board to adjudicate in a permit appeal under Section 124.19.

A. An Appeal From A PSD Permit Issued in 2001 Is Not Timely When It Is Filed In 2009

40 C.F.R. Section 124.19 requires that any appeal of a PSD permit must be filed within 30 days. Here, it is nearly eight years since the permit was issued in July of 2001. The Board lacks jurisdiction over a Petition filed so long after the permit was issued.

Petitioner argues that he should be excused from the timeliness requirement because he claims that he was not given adequate notice of the draft permit, and as a result did not have notice that the appeal clock had started to run at the time the final permit was issued. (*See* Petition at p. 7.) His argument is that the allegedly defective notice means that he is not subject to any time limit whatsoever on appealing the permit.⁵ This cannot be the meaning of Section 124.19, as it would completely eviscerate any element of finality in PSD permit proceedings. It would require the Board to hear appeals of long-settled permits issued years ago anytime a

⁵ Petitioner seeks to appeal a permit here nearly eight years after its issuance, but by logical extension of his theory, he would also claim to be able to challenge permits issued 18 years or 28 years ago or more. His argument is that he can appeal any permit where he can allege that in hindsight there may have been procedural defects in the permit issuance process, going right back to the very inception of the PSD program.

Petitioner can claim in hindsight that there may have been alleged procedural defects in permit issuance, even for facilities that have since completed construction and have begun operating. But the PSD permit is a preconstruction permit, and it would make no sense to have to adjudicate such permits where construction has already occurred. In such a case, there would be nothing to be gained by determining in the permit appeal context that, in hindsight, there may have been deficiencies in the permit issuance process. A meritorious claim that a facility had been built without proper authorization would, of course, be an important Clean Air Act compliance concern that the agency would want to address appropriately. But the mechanism for doing so necessarily has to be through the enforcement context. Even if the EAB were to hear an appeal in such a case and determine that there were defects in permit issuance, it would have no effect on the ground absent an enforcement action for construction without valid PSD authorization. The Board should not devote resources to retrospectively considering the validity of preconstruction permits in the permit appeal context so long after the fact and after the facility has been constructed, where the only meaningful way to remedy any non-compliance with PSD permitting requirements is in the enforcement context. 40 C.F.R. Section 124.19 cannot have been intended to extend the permit appeal process to cover such situations.

But ultimately, even if the Board were to excuse Petitioner's failure to appeal at the time when the permit was issued notwithstanding these arguments, the Board would still lack jurisdiction here because the permit term expired several years ago and so any Petition challenging it at this stage is moot. As Petitioner concedes, construction of the facility began after the Federal PSD Permit was initially issued, but then ceased for over 18 months. (*See* Petition at p. 6.⁶) As a matter of law, the PSD Permit term expired as a result of this cessation of construction by operation of 40 C.F.R. section 52.21(r)(2). Once a permit has expired, there is nothing left for the EAB to review. (*See In re GSX Services of South Carolina, Inc.*, RCRA

⁶ The Petition alleges that construction ceased in February of 2002. Again, the District has not verified the exact dates, but agrees that the cessation in construction exceeded 18 months in duration.

Appeal No. 89-22, 4 E.A.D. 451, 453 n.3 (EAB 1992) (noting in *dicta* that permit expiry can render appeal under 40 C.F.R. § 124.19 moot); *In re 539 Alaska Placer Miners etc.*, NPDES Appeal Nos. 90-10 & 90-11, Slip. Op., 1992 EPA App. LEXIS 48, *2 (CJO Feb. 26, 1992) (dismissing appeal issue as moot where NPDES permit expired before hearing).⁷ The Board therefore lacks jurisdiction over the Petitioner's challenge to the permit that was initially issued, because the validity of that permit is now moot. There would be no purpose to be served by adjudicating such an appeal because there is no meaningful remedy that the Board could grant for any alleged defects in the permit as issued in 2001. The Board could not meaningfully remand the permit to the District to correct any deficiencies at this late stage, so long after the initial application was submitted and after the permit was issued, ran its term, and expired. Nor could the Board grant any meaningful relief in the form of an advisory opinion that the initial permit is not valid at this time, as neither the District and Petitioner dispute its validity now because of the expiration caused by the cessation of construction. Thus, to the extent that the Board can excuse the Petition's un-timeliness, it should still dismiss the Petition's challenge to the permit as moot.

B. The EAB Would Have Had Jurisdiction Over The PSD Permit If It Had Been Timely Appealed (And If All Other Jurisdictional Requirements Had Been Satisfied)

Hypothetically, if a petitioner had appealed within 30 days of the issuance of the PSD Permit, and had participated in the permitting process and properly preserved the arguments for the appeal, then the Environmental Appeals Board would have jurisdiction over the appeal. The District issues Federal PSD Permits under its Delegation Agreement with EPA Region 9 in an integrated permitting system along with District Authorities to Construct.⁸ When the final permit

⁷ Furthermore, the issues raised in the Petition regarding the 2001 PSD Permit are not "capable of repetition, yet evading review" because to the extent that they ever arise again in future permitting, they will be fully reviewable in appeals of future permitting actions and will not "evade review".

⁸ As noted above, this integrated permitting system was described in detail by the Board in its decision in the *Russell City* case, PSD Appeal No. 08-01.

documents are issued, the state-law Authority to Construct permit becomes appealable to the District's Hearing Board and then to the California courts, while the Federal PSD Permit becomes appealable to the EAB and then to the federal courts. The Board has entertained several appeals of Federal PSD Permits issued by the District over the years under this integrated system. (See *In re Russell City Energy Center*, PSD Appeal No. 08-01, 14 E.A.D. __ (July 29, 2008); *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).)

The *Metcalf* case is particularly instructive on this point, as the permit there was issued in the same time frame as the initial permit for the Gateway facility. The Metcalf permit was issued on May 4, 2001, and the appeal was pending until August 10, 2001, when the Board denied it. (See *Metcalf*, PSD Appeal Nos. 01-07 and 01-08, Slip. Op. at pp. 1, 45.) The District issued the permit for the Gateway facility on July 24, 2001, in the middle of this process. (See Petition at p. 6 and Exh. 1.) If the PSD permit for this facility had been appealed at that time, it would have joined the Metcalf case on the Board's docket and the Board would have had jurisdiction to adjudicate it (assuming of course that the Petitioner could have satisfied all of the threshold procedural requirements).

The District does note that the Board phrased its request for further briefing on this issue in terms of whether the EAB would have jurisdiction "over an appeal from the Authority to Construct" (Order at p. 6), and stated elsewhere that "it is questionable whether a final PSD permit decision was ever issued" (Order at p. 5). Obviously, the federal Environmental Appeals Board would not have jurisdiction over the state-law Authority to Construct, but that is not the question here because the permit at issue is the Federal PSD Permit the District issued under the integrated permitting process set up under the Delegation Agreement. Petitioner has attempted to create confusion over this issue by pointing out that the cover letter transmitting the permit states that it is the "Authority to Construct" but does not explicitly state that it is also the federal PSD Permit. (See Petition at p. 11.) The cover letter used that language because under the Delegation Agreement, "District permits issued in accordance with the provisions of Regulation

2-Rule 2 [*i.e.*, District Authorities to Construct] were deemed to meet the federal PSD permit requirements” and thus to be effective as federal PSD Permits. (Delegation Agreement, Crockett Decl. Exh. A, ¶ I.1.) Under this guidance in the Delegation Agreement, the District often referred to these integrated state/federal permits simply as an “Authority to Construct”, even though they were intended for all practical and legal purposes to be effective as both an Authority to Construct under state law and a PSD Permit under federal law. The use of this shorthand in the permit transmittal letter does not change the legal effect of the District’s action in issuing the permit, which was to issue both the state-law Authority to Construct and the Federal PSD Permit.

