

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 }
7 _____

PSD Appeal No. 09-02

8 **PROPOSED INTERVENOR PACIFIC GAS AND ELECTRIC COMPANY'S**
9 **REPLY TO PETITIONER'S RESPONSE TO MOTION FOR STAY**

10
11 Proposed Intervenor Pacific Gas and Electric Company ("PG&E") hereby
12 files this reply to the "Response of [sic] to Motion to Stay Proceedings"
13 ("Response") filed on May 28, 2009 by Petitioner Rob Simpson ("Petitioner").
14 Petitioner's Response relates to PG&E's May 27, 2008 request to stay the
15 proceedings in this matter.

16 Prior to Petitioner's filing of his Petition for Review ("Petition"), PG&E had
17 been in discussions with EPA regarding potential noncompliance with certain
18 regulations under the Clean Air Act Prevention of Significant Deterioration ("PSD")
19 program. See 40 C.F.R. § 52.21; see also PG&E Motion for Stay. In order to
20 avoid unnecessary expenditure of the Environmental Appeals Board's ("the Board")
21 time and resources by working to resolve pending issues with EPA prior to the
22 Board's consideration of the Petition, PG&E requested that the Board stay these
23 proceedings for up to 90 days, until the conclusion of discussions between PG&E
24 and EPA. The Bay Area Air Quality Management District (the "District"), joined in
25 this request. As anticipated by PG&E's Motion for Stay, discussions with EPA are
26 proceeding and may resolve certain issues raised by the Petition.

27 Petitioner has not provided any legal or practical reasons that the Board
28

1 should not stay these proceedings while PG&E and EPA conduct settlement
2 discussions. For the reasons provided below, PG&E respectfully requests that the
3 Board grant the requested stay.

4
5 **I. PETITIONER’S ARGUMENTS ARE IRRELEVANT TO THE**
6 **PROCEDURAL REQUEST FOR STAY**

7 Many of Petitioner’s arguments in the Response are not at all related to the
8 Motion for Stay, but are substantive arguments that either go to the merits of the
9 Petition or are general grievances that are outside the scope of the Board’s
10 jurisdiction.

11 First, Petitioner argues that the Board should order EPA to include Petitioner
12 in any potential settlement negotiations that EPA may conduct regarding the
13 Gateway Generating Station (“Gateway”). Response at 1-2. As relevant here, the
14 Board has jurisdiction only over appeals of administrative enforcement decisions or
15 appeals from permit decisions. See 40 C.F.R. §§ 22, 124; see *a/so* EAB Practice
16 Manual, pp. 2-4. The Board does not have jurisdiction over a permit until there has
17 been final agency action. See EAB Practice Manual, p.16. Petitioner
18 acknowledges that the discussions in which he would like to participate are
19 “enforcement issues.” See Response at 2. As such, EPA, and not the Board, has
20 jurisdiction over such issues. Settlement discussions regarding “enforcement
21 issues” are neither administrative enforcement decisions nor permit decisions and
22 do not constitute final agency action. As such, the Board does not have the
23 authority to require EPA to include Petitioner in any settlement discussions.

24 Second, Petitioner requests that the Board remand the permit to the District
25 during any stay. Response at 2-3. The apparent purpose of the remand would be
26 to require the District to suspend the permit so that Gateway would be unable to
27 operate. This clearly goes to the merits of the Petition and is consistent with the

1 relief requested by Petitioner. Petitioner cites no authority, nor is there authority,
2 for the Board to stay Gateway's permit during a procedural stay of the proceedings.

