BAY AREA
AIR QUALITY
MANAGEMENT
DISTRICT
SINCE 1955

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June 12, 2009

Ms. Eurika Durr
Clerk of the Board
Environmental Appeals Board
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

Re: *In re Gateway Generating Station*, PSD Appeal No. 09-02

Dear Ms. Durr:

Enclosed for filing in the above-referenced Environmental Appeals Board proceeding are the original and five copies of a document entitled "BAAQMD Reply In Support of Motion to Stay Proceedings.

Please give me a call if you have any questions regarding this filing.

Sincerely,

Alexander G. Crockett, Esq.
Assistant Counsel

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 REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS

The Bay Area Air Quality Management District ("District") hereby submits this Reply to Petitioner's "Response Of To Motion To Stay Proceedings". The District submits that the Environmental Appeals Board should grant the Motion to Stay Proceedings filed by proposed intervenor Pacific Gas & Electric Co. ("PG&E"), in which the District has joined.

PETITIONER HAS NOT PROVIDED ANY REASON WHY THE BOARD SHOULD NOT STAY THIS APPEAL PROCEEDING PENDING EPA REGION 9 ENFORCEMENT ACTION

Petitioner is not entirely clear in his Response whether he supports or opposes a stay of proceedings here. Petitioner states that he agrees with the argument that the District made in support of a stay, which is that the issues raised in the Petition – claims that PG&E constructed and is operating the Gateway Generating Station without a current, valid PSD Permit – are Clean Air Act compliance issues that should be addressed by EPA Region 9 in the enforcement context. (*See* Response at p. 2 ("Petitioner agrees that PG&E's actions do constitute enforcement issues . . . .").) Petitioner's concern is apparently that EPA should seek interim injunctive relief while the compliance issues are being resolved. (*See, e.g.* Response at p. 3 ("PG&E should not be allowed to continue operating . . . .").) But the question of interim relief, like the question of the final resolution of these issues, is an enforcement issue and not something that the Board has jurisdiction to consider in a permit appeal proceeding under 40 C.F.R. section 124.19.

Petitioner's concern in this regard therefore does not provide a reason to deny the stay. There is nothing for the Board to do in a permit appeal proceeding to address this issue while EPA Region 9 is engaged in its enforcement action. Decisions regarding the Environmental Protection Agency's enforcement actions are made by the Agency's enforcement staff, not by its Appeals Board.

Petitioner also seems open to the idea of a stay if the Board "remand[s] the permit during the stay." (Response at p. 2.) But the claim that EPA is pursuing in the enforcement context, and that Petitioner is raising here, is that the facility did not have a current, valid PSD permit when it was constructed. As a result, there is no permit to remand at this stage.[1] EPA Region 9 is now taking this position, which is why it has begun enforcement action; the District does not dispute this interpretation, as it defers to EPA Region 9's guidance on federal PSD issues under the PSD Delegation Agreement between the two agencies (although the District notes that EPA's current position conflicts with earlier guidance the District has received on federal PSD issues); and Petitioner takes this position himself in his Petition and in his Response. Petitioner appears to believe that if the EAB issues a "remand" in these circumstances (either on the merits of the Petition or procedurally as part of a stay of these proceedings) that such an order will have the effect of implementing the enforcement action that he seeks. But a "remand" of the permit while the stay is pending would simply throw the ball to EPA Region 9 to take enforcement action for operation without a current, valid permit – the very action that EPA Region 9 has already started to take. The Board should therefore stay the proceedings here, but should not and cannot

[1] The Air District contends that, given EPA's current interpretation, there is no PSD permit to adjudicate at this stage at all under 40 C.F.R. section 124.19, and that the Board therefore lacks jurisdiction over this matter under section 124.19. The District is prepared to seek summary dismissal on this ground if the Board declines to stay these proceedings, but agrees with PG&E that the resources that would be expended in having the Board fully adjudicate this issue could be conserved if these proceedings are stayed until EPA Region 9's enforcement action is complete.

"remand the permit" where there is in fact no current, valid permit, a point on which there is now no disagreement among Petitioner, EPA Region 9, and the District.[2]

Finally, Petitioner also does not provide any good reason not to stay the proceedings pending resolution of these issues through Region 9's enforcement process. The enforcement mechanism is the appropriate context for resolution of the Clean Air Act non-compliance issues Petitioner has raised, and by allowing EPA Region 9 to do so Petitioner's claims will be fully addressed and there will be nothing left for the Board to consider here. It would save considerable resources for the Board and the parties for the Board to put off addressing these issues further until that process is concluded, and Petitioner has not cited any good reason to the contrary.[3]

CONCLUSION

For all of the foregoing reasons, the District respectfully requests that the Environmental Appeals Board stay these proceedings for 90 days to allow time for EPA Region 9 to address the Federal PSD non-compliance issues raised in the Petition in this matter.

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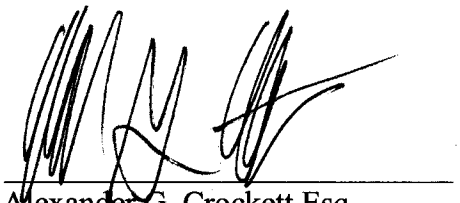
[2] The District also notes that PSD permits are stayed and do not become effective while on appeal to the Environmental Appeals Board, and so if there was in fact a permit on appeal here it would be stayed by operation of law until the appeal is finally resolved, whether the Board decides to stay these proceedings or not.

[3] Petitioner also erroneously claims that the stay that PG&E requested is open-ended and could be protracted. (*See* Response at p. 2 ("The District & PG&E have offered no time limit for the Stay . . . .").) In fact, PG&E explicitly requested a limited stay of a limited period of 90 days. (Motion to Stay Proceedings at p. 2, l. 9.) And the Board of course has the discretion to grant a stay for some other limited time period as it considers appropriate.

Dated: June 12, 2009

Respectfully Submitted

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



By: Alexander G. Crockett Esq.
Assistant Counsel

PROOF OF SERVICE

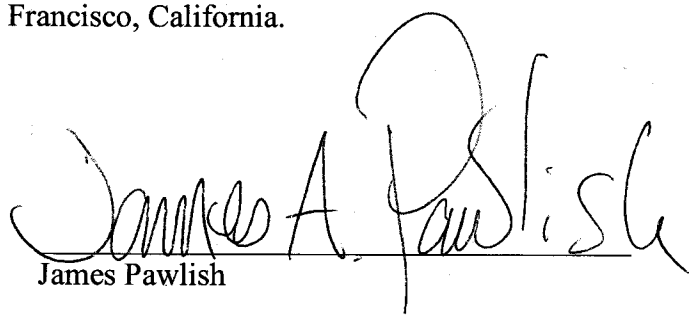
I, James Pawlish, declare as follows: I am over the age of 18, not a party to this action, and employed in the City and County of San Francisco, California, at 939 Ellis Street, San Francisco, CA, 94109. On the date set forth below, I served this document, "BAAQMD Reply In Support Of Motion To Stay Proceedings", by placing copies of it in sealed envelopes, with First Class postage thereon fully paid, and depositing said envelopes in the United States Mail at San Francisco, California, addressed to the persons set forth below:

Mr. Rob Simpson
27126 Grandview Avenue
Hayward, CA 94542

David Farabee, Esq.
Pillsbury Winthrop Shaw Pittman LLP
50 Fremont Street
Post Office Box 7880
San Francisco, CA 94120-7880

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

Executed on June 12, 2009, at San Francisco, California.



James Pawlish