The fact that the District’s permitting action included the Federal PSD permit as well as the District Authority to Construct is clear from references to the PSD requirements throughout the permitting record, even if the permit transmittal letter did not explicitly state that the integrated permit was being issued to serve as both. For example, when the District responded to the comments of Californians for Renewable Energy (“CARE”) on the PDOC/Draft PSD Permit, it explicitly stated that it was not yet issuing the final PSD permit because the Endangered Species Act (“ESA”) consultation was not complete. (*See* Letter from Ellen Garvey, BAAQMD, to Michael Boyd, CARE, February 6, 2001, Exh. D to Crockett Decl.) When EPA engaged in the ESA consultation, it expressly stated that the consultation was related to the issuance of the federal PSD Permit for the facility. (*See* Letter from Gerardo Rios, EPA Region 9, to Jan Knight US Fish & Wildlife Service, May 30, 2001, Exh E to Crockett Decl.) When the consultation was complete, EPA Region 9 wrote to the District to inform the District of that fact, and stated 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, Exh. F to Crockett Decl.) And when the District went ahead and did so, it expressly cited PSD requirements as a basis for many of the actual permit conditions that made up the integrated permitting document. (*See, e.g.*, PSD Permit, Exh. 1 to Petition (Conditions 14, 15, 20-24, 26, 27, 36, 45 & 46 referencing PSD as a basis).) The

semantic effect of the term used in the permit cover letter cannot change the legal effect of the issuance of the permit as an integrated state/federal permit as both a District Authority to Construct and a federal PSD Permit. The permit that the Board would have had jurisdiction to review here, if an appeal had been filed at the time, would have been the Federal PSD Permit, as was the case in the *Metcalfe* proceeding.

But again, this is purely a hypothetical issue at this stage. The Petition in this case was not filed when the permit was issued, it was filed nearly eight years later and after the facility was constructed and commenced operating. As explained above, the Board cannot take jurisdiction over Petitioner's claims in the Section 124.19 permit appeal context under these circumstances. And even if the Petition's un-timeliness can be excused, the Board would still lack jurisdiction because the permit has expired and any issues of its validity are now moot. Put another way, since there is no dispute that the permit was invalid at least by the time construction ceased for over 18 months, there can be no reason to adjudicate whether it became invalid because it expired, or whether it never became valid in the first place because it failed to state "PSD" in the transmittal letter. The outcome is the same either way. The Board should not take jurisdiction of the Petition based on this moot issue.

C. There Is No Other Jurisdictional Basis For This Appeal

As the Board notes in its Order, the only permitting action identified in the Petition was the initial permit issuance in 2001. (*See* Order at p. 4.) As explained above, the Board lacks jurisdiction over this permitting action because the Petition is untimely, and also because any such appeal is moot at this stage so long after the initial permit term expired. The Petition does not provide any other jurisdictional basis for this appeal.

The Petition does reference two other areas of permitting activity, however. Neither of these provides a jurisdictional basis for an appeal under 40 C.F.R. Section 124.19, but since Petitioner has raised them and may seek to assert them as a basis for jurisdiction the District addressed them here.

The first of these additional areas of permitting activity that Petitioner raises concerns the District's extensions of the Authority to Construct, which the Petition states did not extend the PSD Permit when it expired. (See Petition at pp. 9-10.) As noted above, the District was under the understanding that extensions of the Authority to Construct would be effective to extend the Federal PSD Permit as well based on the language of the Delegation Agreement between the District and EPA Region 9. (See Delegation Agreement, Crockett Decl. Exh. A, at ¶ I.1.) EPA Region 9 has now taken the position in hindsight that extensions of an Authority to Construct are not effective to extend a PSD Permit, notwithstanding the language in the PSD Delegation Agreement.⁹ (See Crockett Dec'l Exh. C.) Given this recent guidance from EPA Region 9 regarding implementation of the District's delegated PSD authority, the District does not disagree with Petitioner to the extent he alleges that the renewals of the Authority to Construct were not effective to renew the Federal PSD Permit. As the parties are not now in disagreement on this point, there is no live controversy between them for this Board to adjudicate. Because there is no dispute on the issue of whether the initial PSD Permit was validly extended, the Petition should be dismissed as moot in this respect as well. (See *In re: Great Lakes Chemical Corp.*, 5 E.A.D. 395, 397 (EAB 1994) ("Because there is no longer any dispute [over the issue raised in the appeal], the Board denies review on the grounds that the issue is moot.")) Again, there would be no purpose to be served by adjudicating such an appeal, as there is no meaningful relief the Board could grant on this issue where the parties do not disagree that, based on Region 9's recent guidance, there were no effective extensions of the PSD Permit after it expired.

The other area of permitting activity that Petitioner raises concerns the revised permit that the project owner applied for in 2007 (see Petition at pp. 11-17), but which the District never issued because the application was withdrawn (see Crockett Decl. Exh. B). To the extent that Petitioner is attempting to appeal a permit that has not yet been issued, such a claim is not ripe

⁹ Note that EPA Region 9 has given revised guidance with respect to the permit extension issue only. Region 9 has given no indication that it does not continue to believe that the original permit was issued as a PSD permit.

until the permitting agency has taken final action on the permit and there is a “final permit decision” within the language of 40 C.F.R. section 124.19(a) for the EAB to review. As the Board has held in similar circumstances where appeals have been filed before the permit is actually issued, the petition must be dismissed with respect to such claims. (*See In re City & County of San Francisco*, 4 E.A.D. 559, 574 (EAB 1993) (“[U]ntil such time as the Region makes a decision on the re-proposed permit, [the issues raised in the Petition] and the many sub-issues raised thereunder and arguments asserted in support thereof, are not yet ripe for review.”).) The Petition presents the same situation here in challenging an amended permit that was never issued. It therefore must be dismissed on this issue as unripe because there is no final permit decision to adjudicate under Section 124.19.

Notably, Petitioner’s appeal in this regard is similar to his most recent Petition to this Board regarding the proposed Russell City Energy Center (Docket No. PSD 08-07). In that case, Petitioner sought to challenge certain decisions regarding the proposed Russell City facility made by the California Energy Commission while the District was conducting further PSD permitting proceedings as directed by the EAB in its Remand Order in Docket No. PSD 08-01. Because there had not been any final action with respect to the PSD permit proceeding, the Board held that there was nothing yet to review and dismissed the appeal. (*See In re Russell City Energy Center*, PSD Appeal No. 08-07 (Nov. 25, 2008), slip. op. at p. 3 (“Since no PSD action within this Board’s jurisdiction is being appealed, the review of the Petition is denied.”).) Petitioner’s current Petition is the same with respect to the never-issued PSD Permit amendment. Petitioner seeks to raise purported defects in the permitting proceeding in absence of any final agency action in that proceeding, and the Board should dismiss such claims until such time as there may be an actual PSD permitting action for the Board to review.