3 Finally, Petitioner raises, for the first time, an argument that Gateway should
4 not be allowed to operate based on an alleged failure to comply with the
5 Endangered Species Act ("ESA"). Even if Petitioner had provided *any* evidence to
6 support this allegation, the Board has repeatedly declined to exercise jurisdiction
7 over issues based on regulatory schemes other than PSD permitting. *See In re*
8 *Russell City Energy Center*, PSD Appeal No. 08-01, July 29, 2008 ("*Russell City*"),
9 pp. 40-41 ("As we have stated, "[t]he Board will deny review of issues that are not
10 governed by the PSD regulations because it lacks jurisdiction over them." *See In re*
11 *Sutter Power Plant*, 8 E.A.D. 680, 688 (EAB 1999); *see also Zion Energy, L.L.C.*, 9
12 E.A.D. 701, 706 (EAB 2001)."). Although Petitioner is correct that EPA is required,
13 under 40 C.F.R. § 402, to consult with the United States Fish and Wildlife Agency
14 prior to taking any action (such as issuing a PSD permit), such consultation is
15 required by the ESA, and is not a duty under the PSD program.¹ Hence, even if
16 Petitioner's allegations were valid and could be supported by evidence, they would
17 not properly be before the Board.

18 Petitioner's arguments on these issues provide no basis for the Board to
19 deny PG&E's Motion for Stay.

20
21 **II. GATEWAY MAY CONTINUE TO OPERATE IN COMPLIANCE WITH ITS**
22 **PERMIT DURING THE BOARD'S REVIEW**

23 Petitioner also asks the Board to stay Gateway's permit and enjoin Gateway
24

25 ¹ As recently as the *Russell City* decision, the Board reiterated that it will not entertain challenges
26 based on the ESA. *See Russell City*, at p. 41-42 ("The Board has previously declined to
27 entertain substantive challenges to FWS actions pursuant to the ESA in keeping with the
28 Board's longstanding principle of declining to hear substantive challenges to earlier, predicate
determinations that are separately appealable under other statutes.").

1 from operating. In this case, such a stay and injunction are beyond the scope of
2 the Board's authority. As a general proposition, when a facility is already
3 operating, an appeal of its permit will not prohibit the source from operating
4 pursuant to the existing permit. See 40 C.F.R. § 124.5(c)(2). Therefore, the
5 applicable regulations allow Gateway to continue to operate pending the Board's
6 disposition of the Petition.

7 The authority cited by Petitioner in support of an order to enjoin Gateway
8 from operation is inapplicable for two reasons. First, Petitioner relies on a
9 statement made by Judge Reich during the April 3, 2008 *Russell City* hearing, but
10 takes that statement out of context. Assuming that Petitioner has accurately
11 quoted from the transcript of the *Russell City* hearing, PG&E does not dispute that
12 Judge Reich apparently stated that “the [Russell City] permit does not go into effect
13 while this proceeding is before the Board, [sic]”. See Response at 3. However,
14 different regulations applied in that case because the appeal of the Russell City
15 PSD permit involved a facility that had not yet commenced construction. In
16 contrast, Gateway received its final permit in 2001, the permit was never appealed,
17 construction commenced shortly thereafter, and Gateway has now completed
18 construction and is operating the facility in compliance with its permit.²

19 Second, the Board decision cited by Petitioner that suspended a permit
20 pending review is inapplicable because those federal regulations do not apply here.
21 The decision relied on by Petitioner is based on 40 C.F.R. § 124.16(a). That
22 regulation unambiguously provides: “No stay of a PSD permit is available under
23 this section.”

24 _____
25 ² Gateway commenced construction in 2001, pursuant to a validly issued PSD permit, and has
26 continued to operate in compliance with the terms and conditions of all applicable state and
27 federal permits and regulations. Based on permit action by the District and guidance from EPA,
it is PG&E's position that Gateway has at all times had a valid PSD permit. That PSD permit
has not been amended since its issuance in 2001.

