

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

4 _____
5 In the Matter Of:)

6 Gateway Generating Station)

PSD Appeal No. 09-02

7 _____
8 **INTERVENOR PACIFIC GAS AND ELECTRIC COMPANY'S**
9 **BRIEF ON JURISDICTIONAL ISSUES**
10 **AND MOTION FOR SUMMARY DISPOSITION (DISMISSAL)**
11

12 This Brief on Jurisdictional Issues and Motion for Summary Disposition is
13 submitted in response to the June 18, 2009 Environmental Appeals Board (“EAB”
14 or “Board”) Order requesting briefing on jurisdictional issues in this Appeal. This
15 matter commenced with the filing by Petitioner Rob Simpson (“Petitioner”) of a
16 Petition for Review (“Petition”) challenging the Prevention of Significant
17 Deterioration (“PSD”) permit for the Gateway Generating Station (“Gateway” or “the
18 facility”), located at 3225 Wilbur Avenue in Antioch, California and owned and
19 operated by the Pacific Gas and Electric Company (“PG&E”). The Bay Area Air
20 Quality Management District (“BAAQMD” or “District”), pursuant to authority
21 delegated to the District by EPA, issued the PSD permit to the facility on July 24,
22 2001 as part of a single, comprehensive “Authority to Construct” (“ATC”) permit
23 (Application Number 1000).¹ The Gateway facility is currently operating pursuant
24 to, and in full compliance with, that validly issued PSD permit. While PG&E
25 maintains that it is in compliance with all applicable state and federal laws, as

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27 ¹ BAAQMD’s practice is to track permits by application number, rather than assign a number
28 upon issuance of the permit. (See Declaration of Gary Rubenstein, (“R. Decl.”) submitted
herewith, at ¶ 9.)

1 described in PG&E's May 27 Motion for Stay, EPA has informed PG&E that
2 Gateway may not be in full compliance with the PSD program due to certain events
3 that occurred before PG&E became the owner of the facility.

4 On May 27, 2009 PG&E filed a Motion to Intervene and a Motion for Stay of
5 this matter, to allow time for EPA's enforcement process to proceed and potentially
6 resolve certain issues relevant to this Petition. Also on May 27, 2009, BAAQMD
7 filed a "Joinder in PG&E's Motion to Stay Proceedings". On June 18, 2009, the
8 EAB issued an Order ("EAB Order"): (1) granting PG&E's Motion to Intervene; (2)
9 denying PG&E's Motion for Stay; and, (3) requesting briefing on the following three
10 points:

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

16 The answer to each of the EAB's three questions is "no." Petitioner cannot
17 satisfy his burden to demonstrate that the Petition is timely or within the EAB's
18 jurisdiction. Specifically, and with respect to the issues on which the EAB
19 requested briefing: (1) to the extent that Petitioner is attempting to request review
20 of the original, 2001 ATC and PSD permit, the Petition is untimely; (2) the EAB
21 does not have jurisdiction over an appeal of the state law ATC, although it would
22 have jurisdiction to review a timely appeal of the PSD elements of a District-issued
23 permit had such an appeal been filed and satisfied EAB's jurisdictional
24 requirements; and (3) any other allegations by Petitioner, e.g., that the Gateway
25 facility is not operating in compliance with the terms and conditions of its permits
26 and/or without a valid District-issued Permit to Operate, are without merit and, in
27 any event, are outside the purview of the EAB.

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1 For these reasons, as set forth more fully below, PG&E respectfully requests
2 that the EAB determine that it has no jurisdiction over the instant Appeal, and that
3 the Petition be summarily dismissed.