For all of these reasons, nothing in the Petition provides any ground for EAB jurisdiction under 40 C.F.R. Section 124.19.

IV. THE APPROPRIATE VENUE TO ADDRESS THE CLAIMS RAISED IN THE PETITION AT THIS STAGE IS IN THE ENFORCEMENT CONTEXT, NOT IN THE PERMIT REVIEW CONTEXT.

This analysis of the jurisdictional questions raised by the Petition highlights the fact that the Petition presents, at most, a Clean Air Act enforcement matter, not a permitting issue for this Board to adjudicate under its authority in 40 C.F.R. Section 124.19. Fundamentally, the Petition claims that the Gateway Generating Station was constructed without a valid Federal PSD permit in violation of the PSD Provisions of the Clean Air Act (or alternatively that the facility is in violation of the conditions of its PSD Permit). To the extent that these claims have any merit, they are enforcement issues that must be addressed by Region 9 through a Clean Air Act enforcement action—a process that Region 9 has already begun. They do not challenge PSD permitting actions that the Environmental Appeals Board can or should adjudicate at this stage in the permit appeal context under 40 C.F.R. Section 124.19.

The Petition does of course devote much discussion to several of the PSD-permitting-related actions that have occurred over the long permitting history of the Gateway facility, but none of them presents a live permitting issue for this Board to adjudicate at this point, for the reasons discussed above. Once these purported bases for a permit appeals are seen for what they are—elements of the facility's permitting history, but nothing that presents a live controversy to be adjudicated in an appeal today—it becomes clear what the Petition really is: an attempt to get the EAB to take up Petitioner's claims that the facility has violated the PSD provisions of the Clean Air Act. But such claims must be addressed as Clean Air Act violations through the Clean Air Act enforcement process, and cannot be raised in a permit appeal brought under 40 C.F.R. section 124.19. (*See In re City of Fort Worth*, NPDES Appeal No. 95-8, 6 E.A.D. 392, 408 n. 21 (EAB 1996) (dismissing claim that facility was in violation of its permit, as opposed to challenge to condition of permit, because "if current permit conditions are being violated, such an issue is appropriately addressed through the Agency's enforcement process, and not through these permit issuance proceedings"), and additional cases cited therein.) The Board should therefore dismiss these PSD compliance issues that Petitioner is attempting to raise in this permit appeal

proceeding, and instead allow them to be addressed in the appropriate venue, which is through Region 9's enforcement action.

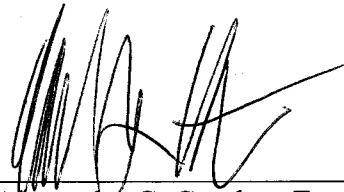
V. CONCLUSION

For all of the foregoing reasons, the Bay Area Air Quality Management District respectfully submits that the Petition for Review should be dismissed for lack of jurisdiction.

Dated: June 22, 2009

Respectfully Submitted

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

A handwritten signature in black ink, appearing to read 'AGC', is written over a horizontal line.

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, "BAAQMD Brief on Jurisdictional Issues", by placing a copy of it in a sealed envelope, with First Class postage thereon fully paid, and depositing said envelope in the United States Mail at San Francisco, California, addressed to the person set forth below:

Mr. Rob Simpson
27126 Grandview Avenue
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Nancy Marvel, Esq., Regional Counsel
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U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105

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

Executed on 30, 2009, at San Francisco, California.



Charlene Forbush

ORIGINAL

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

In the matter of
Gateway Generating Station

PSD Appeal No. 09-02

ENVIR. APPEALS BOARD

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**DECLARATION OF ALEXANDER G. CROCKETT, ESQ.,
IN SUPPORT OF BAAQMD BRIEF ON JURISDICTIONAL ISSUES**

I, Alexander G. Crockett, Esq., hereby declare as follows.

1. I am employed by the Bay Area Air Quality Management District ("District") as Assistant Counsel. I am the staff attorney with primary direct responsibility for the above-captioned matter, and generally for legal issues regarding permitting and enforcement with respect to the Gateway Generating Station. I make this Declaration in support of the District's Brief on Jurisdictional Issues being filed concurrently herewith. I have personal knowledge of the matters stated herein and know them to be true (or, where indicated, I am informed and believe that they are true), and I can testify truthfully and competently thereto.

2. Attached hereto as Exhibit A is a true and correct copy of an agreement between the District and EPA Region 9 regarding delegation of the Federal Prevention of Significant Deterioration ("PSD") permitting program in the San Francisco Bay Area, entitled *U.S. EPA – Bay Area Air Quality Management District Agreement for Delegation of Authority to Issue and Modify Prevention of Significant Deterioration Permits Subject to 40 CFR 52.21*.

3. Attached hereto as Exhibit B is a true and correct copy of a letter dated February 13, 2009, from Thomas Allen of Pacific Gas & Electric Co., to Brian Bateman of the District.

4. Attached hereto as Exhibit C is a true and correct copy of a letter dated May 21, 2009, from Brian C. Bunger, Esq., District Counsel, to Nancy Marvel, Esq., EPA Region 9 Regional Counsel.

5. Attached hereto as Exhibit D is a true and correct copy of a letter dated February 6, 2001, from Ms. Ellen Garvey, District Executive Officer/Air Pollution Control Officer, to Mr. Michael Boyd, President, Californians for Renewable Energy ("CARE").

6. Attached hereto as Exhibit E is a true and correct copy of a letter dated May 30, 2001, from Mr. Gerardo Rios, Acting Chief, Permits Office, EPA Region 9, to Mr. Jan Knight, Chief, Endangered Species Division, U.S. Fish & Wildlife Service.

7. Attached hereto as Exhibit F is a true and correct copy of a letter dated July 12, 2001, from Mr. Gerardo Rios, Acting Supervisor, Permits Office, EPA Region 9, to Ms. Ellen Garvey, District Executive Officer/Air Pollution Control Officer.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct, and that this declaration was executed on June 22, 2009.

A handwritten signature in black ink, appearing to read 'Alexander G. Crockett', is written over a horizontal line.

Alexander G. Crockett, Esq.

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, "Declaration of Alexander G. Crockett, Esq., in support of BAAQMD Brief on Jurisdictional Issues", by placing a copy of it in a sealed envelope, with First Class postage thereon fully paid, and depositing said envelope in the United States Mail at San Francisco, California, addressed to the person set forth below:

Mr. Rob Simpson
27126 Grandview Avenue
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Nancy Marvel, Esq., Regional Counsel
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San Francisco, CA 94105

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

Executed on 30, 2009, at San Francisco, California.


Charlene Forbush

A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901

FEB 04 2008

Mr. Jack Broadbent
Air Pollution Control Officer
Bay Area AQMD
939 Ellis Street
San Francisco, CA 94109-7799

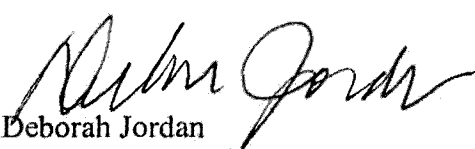
RE: Amended PSD Delegation Agreement

Dear  Mr. Broadbent:

EPA appreciates the efforts of your staff to work with us in amending your Prevention of Significant Deterioration (PSD) Delegation agreement between the District and EPA. Under the amended delegation agreement, the District is now primarily responsible for issuing and modifying PSD permits. EPA remains available to assist the District in any applicability or implementation issues. I am pleased to enclose a signed copy of the revised PSD delegation agreement. The agreement is effective immediately.

