

**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  
)  
)

**RESPONSE OF TO MOTION TO STAY PROCEEDINGS**

Petitioner respectfully submits this response to PG&E's motion to stay proceedings. The Environmental Appeals Board Practice Manual (PM) provides provisions for "Stays of Permit Appeals Pending Settlement Negotiations." The District's Motion does not appear to address "Settlement Negotiations" that include the public or petitioner:

PG&E and EPA Region 9 are currently involved in discussions regarding the allegations of noncompliance raised in the Petition. The District agrees that it would be appropriate for the Environmental Appeals Board to stay the proceedings here to provide time for EPA Region 9 and PG&E to complete these discussions.

I have not been a party to any "discussions" between "EPA Region 9 and PG&E" This is indicative of the first Basis for the appeal.

**THE BOARD SHOULD REMAND THE PSD PERMIT BECAUSE THE DISTRICT DID NOT PROVIDE FOR PUBLIC PARTICIPATION IN ITS PERMITTING OR EXTENSIONS.**

The Board should require that EPA Region 9 and the District include Petitioners and other interested members of the public in these discussions. The public did not have an opportunity to comment on PG&E's construction and operation since it went ahead and constructed its facility without a valid permit. The District and PG&E has kept the public in the dark about its completion of construction and operation.

The District further states:

The Petition in this matter presents allegations of potential noncompliance with Federal PSD regulations in connection with the Gateway Generating Station. The District submits that any such allegations are enforcement issues that are 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.

Although Petitioner agrees that PG&E's actions do constitute enforcement issues, Petitioner has raised these enforcement issues prior to filing of the petition and should be allowed to participate in these discussions, but this petition is regarding the past permitting actions of the District and not the future enforcement actions of others. This appeal certainly does not interfere with EPA Region 9 enforcement actions.

The District has continued to withhold the access to the administrative record for their actions from the petitioner (Exhibit A). Petitioner has been provided no records that indicate that the District complied with ESA or any other requirements.

Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], "insure that any action authorized, funded, or carried out by such agency (hereinafter . . . "agency action")" is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary. . . to be critical, unless such agency has been granted an exemption for such action. [16 U.S.C. 5 1536(a)(2) & (3).12]

Petitioner has also requested action and records from Region 9 without response. (Exhibit B).

**PURSUANT TO THE EAB PRACTICE MANUAL (PM) THE BOARD SHOULD REMAND THE PERMIT DURING THE STAY**

The District and PG&E have offered no time limit for the Stay and has given no indication that the Stay will not be "protracted". Without a defined limit, the negotiations may be delayed while the local community and endangered species suffer. Given the years that have ensued after permit applications and the apparent intention to continue to exclude the Petitioner and public from participation there is every indication that the Stay will be "protracted".

If protracted settlement negotiations are contemplated, the EAB may remand the permit to the permitting authority for the purpose of pursuing a settlement outside the appeals process, without prejudice to a party's right to request reinstatement of the appeal if that should prove

necessary.

The District has apparently issued NO Permit To Operate or Title V permit. Any Stay granted by the Board should not be construed to allow continued operation of a Facility without a permit or ESA consistency. The public, endangered species and the environment continue to be exposed to harm from operation of an unlicensed pollution source.

**THE DISTRICT SHOULD BE INFORMED THAT THE STAY INCLUDES A STAY OF THE PERMIT.**

PG&E and the District have not demonstrated good cause for a stay. PG&E is currently operating the Gateway Generating Facility without a valid Prevention of Significant Deterioration permit and emitting harmful emissions above the levels considered Best Available Control Technology. The facility is located on the shore of the San Joaquin River, part of the Bay-Delta estuary, which provides habitat for many plant and animal species. It also borders a heavy industrial area, close to poor residential neighborhoods. PG&E's emissions are currently harming the local residential community and endangered species. Given the harmful impacts this facility could have everyday while the stay is in effect, the invalid expired permit from 2001 that PG&E appears to rely on should also be stayed. PG&E should not be allowed to continue to operate when even EPA Region 9 appears to admit that its operation involves compliance issues.

JUDGE REICH: By operation of federal regulations, the permit does not go into effect while this proceeding is before the Board, **Hearing held on April 3, 2008 Russell City Energy Center.**

**See In re Wastewater Treatment Facility of Union Township, Mich., NPDES Appeal No. 00-27, (EAB, Oct. 19, 2000) (Order Denying Request Not to Stay Permit)**

MDEQ and the Township both requested that the permit not be stayed pending the outcome of this appeal. On October 19, 2000, we issued Orders Denying Request Not to Stay Permit. We concluded that there was no regulatory authority that allows a new discharger to commence discharging while its NPDES permit is on appeal. *See* 40 C.F.R. § 124.16(a) (stating "if the facility involves a new facility or new injection well, new

source, new discharger or a recommencing discharger, the applicant shall be without a permit for the proposed new facility, injection well, source or discharger pending final agency action”). *See also* 65 Fed. Reg. 30,899 (May 15, 2000) (preamble to changes to NPDES regulations eliminating a provision that allowed a new facility to commence discharging under certain circumstances during permit review, stating that EPA “acknowledges that new dischargers may not begin to discharge until the process of review is complete”).

PG&E claims in its Motion for Stay that “ the facility has completed construction and is now operating in compliance with all emission limits and other conditions of that (2001) permit.” They appear to contradict themselves in their current amendment filed at the California Energy Commission (CEC) (Exhibit C). A petition for amendments to the air quality conditions of the facility license was filed with the CEC in January 2008. After 13 months they had still not obtained an acceptance. Four Months after the Facility began operations, on February 13, 2009 PG&E withdrew its applications to the District and the CEC for amendments. After the filing of this petition PG&E filed another Amendment to the CEC and possibly to the District but there is no way for Petitioner to know about what's going on at the District while they continue to withhold the records.

In the CEC amendment PG&E admits that:

There remain several inconsistencies between the facility as originally permitted and the GGS as constructed.

There are several discrepancies between the project as built, the BAAQMD Authority to Construct, and the CEC license.

As demonstrated by PG&E’s recent filings with the CEC, PG&E’s operation is not even in compliance with the air quality conditions of its, expired permit. The PSD permit which is no longer valid should have been subject to at least 3 renewal notices and should have been required to adopt current BACT for combined cycle turbines during each renewal period. The District continues to exclude the public from participating in the PSD extensions and provides no notice of them in violation of federal regulations. This has lead to the situation that we are in now and could have been easily

avoided had the District followed the federal regulations and notified the public of the PSD renewal.  
The District has again created this permitting debacle.

The Board was clear in its offer to the District to seek summary Disposition by May 27, 2009  
and should not accept further response from the District or PG&E on this matter.

Respectfully Submitted  
By:

**Rob Simpson**  
**Petitioner**  
**27126 Grandview Avenue**  
**Hayward CA. 94542**  
**510-909-1800**  
[Rob@redwoodrob.com](mailto:Rob@redwoodrob.com)