4

5 **I. BACKGROUND**

6 Pursuant to the Clean Air Act and EPA regulations, BAAQMD implements
7 the federal PSD permit program in the San Francisco Bay Area. See Clean Air Act
8 (“CAA”) §§ 107(a), 110; 42 U.S.C. §§ 7407(a), 7410; 40 C.F.R. § 52.21(u). The
9 District administers the PSD permit program through a contractual “delegation
10 agreement” with EPA. See, e.g., “U.S. EPA-Bay Area AQMD Agreement for
11 Delegation of Authority for Prevention of Significant Deterioration of Air Quality
12 Program (40 CFR 52.21),” dated April 23, 1986, (R. Decl., Exh. A.). In delegating to
13 the District the authority to administer the PSD permit program, EPA determined
14 that District Regulation 2, Rule 2 “generally meets the requirements of 52.21;
15 therefore, *District Authorities to Construct (ATCs or permits) will be deemed to*
16 *meet Federal PSD permit requirements. . . .*” *Id.*, emphasis added. Pursuant to the
17 terms of this delegation agreement, the District issues a single permit that functions
18 as both a District ATC and a PSD permit. See also District Regulations 2-2-101, 2-
19 2-304, R. Decl., Exh. B.)

20 Pursuant to District regulations, on July 24, 2001 the District issued an ATC
21 for the facility (R. Decl., ¶ 9, Exh. C, pp. 1, 23-36).² Consistent with the PSD
22 delegation agreement, the ATC included the PSD permit.³ *Id.* Construction of the

23

24 ² The ATC was issued to Mirant Delta, LLC, which originally owned the facility, and at the time
25 the ATC was issued referred to the facility as Contra Costa Unit 8. PG&E acquired the facility
26 on November 30, 2006 and BAAQMD transferred the District permit (including the PSD permit)
27 to PG&E on January 4, 2007. (R. Decl. at ¶¶ 1, 9.) In some documents, EPA refers to the
28 facility as the “Delta Power Plant.” After acquiring the facility, PG&E renamed the facility the
Gateway Generating Station. For consistency, the project will be referred to as “Gateway” or
“the facility” in this Brief.

³ The EPA-BAAQMD PSD delegation agreement in effect at the time that BAAQMD issued the
facility’s permit was the April 23, 1986 agreement, (R. Decl. at ¶ 3, Exh. A). For various reasons
(continued...)

1 facility commenced in 2001. (R. Decl. at ¶ 10.) The facility’s prior owner
2 suspended construction of the facility during August 2002. PG&E took over
3 ownership of the facility on November 30, 2006, and recommenced construction in
4 February 2007. (R. Decl. at ¶¶ 1, 10.) Pursuant to BAAQMD regulations, the
5 facility timely filed requests to extend the ATC/PSD permit. (R. Decl. at ¶ 10.) As
6 noted in BAAQMD’s Brief on Jurisdictional Issues, filed July 1, 2009 (“BAAQMD
7 Brief”), the District “intended that [the District permit extensions] would be effective
8 to extend the PSD permit. (BAAQMD Brief, pp. 3, 11.)⁴

9 On December 18, 2007, PG&E submitted to BAAQMD an application to
10 amend certain emission limits in the PSD permit relating primarily to commissioning
11 and start-up procedures. (R. Decl. at ¶ 11, Exh. F.) The District prepared a draft
12 amended permit and circulated that draft for public comment. (See Petition for
13 Review (“Pet.”) at Exh. 2B.) However, after the close of the public comment period
14 and before the District took final action, by letter dated February 13, 2009, PG&E
15 withdrew its permit amendment application because PG&E determined that it could
16 comply with the original permit conditions. (R. Decl. at ¶ 12, Exh. G.) Since PG&E

17 _____
18 (...continued)

19 related to changes in state and federal law, in 2004, EPA re-delegated limited PSD authority to
20 the District. (R. Decl. at ¶ 4, Exh. D.) The current version of the PSD delegation agreement is
21 dated February 4, 2008. (R. Decl. at ¶ 5, Exh. E.)