Please contact Laura Yannayon at (415) 972-3534 if you have any other questions related to this matter.

Sincerely,


Deborah Jordan
Director, Air Division

Enclosure

cc: Brian C. Bunger, Bay Area Air Quality Management District, w/enclosure
James Goldstene, Executive Officer, California Air Resources Board w/enclosure

U.S. EPA - Bay Area Air Quality Management District
Agreement for Delegation of Authority to Issue and Modify Prevention of
Significant Deterioration Permits Subject to 40 CFR 52.21

The undersigned, on behalf of the Bay Area Air Quality Management District (District) and the United States Environmental Protection Agency (EPA), hereby agree to the partial delegation of authority to issue Prevention of Significant Deterioration (PSD) initial permits and to modify existing PSD permits, subject to the terms and conditions of this Agreement. This partial delegation is executed pursuant to 40 CFR 52.21(u), Delegation of Authority.

I. Background Recitals

1. On April 23, 1986, EPA delegated authority to implement the federal PSD regulations at 40 CFR 52.21 to the District. This delegation was based on EPA's determination that the PSD portion of District Regulation 2 – Rule 2 (Readopted and Renumbered July 17, 1991, amended June 15, 1994) generally met the requirements of 40 CFR 52.21; therefore District permits issued in accordance with the provisions of Regulation 2 – Rule 2 were deemed to meet the federal PSD permit requirements pursuant to the provisions of the delegation agreement.
2. On December 31, 2002, EPA finalized revisions to the regulations at 40 CFR 52.21, which became effective on March 3, 2003. See 67 FR 80186. After discussions with the California Air Resources Board and the District, EPA informed the District that it would need to adopt revisions to Regulation 2 – Rule 2 to address the recent PSD revisions and continue to implement the federal PSD program pursuant to 40 CFR 52.21. Accordingly, on March 3, 2003, EPA withdrew the delegation of federal PSD authority from the District. See 68 FR 19371 (April 21, 2003).
3. On June 24, 2005, the District of Columbia Court of Appeals vacated two provisions of the revised federal PSD regulations related to Clean Units and Pollution Control Projects. The provisions upheld by the Court provide new additional calculation methodologies for determining if a proposed project will result in a major modification and the application

of a Plantwide Applicability Limit (PAL). On June 13, 2007, EPA issued a direct final rule revising the federal PSD regulations to remove the vacated portions.

II. Scope of Partial Delegation

1. The provisions upheld by the court (additional calculation methodologies and PALs) are not specifically addressed by Regulation 2 – Rule 2. Therefore, this partial delegation of authority to issue and modify PSD permits does not delegate authority to the District to modify PSD permits when the applicant seeks to use the additional calculation methodologies promulgated in 40 CFR 52.21 but not set forth in Regulation 2 – Rule 2 and does not delegate authority to issue new or modified PSD permits based on PALs.
2. For all applications for new or modified PSD permits other than those set forth in paragraph 1 above, the existing District regulations continue to generally meet the requirements of 40 CFR 52.21 for issuing PSD permits; therefore District permits issued in accordance with the provisions of Regulation 2 – Rule 2 shall be deemed to meet federal PSD permit requirements pursuant to the provisions of this delegation agreement.

III. Applicability

1. EPA and the District have agreed to this partial delegation of PSD authority to allow the District to issue initial and modified PSD permits, except for modifications seeking to determine PSD applicability based on the additional calculation methodologies set forth in 40 CFR 52.21 and new or modified PSD permits seeking PALs. (Modifications include Administrative Amendments, Major Modifications, and non-Major Modifications.)
2. Pursuant to this partial delegation agreement, the District shall have primary responsibility for issuing all new and modified PSD permit(s).
3. The authority to issue a PSD permit containing a PAL is not delegated to the District as part of this delegation agreement. If any facility subject to this agreement requests a permit modification to incorporate conditions for a PAL, as provided in 40 CFR 52.21(aa), EPA shall process the application and issue the final PAL permit for the modification.

4. If any source seeks a PSD permit modification based on determining applicability with the additional calculation methodologies set forth in 40 CFR 52.21 (as revised in 2002), EPA shall issue the PSD permit.
5. This partial delegation of PSD authority becomes effective upon the date of the signatures of both parties to this Agreement.

IV. General Delegation Conditions

1. The District shall issue PSD permits under this partial delegation Agreement in accordance with the PSD requirements of the District's Regulation 2 – Rule 2 and 40 CFR 52.21, as amended on December 31, 2002; except as provided in subsection III.
2. This partial delegation may be amended at any time by the formal written agreement of both the District and the EPA, including amendments to add, change, or remove terms or conditions of this Agreement.
3. EPA may review the PSD permit(s) issued by the District to ensure that the District's implementation of this delegation Agreement is consistent with federal PSD regulations for major sources and major modifications (40 CFR 52.21).
4. If the EPA determines that the District is not implementing or enforcing the PSD program in accordance with the terms and conditions of this partial delegation agreement, the requirements of Regulation 2 – Rule 2, 40 CFR 52.21, 40 CFR 124 or the Clean Air Act, this partial delegation agreement 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 District.
5. If the District determines that issuing a PSD permit in accordance with the terms and conditions of this agreement, the requirements of Regulation 2 – Rule 2, 40 CFR 52.21, 40 CFR 124 or the Clean Air Act conflicts with State or local law, or exceeds the District's authority or resources to fully and satisfactorily carry out such responsibilities, the District after consultation with EPA, may remand administration of these permits to EPA. Any such remand shall be effective as of the date specified in a Notice of Remand to EPA.

6. The permit appeal provisions of 40 CFR 124, including subpart C thereof, pertaining to the Environmental Appeals Board (EAB), shall apply to all federal PSD permitting action appeals to the EAB for permits issued by the District under this partial delegation agreement. For purposes of implementing the federal permit appeal provisions under this partial 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 District 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 shall be 30 days after the date of the final decision by the District to issue, modify, or revoke and reissue the permit; and (2) if an appeal is made to the EAB, the effective date of the permit shall be suspended until such time as the appeal is resolved. Failure by the District to comply with the terms of this paragraph shall render the subject permit invalid for PSD purposes.

V. Communication Between EPA and the District

The District and EPA will use the following communication procedures:

1. The District will forward to EPA copies of (1) the findings related to the PSD application, (2) the justification for the District's preliminary determination, (3) the draft permit and (4) all public notices required by 40 CFR 124. Such copies shall be provided at or prior to the beginning of the public comment period for each PSD preliminary determination. EPA will provide comments to the District as soon as possible prior to the close of the public comment period.
2. The District will forward to EPA copies of the final action for each PSD permit application at the time of issuance, as well as a summary of public comments and, upon request by EPA, copies of substantive public comments.
3. The District will send to EPA a copy of all PSD non-applicability determinations that utilize netting. All such determinations must be accompanied by a written justification.

VI. EPA Policies Applicable to PSD Review

1. EPA is responsible for the issuance of PSD permits on Indian Lands, under Sections 110 and 301 of the Clean Air Act and for those situations set forth in Section III above. This

agreement in no way grants or delegates any authority under the Clean Air Act on Indian Lands to the District.

2. All PSD BACT determinations are required to perform a "top-down" BACT analyses. EPA will consider as deficient any BACT determination that does not begin with the most stringent control options available for that source category.
3. The District must consult with the appropriate Federal, State and local land use agencies prior to issuance of a PSD permit preliminary determination. For the purposes of the Endangered Species Act (ESA), the District shall:
 - a. Notify the appropriate Federal Land Manager (FLM) within 30 days of receipt of a PSD permit application. If the proposed project will impact a Class I area, notify the appropriate Federal Land Manager (FLM) no later than 60 days prior to issuing a public notice for the project.
 - b. Notify the Fish and Wildlife Service (FWS) and EPA when a submitted PSD permit application has been deemed complete, in order to assist EPA in carrying out its non-delegable responsibilities under Section 7 of the ESA (PL 97-304).
 - c. Notify applicants of the potential need for consultation between EPA and FWS if an endangered species may be affected by the project.
 - d. Refrain from issuing a final PSD permit unless FWS has determined that the proposed project will not adversely affect any endangered species.

VII. Permits

1. The District shall follow EPA guidance on any matter involving the interpretation of Sections 160-169 of the Clean Air Act or 40 CFR 52.21, relating to applicability determinations, PSD permit issuance and enforcement.
2. The District will at no time grant any waiver to the PSD permit requirements.
3. Authorities to Construct must include appropriate provisions to ensure permit enforceability. Permit conditions shall, at a minimum, contain reporting requirements on initiation of construction, start-up, and source testing (where applicable).

4. When any conditions of a PSD permit are incorporated into a Title V permit, the District shall clearly identify PSD as the basis for those conditions.
5. The primary responsibility for the administration and enforcement of the following EPA-issued permits is delegated to the District:

<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
Crockett Cogen	SFB 82-05	February 9, 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

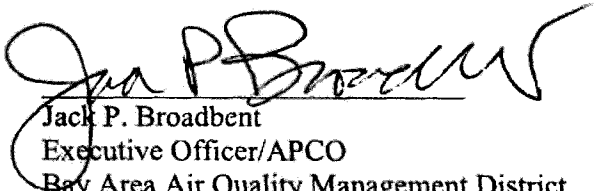
District-issued modifications to these permits which meet the requirements of 40 CFR 52.21 will be considered valid by EPA. The District shall issue any permit modifications to the above listed sources pursuant to this agreement and using District Regulation 2 – Rule 2, which incorporates the requirements of 40 CFR 52.21.

VIII. Permit Enforcement

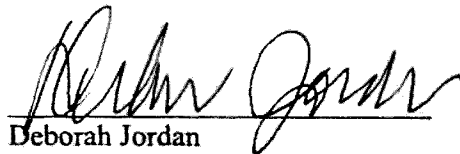
1. The primary responsibility for enforcement of the PSD regulations rests with the District. The District will enforce the provisions of the PSD program except in those cases where District rules or policy are more stringent. In that case, the District may elect to implement the more stringent requirements.
2. Nothing in this partial delegation agreement shall prohibit EPA from enforcing the PSD provisions of the Clean Air Act, 40 CFR 52.21 or any PSD permit issued by the District pursuant to this agreement.
3. In the event that the District is unwilling or unable to enforce a provision of this partial delegation agreement with respect to a source subject to the PSD regulations, the District will immediately notify the Air Division Director. Failure to notify the

Air Division Director does not preclude EPA from exercising its enforcement authority.

Jan 29, 2008
Date


Jack P. Broadbent
Executive Officer/APCO
Bay Area Air Quality Management District

Feb. 6, 2008
Date


Deborah Jordan
Director, Air Division
U.S. EPA, Region IX

B



**Pacific Gas and
Electric Company®**

Mailing Address:
Pacific Gas & Electric Company
Gateway Generating Station
3225 Wilbur Ave.
Antioch, CA 94509
(925) 522-7801

RECEIVED
BAY AREA AIR QUALITY
MANAGEMENT DISTRICT
FEB 17 AM 10:40

February 13, 2009

Brian Bateman
Director of Engineering
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109

Re: Application for Modifications to the Authority to Construct
Gateway Generating Station—Plant No. 18143, Application No. 17182

Dear Mr. Bateman:

PG&E hereby withdraws Application No. 17182, the application for modifications to the Authority to Construct for the Gateway Generating Station (GGS), which was filed with the District in December 2007. As we have discussed with you, the principal reason for requesting the permit modifications was because we believed that the original conditions governing commissioning and startups were overly stringent and could not be complied with. In our application we had requested changes to these conditions that would have increased some emissions limits and extended some time periods related to commissioning and startups. However, GGS has completed commissioning in compliance with the existing conditions, so no revisions are needed for commissioning-related conditions. Further, GGS has completed several warm and hot startups and two complete cold startups. Based on the data collected during these startups, we now believe we can comply with the existing startup conditions. As a result, we no longer believe the amendments originally requested in our December 2007 application are necessary.

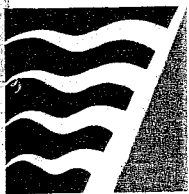
We appreciate the assistance you and your staff have provided during the permit review. If you have any questions regarding this request to withdraw the application, please do not hesitate to call me or Gary Rubenstein of Sierra Research at (916) 444-6666.

Sincerely,

Thomas Allen
Project Manager

cc: Brian Lusher, BAAQMD Permit Services
Andrea Grenier, Grenier & Associates
Scott Galati, Galati Blek
Gary Rubenstein, Sierra Research

C



BAY AREA
AIR QUALITY
MANAGEMENT
DISTRICT
SINCE 1955

May 21, 2009

BY FAX (415/947-3571)
AND FIRST CLASS MAIL

Nancy Marvel, Esq.
Regional Counsel
United States Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94108

Re: Potential PSD Non-Compliance – Gateway Generating Station

Dear Ms. Marvel:

I am writing to confirm the understanding of the Bay Area Air Quality Management District ("District") regarding EPA Region 9's interpretation of the Federal PSD Permit status of the Gateway Generating Station based on discussions between District and Region 9 representatives over the past several weeks. This letter is to memorialize the District's understanding in writing, and also to ensure that the District has satisfied its obligation under Paragraph VIII.3. of the PSD Delegation Agreement between our agencies, which requires that the District notify EPA Region 9 in the event that there is potential non-compliance with Federal PSD requirements over which the District does not have enforcement jurisdiction.

As has been made clear in recent discussions, the District issued a Federal PSD Permit for the Gateway facility in 2001, in conjunction with a District Authority to Construct issued under District regulations. The District issued the Federal PSD Permit on behalf of EPA Region 9, pursuant to the Delegation Agreement between the two agencies. The project owner subsequently began construction on the facility, but then ceased construction for more than 18 months, which required that the PSD permit be extended under 40 C.F.R. section 52.21(r)(2). The Air District issued several extensions of the District Authority to Construct over the next several years, and intended that these extensions would be effective to extend the Federal PSD permit as well. The District's

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Nancy Marvel, Esq.
Regional Counsel
United States Environmental Protection Agency
Region IX
May 21, 2009
Page 2

understanding that the Authority to Construct extensions would also extend the Federal PSD Permit was based on the provision in the Delegation Agreement establishing that permits issued pursuant to District regulations are deemed to meet the Federal PSD permit requirements. (See, Delegation Agreement, ¶ I.1.) In recent discussions, however, EPA Region 9 staff have informed District staff that they do not now consider the Authority to Construct extensions to have been effective to extend the Federal PSD Permit, notwithstanding the provisions of the Delegation Agreement. As a result of this interpretation, it appears that the Federal PSD Permit for the facility expired and was not extended or renewed.