22 ⁴ PG&E notes that whether the PSD permit was properly, or needed to be, “extended,” by either
23 BAAQMD or EPA, is not the issue in this case. First, PG&E unequivocally disagrees with any
24 implication that the facility’s PSD permit expired or that all of “the parties” are in agreement on
25 this point. (BAAQMD Brief at p. 11.) Second, PG&E disagrees with any representation made
26 by the District that Gateway’s current PSD permit is not valid or was not validly extended,
27 should extensions have been necessary. The District acknowledges that, until early 2009, the
28 District believed that the facility’s permit had been appropriately extended. (BAAQMD Brief at
pp. 3-4, 11, Exh. C.) PG&E agrees with the District’s previous position that if the PSD permit
did need to be extended, the District effectuated such extensions by extending the ATC,
pursuant to the EPA-BAAQMD delegation agreements. (BAAQMD Brief at pp. 3, 11.) Indeed,
in June 2004, months after the PSD permit allegedly “expired”, EPA re-delegated authority to
the District to administer the PSD permit for the facility—which was specifically named in the
agreement—and gave no indication that Gateway’s permit was no longer valid. (R. Decl. ¶ 4,
Exh. D, pp. 1-8) Any present interpretation by EPA that the PSD permit expired is certainly, as
the District characterizes it, “revised guidance.” (BAAQMD Brief at p. 11, n. 9.) While this
presents interesting history and context, any controversy over the validity of extension of the
facility’s PSD permit is an enforcement matter, and therefore, not within the EAB’s jurisdiction.

1 withdrew its application, the District did not amend the PSD permit. PG&E is
2 operating the Gateway facility in conformance with the terms and conditions of the
3 original, unmodified PSD permit, and with all other applicable regulatory
4 requirements.

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6 **II. PETITIONER IS BARRED FROM SEEKING REVIEW OF THE ORIGINAL**
7 **PSD PERMITTING DECISION.**

8 As stated in the EAB Order, “the petitioner has the burden to set forth, in the
9 petition, the basis for appeal and the threshold jurisdictional requirements.” (EAB
10 Order at p. 5.) The Petition in this case fails to meet even the most generous
11 interpretation of this standard. Indeed, Petitioner concedes his “failure to
12 participate in the permit process.” (Pet. at p. 7.) For these reasons, as set forth in
13 more detail below, the EAB’s initial impression, expressed in the EAB Order, that
14 “the EAB lacks jurisdiction over this matter” is correct. (EAB Order at p. 4.)
15 Therefore, the Petition should be dismissed.

16 A. The District issued a valid PSD permit to Gateway.

17 Petitioner and the EAB have questioned whether the facility ever had a PSD
18 permit (Pet. at 11; EAB Order at p.3, n.2.), with Petitioner claiming that “the District
19 has offered no evidence that they ever issued a PSD permit for this facility.”
20 However, Petitioner himself states that District Assistant Counsel Alexander
21 Crockett informed him that the District issued the facility a state-law ATC and a
22 federal PSD permit in 2001. (Pet. at 11.) The record clearly demonstrates that
23 BAAQMD issued an ATC/PSD permit for the facility in 2001, supporting these
24 statements by the District. (R. Decl. ¶¶ 1, 3, 8, 9, Exh. C, July 24, 2001 ATC, citing
25 “PSD” as the basis for certain permit conditions.)⁵

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27 ⁵ See, e.g., Condition 14: “The combined heat input rate to each power train consisting of a Gas
28 Turbine and its associated HRSG (S-41 & S-42 and S-43 & S-44) shall not exceed 2,227 MM
Btu per hour, averaged over any rolling 3-hour period. (PSD for NOx)” (*Emphasis added.*)

1 Issuance of the PSD permit was coordinated with the state's process for
2 permitting power plants.⁶ On October 23, 2000, BAAQMD issued a Preliminary
3 Determination of Compliance ("PDOC") for the facility. The PDOC serves as the
4 draft statement of basis for both the ATC and the PSD permit. In issuing the draft
5 statement of basis, the District described the scope of the permitting action and
6 requested public comment:

7 Pursuant to BAAQMD Regulation 2, Rule 3, Section 403, this document
8 serves as the Preliminary Determination of Compliance (PDOC) document for the
9 CCPP Unit 8. It will also serve as the evaluation report for the
10 BAAQMD Authority to Construct application #1000. *The PDOC describes
11 how the proposed facility will comply with applicable federal, state, and
12 BAAQMD regulations, including the Best Available Control Technology and
13 emission offset requirements of the District New Source Review regulation.
14 Permit conditions necessary to insure compliance with applicable rules and
15 regulations and air pollutant emission calculations are also included. This
16 document includes a health risk assessment that estimates the impact of the
17 project emissions on public health and a PSD air quality impact analysis,
18 which shows that the project will not interfere with the attainment or
19 maintenance of applicable ambient air quality standards.*
20 Pursuant to Regulation 2, Rule 3, Section 404, this PDOC is subject to the
21 public notice, public inspection, and 30-day public comment period
22 requirements of District Regulation 2, Rule 2, Sections 406 and 407.

23 (R. Decl., Exh. H, p. 1, emphasis added.)

24 The PDOC and the Final Determination of Compliance ("FDOC"), issued on
25 February 2, 2001, each provide a complete PSD analysis, including a BACT
26 analysis and a PSD air quality impact analysis. The FDOC also incorporates
27 comments that were received during the public comment period for the PDOC, and
28 demonstrates that the District satisfied the required public process. (R. Decl., Exh.
I, p. 8.) The PDOC, FDOC, and the facility's permit list numerous permit conditions

25 ⁶ The District's process for permitting power plants is integrated with the California Energy
26 Commission's ("CEC's") certification process. Where the District would normally issue a
27 "Statement of Basis" for a permitting decision, it instead issues a "Determination of
28 Compliance." See District Regulation 2, Rule 3. The District will issue an ATC for a power plant
only after the CEC's certification process is complete, and only if the certification incorporates
the District's permit conditions. See District Regulation 2-3-301.

1 as “PSD” conditions; thus, making it clear that Gateway has a validly issued PSD
2 permit. (R. Decl., Exhs. C, H, I.)

3 B. The Petition for Review is Untimely.

4 As the facility was validly issued a PSD permit in 2001, any challenge to that
5 permitting activity is untimely. Pursuant to 40 C.F.R. Part 124.19(a), a Petitioner
6 has 30 days after a final permit decision to file a petition with the EAB. It has been
7 approximately eight years since BAAQMD issued a final PSD permit to the facility
8 in July, 2001. The Petitioner has not explained how the EAB could have
9 jurisdiction over a final permitting decision that is eight years old. Indeed,
10 Petitioner cannot do so, as the EAB has consistently held that “[it] is a petitioner’s
11 responsibility to ensure that filing deadlines are met, and the Board will generally
12 dismiss petitions for review that are received after a filing deadline.” See *EAB*
13 *Practice Manual*, p.32, citing *In re AES Puerto Rico, L.P.*, 8 E.A.D. 324, 329 (EAB
14 1999), *aff’d*, *Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000)
15 (limited extensions granted due to delays cause by a hurricane); *In re Kawaihae*
16 *Cogeneration Project*, 7 E.A.D. 107 (EAB 1997). The EAB strictly construes the
17 filing deadline and has relaxed the requirement only in extraordinary
18 circumstances. See *In re Town of Marshfield, Mass*, NPDES Appeal No. 07-03,
19 slip op. at 8 (EAB, Mar. 27, 2007); *In the Matter of Georgetown Steel Corp.*, 3
20 E.A.D. 607 (EAB 1991). Even so, the EAB’s rare relaxation of the filing
21 requirement has, at most, involved an extension of a matter of weeks – certainly
22 not years as would be the situation here.

23 C. Petitioner Does Not Have Standing

24 Even if the EAB waives the requirement for timeliness, Section 124.19(a)
25 grants standing only to a “person who filed comments on that draft permit or
26 participated in the public hearing.” Petitioner did neither, and has not provided any
27 evidence that he participated or sought to participate in the facility’s 2001 PSD
28 permitting process in any manner. Petitioner therefore does not have standing to

1 challenge the PSD permit.