After a cessation of work on the project for several years, the current project owner restarted construction and completed the facility, and has now commenced operation. The project owner has stated in discussions with District and EPA Region 9 staff that it believed that the Federal PSD Permit as initially issued had been duly extended and was still valid when the facility was constructed. EPA's recent clarification of its interpretation of the status of the Federal PSD Permit conflicts with this view, however, and suggests that the Federal PSD Permit had expired and was no longer valid when construction was restarted and completed. Construction of the facility without a current Federal PSD Permit would be a violation of the Clean Air Act's PSD provisions. To the extent that this situation presents a non-compliance situation with respect to the PSD requirements, the District is obligated under Paragraph VIII.3. of the Delegation Agreement to refer any enforcement action to EPA Region 9 as the federal agency responsible for enforcing the Federal Clean Air Act in the Bay Area. This letter is to document the District's compliance with that provision of the Delegation Agreement.

Please give me a call at the number listed above if you would like to discuss any of the foregoing, or alternatively have your staff who have been working on these matters contact Alexander Crockett of my staff at (415) 749-4732.

Sincerely,



Brian C. Bunger, Esq.
District Counsel

cc: Alexander Crockett, Esq., BAAQMD
Ann Lyons, Esq., EPA Region 9
David Farabee, Esq., Pillsbury Winthrop LLP

TRANSMISSION VERIFICATION REPORT

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 TEL : 4157495103
 SER.# : BROE5J279710

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BAY AREA
 AIR QUALITY
 MANAGEMENT
 DISTRICT

DISTRICT COUNSEL'S OFFICE
 939 ELLIS STREET
 SAN FRANCISCO, CA 94109
 TEL. (415) 749-4920
 FAX: (415) 749-5103

FACSIMILE TRANSMITTAL SHEET

DATE:
 5/21/2009

FROM:
 Alexander Crockett, Assistant Counsel

TO:
 Nancy Marvel, Esq.
 Regional Counsel

FAX:
 (415) 947-3571

COMPANY/FIRM:
 US EPA, Region IX

PHONE NUMBER:

REFERENCE:
 Gateway Generating Station

TOTAL NO. OF PAGES INCLUDING COVER: 3

SUBJECT:
 Potential PSD Non-Compliance

HANDLING:
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☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PER YOUR REQUEST

NOTES/COMMENTS:

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DATE: 5/21/2009

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TO: Nancy Marvel, Esq.
 Regional Counsel

FAX: (415) 947-3571

COMPANY/FIRM:

PHONE NUMBER:

US EPA, Region IX

REFERENCE:

TOTAL NO. OF PAGES INCLUDING COVER: 3

Gateway Generating Station

SUBJECT:

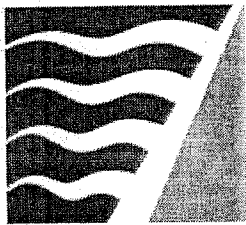
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Potential PSD Non-Compliance

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NOTES/COMMENTS:



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MANAGEMENT
DISTRICT

DISTRICT COUNSEL'S OFFICE
939 ELLIS STREET
SAN FRANCISCO, CA 94109
TEL. (415) 749-4920
FAX: (415) 749-5103

FACSIMILE TRANSMITTAL SHEET

DATE:

5/21/2009

FROM:

Alexander Crockett, Assistant Counsel

TO:

Nancy Marvel, Esq.
Regional Counsel

FAX:

(415) 947-3571

COMPANY/FIRM:

US EPA, Region IX

PHONE NUMBER:

REFERENCE:

Gateway Generating Station

TOTAL NO. OF PAGES INCLUDING COVER: **3**

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NOTES/COMMENTS:

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D



BAY AREA
AIR QUALITY
MANAGEMENT
DISTRICT

February 6, 2001

ALAMEDA COUNTY
Roberta Cooper
Scott Haggerty
(Vice-Chairperson)
Nate Miley
Shelia Young

Mr. Michael Boyd
President, CARE
821 Lakeknoll Drive
Sunnyvale, CA 94809

CONTRA COSTA COUNTY
Mark DeSaulnier
Mark Ross
Gayle Ulkema

Re: Contra Costa Power Plant-Unit 8
Southern Energy Delta, LLC.
BAAQMD Application 1000

MARIN COUNTY
Harold C. Brown, Jr.

Dear Mr. Boyd:

NAPA COUNTY
Brad Wagenknecht

SAN FRANCISCO COUNTY
Amos Brown
Michael Yaki

SAN MATEO COUNTY
Jerry Hill
Marland Townsend
(Secretary)

SANTA CLARA COUNTY
Randy Attaway
(Chairperson)
Liz Kniss
Julia Miller
Dena Mossar

SOLANO COUNTY
William Carroll

SONOMA COUNTY
Tim Smith
Pamela Torliatt

Ellen Garvey
Executive Officer/
Air Pollution Control Officer

Thank you for your comments regarding the Preliminary Determination of Compliance (PDOC) for the Contra Costa Power Plant-Unit 8 (CCPP-Unit 8). After careful consideration of those comments, we offer the following responses. A copy of the Final Determination of Compliance (FDOC) is enclosed. Please be advised that the FDOC does not constitute a Final PSD Permit under 40 CFR 52.21 since the United States Environmental Protection Agency (US EPA) is currently involved in a consultation with the U.S. Fish and Wildlife Service (USFWS) pursuant to Section 7 of the Endangered Species Act. The consultation concerns the potential impacts of the Contra Costa Power Plant-Unit 8 on federally protected species and will be completed when the USFWS issues their biological opinion on the potential impacts of the CCPP-Unit 8. The District will issue the Final PSD Permit after the Section 7 consultation process is completed and US EPA has determined that the issuance of the permit will be consistent with US EPA's obligations under the Endangered Species Act. Accordingly, the permit conditions in this FDOC are not final at this time. The Final PSD Permit may contain revised terms and permit conditions necessary to insure compliance with the requirements of the Endangered Species Act.

Comment II: The PDOC does not include a top-down BACT analysis.

Response: The FDOC includes a top-down BACT analysis that considers SCONO_x and SCR as control technologies for NO_x. The analysis, which was conducted in accordance with the procedures described in EPA's 1990 Draft New Source Review Workshop Manual, considers the collateral impacts associated with SCONO_x and SCR.

Comment III: A NO_x emission limit of 2.5 ppmvd is not BACT.

Response: EPA Region IX, the ARB, SCAQMD, and the BAAQMD have all determined that BACT for NO_x is an emission limitation of 2.5 ppmvd @ 15% O₂

averaged over one hour or 2.0 ppmvd @ 15% O₂, averaged over 3 hours.

It should be noted that Table 1, Cost-Effectiveness Analysis for SCONOX, in the CARE comments, is incorrect since it uses the cost for one gas turbine and the emissions for two gas turbines. The effect, of course, is to reduce the cost effectiveness by a factor of two.

Comment IV: BACT has not been required for CO. CO itself is an ozone precursor.

Response: The District is unaware of any commercial installations that have consistently operated at CO levels of less than 10 ppm while meeting a NO_x level of 2.5 ppm. Levels authorized in EPA's PSD permit for Sutter are not relevant to BACT until the facility has been constructed and the level successfully achieved. The District has reviewed the CARB BACT clearinghouse, and none of the entries for turbines with NO_x levels ≤ 2.5 ppm and CO levels < 10 ppm have been built. The applicant's proposed CO level of 6 ppm complies with BACT. The discussion in the FDOC will be expanded to include this information.

District regulations do not require a permit applicant to determine the impact of CO emissions on the formation of tropospheric ozone. The regulations require only that the release of CO from a facility does not cause a violation of all CO ambient air quality standards. The comment from CARE is also misleading. It is misleading because, contrary to CARE's assertion that 0.1 "represents the most conservative factor for assessing the relative ozone formation potential of CO emissions," basing the equivalency on propane is the least conservative factor since VOC emissions are as a whole, more reactive than propane.

Comment V: The POC limit of 2 ppmvd @ 15% O₂ is not BACT

Response: Based upon current available data, lower levels than 2 ppmvd have not been achieved in practice. The planned POC limit for this facility will be 2 ppmvd @ 15% O₂ one hour average. This is more stringent than the District and ARB BACT determination of 2 ppmvd POC @ 15% O₂, averaged over 3 hours that was established for the Delta Energy Center.

Comment VI: Start-up and shutdown emissions are improperly permitted since BACT was not required for start-up and shutdown. Gas turbine start-up and shutdown emission rates are inconsistent with vendor data.

Response: The District's method of limiting startup and shutdown emissions by using CEM data and source test correlation is the same as what has been used for the last three powerplants that the District approved. While we agree there can be problems that arise due to instrument ranges or response times the CEM instruments will be required to have sufficient scale ranges to monitor startups and shutdowns. Care will also be taken to insure that response times are rapid and equal, as far as possible. The emissions of unmonitored pollutants (those not on the CEM) will be calculated in the source testing program and correlated to the CEM and other monitored data. The District favors this CEM based approach because it can account for emission variations due to equipment deterioration or unforeseen process conditions. In addition, this method gives the applicant greater operating flexibility and is consistent with recent permits issued by the District.

It should be noted that the Startup/Shutdown emission table in this section of CARE's comment is incorrect because the last line of the table, labeled CCEP, is in fact emissions for the Metcalf Energy Center. The emissions for CCEP-Unit 8 do not appear in this table. In addition, this table is said to

be for Westinghouse 501F machines while CCPP-Unit 8 will use General Electric Frame 7FA machines.

Comment VII: PM₁₀ emissions are improperly estimated and permitted.

Response: The source tests that the PDOC emissions are based on tests that include both the front and back half (filterable and condensable) catch of particulate collection train.

Annual source testing of the Crockett Cogeneration gas turbine from 1996 through 1999 has shown front-end (filterable) PM₁₀ emission rates ranging from 0.8 lb./hr to 4.8 lb./hr for full load gas turbine operation with duct burner firing. If these emission rates are doubled to account for back-half (condensable) particulate matter; they show that the worst-case estimate of 13 pounds per hour is sufficiently conservative.

As far as a CEM to monitor PM₁₀ emissions, the District knows of no operational system that can monitor particulate emissions at the low levels produced by complete natural gas combustion. If this facility was burning solid waste or coal a PM₁₀ CEM might be practical but it is not considered feasible at the low levels this facility will operate at.

The CARE comment states that the cooling towers were incorrectly modeled as a series of point sources, rather than as volume sources in the ISC3 model runs. CARE then incorrectly states that the maximum 24-hour PM₁₀ impact from the facility was 8 mg/m³. The maximum 24-hour PM₁₀ impact from the project, as presented in the PDOC, was 4.6 mg/m³, not 8 mg/m³.

The Guideline on Air Quality Models, Appendix W to Part 51 of 40 CFR, Chapter I, states that volume sources are collections of a multitude of minor sources with individually small emissions that are impractical to consider as separate point or line sources. It continues by stating that volume sources are most commonly used for modeling elevated area sources, where there is no vertical component to the release. It is stated in the EPA ISC3 user manual that volume source algorithms are used to model releases from a variety of industrial sources, such as building roof monitors, multiple vents, and conveyor belts. The users manual continues on to say that the algorithms for volume sources cannot consider building downwash, whereas building downwash is considered for sources modeled as point sources.

Building downwash can, and often does, have a major influence on the air quality impact of a source and should always be considered. Because the characteristics of the cooling tower emissions are not of the nature of the volume sources as defined in the EPA documents, modeling the cooling tower as a series of point sources is the acceptable, and preferred, methodology for determining the impact from a cooling tower.

Comment VIII: The PDOC does not accurately assess the health risks of CCPP-Unit 8. The emission factors used for various compounds are too low since they do not reflect partial load operation or the use of dry-low NO_x combustors. The acrolein emission factor improperly relies on CARB Method 430.

Response: The Calpine turbine in Pasadena Texas, which employs dry-low NO_x combustors, was recently tested for acrolein, formaldehyde, and acetaldehyde at minimum load to address these concerns. In recognition of ARB's advisory regarding the use of Method 430 to measure acrolein,

EPA method TO-14 was used to measure acrolein. The results of the source tests show that the CATEF emission factors utilized to calculate the emission rates used in the health risk assessment were sufficiently conservative to assess the health impacts of the CCPP-Unit 8.

It should be further noted that footnote 67 in this section of CARE's comments is for the Metcalf Energy Center and refers to tables that are not in the CCPP-Unit 8 PDOC.

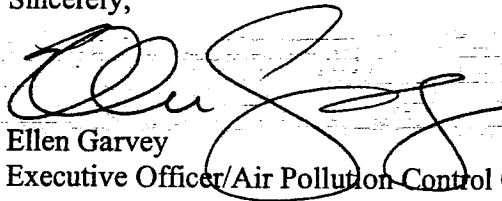
Comment IX: Contemporaneous Offsets should be considered. The PSD should not be issued prior to issuance of a biological opinion from the US Fish and Wildlife Service.

Response: Contemporaneous offsets for this facility would require shutting down the two existing units with a resulting loss of 690 MW of generating capacity (more than the 530 MW Unit 8 will add). After the NO_x controls are retrofit (installation of SCR) as required by Regulation 9-11, the existing units will have a NO_x emission level close to gas turbine BACT. The retrofit NO_x levels will be 3.3 ppmvd @ 15% O₂ (10 ppmvd @ 3% O₂ per regulation 9-11). In addition, the District does not have the authority to require the applicant to use contemporaneous offsets.

As stated in the first paragraph of this letter, issuance of the FDOC does not constitute issuance of the PSD. The PSD will not be issued until issuance of a biological opinion from the US Fish and Wildlife Service.

If you have any questions, please contact, Dick Wocasek, Air Quality Engineer at (415) 749-4984.