2 Petitioner asserts that he is exempt from the ordinary standing requirement,
3 based on the EAB's recent decision regarding the Russell City Energy Center.⁷
4 See, *In re Russell City Energy Center*, Slip Opinion, PSD Appeal No. 08-01 (July
5 29, 2008) ("*Russell City*"). Petitioner's reliance on the *Russell City* decision is
6 wholly misplaced. In its *Russell City* opinion, the EAB based the decision to
7 remand the permitting action on the specific circumstances where the EAB found
8 proper public notice to be lacking. In *Russell City*, the Petitioner pled substantial
9 facts describing the District's failure to involve itself in the process of noticing the
10 draft permit and in the District's failure to address – or even record – comments on
11 the draft permit. *Russell City*, 29, 35-37. Other than quoting from the *Russell City*
12 opinion, Petitioner has not described or demonstrated that the District's notice of
13 the PSD permit in 2001 was at all faulty.

14 Even if Petitioner attempts to demonstrate that the District's 2001 PSD
15 permitting process for the Gateway facility was deficient and that the deficiency
16 should excuse Petitioner's failure to participate (as in *Russell City*), in *Russell City*
17 Petitioner's Appeal was filed only about 63 days after the permit was issued (about
18 33 days after the appeal deadline). Here, the permit was issued eight years ago.
19 The sheer length of time that has passed here obviates any possible extraordinary
20 circumstances that might justify Petitioner's late filing and lack of participation.

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22 **III. THE EAB DOES NOT HAVE JURISDICTION TO REVIEW THE DISTRICT-**
23 **ISSUED ATC**

24 The permit issued to the facility in 2001 was a joint ATC/PSD permit. To the
25 extent that the Petitioner may be appealing the 2001 ATC or later versions of the
26 District-only portions of the facility's permit, the EAB does not have jurisdiction over

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⁷ Mr. Simpson was also the Petitioner in the *Russell City* case.

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1 such an appeal.

2 The FDOC issued by the District in February 2001 specifically states that the
3 document addresses federal, state and local requirements in addition to PSD
4 requirements: “The FDOC describes how the proposed facility will comply with
5 applicable federal, state, and BAAQMD regulations, including the Best Available
6 Control Technology and emission offset requirements of the District New Source
7 Review regulation.” (R. Decl., Exh. I, p. 1) and “The following permit conditions will
8 be imposed to ensure that the proposed project complies with all applicable
9 District, State, and Federal Regulations “ (R. Decl., Exh. I, p. 23). The FDOC
10 addresses areas that are not part of the PSD program, specifically, emissions
11 offsets, which are required for nonattainment areas under New Source Review but
12 are clearly not part of a PSD program (R. Decl., Exh. I, pp. 15-17); a health risk
13 assessment, to address the District’s Health Risk Assessment Policy (R. Decl.,
14 Exh. I, p. 18); other District rules and regulations (such as prohibitory rules) (R.
15 Decl., Exh. I, pp. 19-22); and requirements of the California Environmental Quality
16 Act (R. Decl., Exh. I, p. 22). Finally, the conditions of the ATC cite their basis, and
17 many if not most of the conditions are based on regulatory requirements other than
18 the requirements of the PSD program. For example, there is a condition limiting
19 ammonia, which is not a pollutant that is regulated under PSD. The basis for the
20 ammonia limit is cited as “TRMP⁸ for NH₃” (R. Decl., Exh. C, p. 9; Exh. I, p. 28).

21 The EAB’s jurisdiction and authority to adjudicate permit appeals arises from
22 40 C.F.R. Part 124.19. This section provides for the “Appeal of RCRA, UIC,
23 NPDES, and PSD Permits.” State law permits are not included within the EAB’s
24 jurisdiction. See *In re Sutter Power Plant*, 8 E.A.D. 680, 688 (EAB 1999) (“[t]he
25 Board will deny review of issues that are not governed by the PSD regulations
26 because it lacks jurisdiction over them.”); see also *In re Tondu Energy Co.*, 9

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28 ⁸ “TRMP” is the District’s Toxic Risk Management Program

1 E.A.D. 710, 719 (EAB 2001) (“State law claims are not grounds for review.”) (citing
2 cases). Hence, the various non-PSD permit provisions summarized above, which
3 comprise the majority of the ATC, are not subject to EAB review.