Sincerely,



Ellen Garvey
Executive Officer/Air Pollution Control Officer

EG:frw
Enclosure

E



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, California 94105-3901

30 May 2001

Ms. Jan Knight
Chief, Endangered Species Division
U.S. Fish and Wildlife Service
2800 Cottage Way, Suite W2605
Sacramento, California 95825-3901

Re: Request for Concurrence with EPA Finding of No Likely Adverse Effect under
Section 7 of the ESA for Modification to Contra Costa Power Plant, Antioch,
California

Dear Ms. Knight:

By this letter, the U.S. Environmental Protection Agency, Region 9 ("EPA") seeks to conclude informal consultation under Section 7 of the Endangered Species Act ("ESA") between EPA and the U.S. Fish and Wildlife Service ("FWS" or "Service") concerning the Contra Costa Power Plant Project (the "Project"). The Project involves a modification at an existing power plant to add a 530 MW natural gas-fired combined cycle combustion turbine (the "Turbine") at the existing Contra Costa Power Plant. Mirant Delta, LLC ("Mirant") has applied to the Bay Area Air Quality Management District ("BAAQMD") for a federal Prevention of Significant Deterioration ("PSD") permit for the Project, as required by Part C of the Clean Air Act and regulations at 40 C.F.R. § 52.21. Background information on the PSD program and more detailed information regarding the Project and this consultation are included below.

Background on PSD Program

Region 9 is responsible for complying with ESA Section 7 requirements with respect to federal PSD permitting. In some instances, EPA has delegated its PSD permitting authority to a state agency or air district pursuant to the PSD regulation at 40 C.F.R. § 52.21(u). In such instances, issuance of a federal PSD permit by a state agency or air district in EPA's stead is considered a federal action that may be subject to ESA requirements. (A "Delegation Agreement" establishes the roles and responsibilities for EPA and the State delegated to administer the PSD program and issue federal PSD permits in EPA's stead.)

A PSD permit for the Project is required for the modification to the existing power plant (i.e., installation of the Turbine). EPA has determined that issuance of the federal PSD permit for the Project is a federal action that may affect listed species or habitat through its construction or operation, thereby triggering ESA Section 7. Final action on this PSD permit may not occur

until EPA has determined that permit issuance will be consistent with the substantive and procedural requirements of the ESA.

Informal Consultation and Request for Concurrence under Section 7 of the ESA

EPA has been engaged in informal consultation with your office regarding the Project. We understand that you have been forwarded a copy of the California Energy Commission's Final Staff Assessment for the Project, which evaluates the environmental effects of the Project, including effects on listed species and habitat. In addition, as you are aware, Mirant previously submitted to the Service an application for an ESA Section 10 permit concerning the existing Contra Costa Power Plant. In this context, Mirant has prepared documents providing an analysis of the effects of the Contra Costa Power Plant on listed species and critical habitat, which were compiled as part of the ESA Section 10 permit application. Since EPA understands that your office already has copies of these documents, we are not forwarding them to you with this letter.

Mirant has discussed with the Service the potential impacts to species/habitat related to the Contra Costa Power Plant. The Service has identified the existing cooling water intake system at the facility as a concern, due to the potential for impingement and entrainment of the following listed threatened species: Delta smelt (*Hypomesus transpacificus*) and the Sacramento splittail (*Pogonichthys macrolepidotus*). The following listed threatened species under the National Marine Fisheries Service ("NMFS") jurisdiction also may be affected by the existing cooling water intake system: Central Valley ESU spring-run and winter-run chinook salmon (*Oncorhynchus tshawytscha*) and the Central Valley ESU Steelhead (*Oncorhynchus mykiss*). In addition, the following species are identified as occurring near the Project area but not likely to be adversely affected by the Project: San Joaquin harvest mouse (*Reithrodontomys raviventris*), California least tern (*Sterna antillarum browni*), Sort bird's-beak (*Cordylanthus mollis* ssp. *mollis*), Lange's metalmark butterfly (*Apdemia mormo langei*), Contra Costa Wallflower (*Erysimum capitatum angustatum*), Antioch Dunes evening Primrose (*Oenothera deltoids howellii*), all of which are listed endangered species.

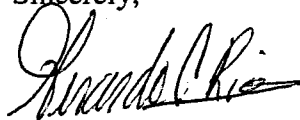
Mirant has agreed to take measures that would avoid or minimize the effects associated with the power plant, namely the installation of an Aquatic Filter Barrier to address potential impacts from the cooling water intake at the existing facility. Mirant has applied for a permit from the United States Army Corps of Engineers ("COE") for installation of the Aquatic Filter Barrier on the cooling water intake system at the Contra Costa Power Plant. By letter dated April 19, 2001, the COE requested consultation under ESA Section 7 concerning its permit action for the Aquatic Filter Barrier. Since the COE has requested consultation on a matter that specifically addresses the cooling water intake system, the FWS and NMFS will have the opportunity to address any impacts of this intake system to species or habitat through COE's ESA Section 7 consultation.

EPA has discussed with the FWS potential effects associated with PSD permit issuance for the Project. Per a discussion between Pamela Schultz (Office of Regional Counsel, EPA, Region 9), Roger Kohn (Air Division, EPA, Region 9) and Michael Thabault (FWS) on March 30, 2001, the FWS noted that its only concern with respect to the Contra Costa Power Plant was related to impacts on listed and threatened species due to the cooling water intake system.

Apart from potential impacts associated with the existing cooling water intake system, EPA believes that there are no likely adverse effects to species or habitat resulting from the addition of the new Turbine to the Contra Costa Power Plant. As noted above, the COE has requested consultation with respect to its federal permit for installation of the Aquatic Filter Barrier at the cooling water intake system. EPA believes that COE's federal action is more directly related to the area of concern (i.e., effects of cooling water intake) than EPA's air permitting action and defers to COE and the outcome of COE's Section 7 consultation to address any potential impacts associated with the cooling water intake. With respect to EPA's air permitting matter, EPA finds that, in all other regards, the Project is not likely to adversely affect listed species or critical habitat, in accordance with 50 C.F.R. §§ 402.13 and 402.14(b). I am writing to request written concurrence from the Service with this finding.

If you have any questions regarding this request, please contact Roger Kohn at (415) 744-1238.

Sincerely,



Gerardo Rios
Acting Chief, Permits Office
Air Division

cc: Mike Thabault, USFWS
Steve Hill, BAAQMD

F



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901

July 12, 2001

Elton Garvey
Air Pollution Control Officer
Bay Area AQMD
939 Ellis St.
San Francisco, CA 94109

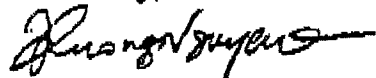
Re: Issuance of Prevention of Significant Deterioration (PSD) permit to Mirant Delta, LLC for modification of Contra Costa Power Plant (CCPP)

Dear Ms. Garvey:

I am writing to notify the Bay Area Air Quality Management District (District or BAAQMD) that the U.S. Environmental Protection Agency (EPA) has concluded its consultation with the U.S. Fish and Wildlife Service (FWS) on the construction of Unit 8 at the Contra Costa Power Plant, as required by Section 7 of the Endangered Species Act (ESA), through use of the informal consultation process. As EPA has met its ESA obligations with respect to the permitting action that authorizes the construction of Unit 8, the District may issue a final PSD permit to Mirant Delta in accordance with the PSD Delegation Agreement between EPA and BAAQMD.

We appreciate your patience during the time that EPA was addressing ESA issues. If you have any questions, please call me or Roger Kohn of my staff at (415) 744-1238.

Sincerely,


for Gerardo C. Rios
Acting Supervisor, Permits Office
Air Divisioncc: Mike Tollstrup, ARB
Ronald Kino, Mirant Delta, LLC

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