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5 **IV. BAAQMD DID NOT AMEND THE GATEWAY PSD PERMIT, SO THERE IS**
6 **NO RECENT PSD PERMIT ACTION FOR THE EAB TO REVIEW.**

7 The Petition for Review requests that the EAB remand the PSD permit to
8 BAAQMD, apparently in order to enable the Petitioner to participate in a public
9 review and comment process for a permit amendment application that was
10 withdrawn.⁹ Even assuming that Petitioner’s asserted inability to participate in the
11 public process for the District’s previously proposed Gateway permit amendment
12 was due to inadequate notice, Petitioner’s request for a remand so that he may
13 participate in the permitting process is nonsensical since, as acknowledged in the
14 Petition (Pet. at 10) and mentioned in the EAB Order (EAB Order at p. 2, n.1), the
15 permit process ended when PG&E withdrew its application for the permit
16 amendment.

17 Petitioner claims to satisfy “threshold procedural requirements [for EAB
18 jurisdiction] because this Petition challenges ‘changes from the draft permit to the
19 final decision.’” (Pet. at 8.) However, BAAQMD never made a “final permit
20 decision” on that proposed amendment because PG&E withdrew its permit
21 amendment application before the permitting process was complete. Therefore,
22 there is no action for the EAB to review and Petitioner cannot satisfy any “threshold
23 procedural requirements.”

24 Petitioner also seems to believe – without any foundation – that PG&E is
25 operating the plant in accordance with the withdrawn, draft permit amendment.

26

27 ⁹ See Petitioner’s citations to the *withdrawn* “Application to the Bay Area Air Quality Management
28 District for Modifications to the Authority to Construct for the Gateway Generating Station,
Antioch, California.” (Pet. at 10-13; Pet. Exh. 6.).

1 (Pet. at 10.) Petitioner’s mere belief that BAAQMD amended the permit or that
2 Gateway is operating pursuant to the proposed draft amendments, where no such
3 agency action or evidence of operation in the purported manner exists, cannot form
4 the basis for a Petition for Review. *See In re Tondu*, 9 E.A.D. at 724-725
5 (asserting an unsubstantiated opinion does not meet the petitioner’s burden).

6 The Petition for Review also alleges that “major modifications have occurred
7 in the construction and operation of the facility that allow it to pollute even more
8 than the 2000-2001 BACT determinations” (Pet. at 11) and that the EAB “should
9 remand the permit because it does not utilize Best Available Control Technology
10 (BACT)” (Pet. at 14). Petitioner then compares 2009 BACT standards to 2001
11 BACT standards. Petitioner cites to the *withdrawn* permit amendment application
12 to support an allegation that changes have been made to the facility that would
13 require an amendment to the PSD permit. Whether or not Gateway complies with
14 2009 BACT standards is irrelevant because Gateway has not undergone any
15 permitting activity that would require application of BACT since issuance of the
16 PSD permit in 2001. Furthermore, there have been no major modifications to the
17 facility since the issuance of the PSD permit in 2001. (R. Decl. ¶ 13.)

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19 **V. THE EAB DOES NOT HAVE JURISDICTION TO REVIEW ALLEGED**
20 **NONCOMPLIANCE**

21 By alleging that BAAQMD “chose to quietly allow” operation of a modified
22 facility without the necessary permits, Petitioner apparently is alleging that PG&E is
23 operating its facility in violation of state and/or federal law. These allegations are
24 simply untrue and unsupported, and Petitioner has provided no evidence to
25 support this position. As noted above, PG&E is operating the Gateway facility in
26 full compliance with the terms and conditions of its ATC and PSD permit, as well as
27 with all applicable federal requirements, so that there is no noncompliance issue.

28 Even if PG&E was in violation of one or more of its ATC or PSD permit

1 conditions, the EAB does not have jurisdiction to review alleged noncompliance.
2 See 40 C.F.R. Part 22 (EAB jurisdiction over civil penalty cases); 40 C.F.R. Part
3 124 (EAB jurisdiction over permit appeals); *EAB Practice Manual*, pp. 2-4
4 (describing EAB jurisdiction as a reviewing body and not an independent
5 enforcement authority.)

6 Lastly, Petitioner argues that “Federal Regulations require that the PSD
7 permit be renewed every 18 months with the BACT determinations adjusted
8 accordingly.” (Pet. at 15.) The policy relied on by Petitioner (which has not been
9 codified into regulation) refers to guidance applicable only to the process for
10 renewing a PSD permit for a source that has not commenced construction. See
11 *EPA Region IX Policy on PSD Permit Extensions*, p. 1 (July 6, 1988) (“This policy
12 clarifies the subject of extensions of the 18-month commencement of construction
13 deadline found in 40 CFR 52.21(r)(2).”). Gateway commenced construction in
14 2001, shortly after it received the PSD permit, thus satisfying the deadline to
15 commence construction.¹⁰ (R. Decl. ¶ 10.) Wholly as a matter of state law and
16 BAAQMD rules, a District ATC expires every two years and can be renewed. See
17 District Regulation 2-1-407.¹¹ The facility properly renewed the ATC pursuant to
18 BAAQMD rules (R. Decl. ¶ 10), and any objection to the state law permit renewal
19 process is not within the EAB’s jurisdiction. See *In re Sutter Power Plant*, 8 E.A.D.
20 at 688 (“[t]he Board will deny review of issues that are not governed by the PSD
21 regulations because it lacks jurisdiction over them.”); see also *Tondu*, 9 E.A.D. at
22 717 (“State law claims are not grounds for review.”) (citing cases).

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24 ¹⁰ The PSD regulations define “commence construction” as
25 “Commence as applied to construction of a major stationary source . . . means that the
26 owner or operator has all necessary preconstruction approvals or permits and . . . [e]ntered
into binding agreements or contractual obligations . . . to undertake a program of actual
construction of the source. . . .”

See 40 C.F.R. Part 52.21(b)(9).

27 ¹¹ By demonstrating that “substantial use of the authority to construct has begun” Gateway met the
28 District’s requirements for renewal of the ATC. See Regulation 2-1-407.3.

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VI. CONCLUSION

The Petition for Review should be summarily dismissed. Gateway is operating in accordance with the terms and conditions of the currently effective ATC and PSD permits and applicable state and federal regulations. Any challenge to the 2001 permit is clearly time-barred, and Petitioner does not have standing to bring such a challenge in any event. The PSD permit has not been amended since it was issued, and accordingly Petitioner has not been excluded from participating in any more recent permitting activity. There simply is no relief for the EAB to grant to the Petitioner, and therefore the Petition for Review should be summarily dismissed.

Accordingly, PG&E respectfully requests that the Board summarily dismiss PSD Appeal 09-02. PG&E reserves any and all rights to present further evidence and argument in the event that the EAB asserts jurisdiction over this PSD appeal.

1 Dated: July 2, 2009

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Respectfully submitted,

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By 

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CERTIFICATE OF SERVICE

I the undersigned, hereby certify that on the 2nd day of July, 2009, service of a true and complete copy of **Intervenor Pacific Gas And Electric Company's Opposition To Petition For Review And Motion For Summary Disposition (Dismissal)** was made upon the following parties:

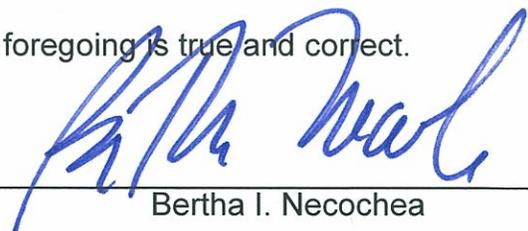
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by depositing the same in the U.S. Mail.

I declare under penalty of perjury that the foregoing is true and correct.



Bertha I. Necochea