1 Therefore, Petitioner has not provided any authority to support his request to
2 enjoin operation of Gateway.

3
4 **III. PETITIONER'S FACTUAL ALLEGATIONS REGARDING PERMIT**
5 **MODIFICATION ARE INCORRECT AND ARE IRRELEVANT TO THE**
6 **PROCEDURAL REQUEST FOR STAY**

7 Petitioner repeatedly asserts that Gateway has failed to obtain necessary
8 permit modifications and is not operating in compliance with its permit. These
9 allegations are simply false. On February 13, 2009 PG&E withdrew its
10 December 24, 2007 request to the District for a permit modification and the
11 corresponding Petition to Amend Air Quality Conditions of Certification that PG&E
12 had filed with the California Energy Commission. (See Exhibits A, B). Thus, the
13 District's final action on the permit was in 2001, when the permit was issued.
14 Petitioner has not produced any evidence to support the allegation that there has
15 been a new agency action that has resulted in a final, modified permit, nor has
16 Petitioner produced any evidence to support the allegation that Gateway is not in
17 compliance with the terms and conditions of its existing permit.

18 Therefore, Petitioner's allegations of noncompliance provide no grounds for
19 the Board to deny the Motion for Stay.

20
21 **IV. CONCLUSION**

22 Based on the facts set forth in PG&E's Motion for Stay and in this Reply, the
23 Board should grant a stay of these proceedings until EPA has concluded its
24 investigation. Petitioner's Response does not set forth any legal or practical
25 reasons that the Board should deny the Motion for Stay; therefore, PG&E
26 respectfully renews its request that the Board grant a stay of this matter for 90
27 days.

1 As noted in its Motion for Stay, PG&E reserves any and all rights to present
2 arguments that the Petition is untimely, that the Board otherwise lacks jurisdiction
3 over the Petition for Review, and should the Board assert jurisdiction over this PSD
4 appeal, PG&E reserves any and all rights to present further evidence and
5 argument, as necessary.

6
7 Dated: June 15, 2009

8
9 Respectfully submitted,

10 PILLSBURY WINTHROP SHAW PITTMAN LLP

11 
12 By _____
13 Attorneys for Pacific Gas and Electric Company

14 David R. Farabee (SBN 130941)
15 Diana J. Graves (SBN 215089)
16 PILLSBURY WINTHROP SHAW PITTMAN LLP
17 50 Fremont Street
18 Post Office Box 7880
19 San Francisco, CA 94120-7880
20 (415) 983-1000 (phone)
21 (415) 983-1200 (fax)
22 david.farabee@pillsburylaw.com
23 diana.graves@pillsburylaw.com

24 WILLIAM V. MANHEIM (SBN 130182)
25 DAVID T. KRASKA (SBN 161878)
26 Law Department
27 Pacific Gas and Electric Company
28 Post Office Box 7442
San Francisco, CA 94120
Telephone: (415) 973-7503
Fax: (415) 973-5952
E-mail: dtk5@pge.com

1 CERTIFICATE OF SERVICE

2
3 I the undersigned, hereby certify that on the 15 day of June, 2009, service
4 of a true and complete copy of **Reply to Petitioner's Response to Motion for
Stay** was made upon the following parties:


5
6 Alexander G. Crockett, Esq.
7 Assistant Counsel
8 Bay Area Air Quality Management District
9 939 Ellis Street
10 San Francisco, CA 94109
11 Phone: (415) 749-4732
12 Fax: (415) 928-5103

13 Rob Simpson
14 27126 Grandview Avenue
15 Hayward, CA 94542

16 Nancy Marvel, Esq., Regional Counsel
17 Office of Regional Counsel
18 U.S. Environmental Protection Agency, Region 9
19 75 Hawthorne Street
20 San Francisco, Ca 94105
21 Phone: (415) 947-8705

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

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

24
25 
26
27
28

Bertha I. Necochea

EXHIBIT A



**Pacific Gas and
Electric Company®**

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

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,

A handwritten signature in blue ink that reads 'Thomas Allen'.

Thomas Allen
Project Manager

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

EXHIBIT B



**Pacific Gas and
Electric Company®**

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

February 13, 2009

Mr. Ron Yasny
California Energy Commission
1516 Ninth Street, MS-2000
Sacramento, CA 95814

Reference: PG&E Gateway Generating Station (00-AFC-01C)

Subject: Withdrawal of Petition to Amend Various Air Quality Conditions of Certification

Dear Mr. Yasny,

On January 15, 2009, PG&E submitted to the CEC a petition to amend air quality conditions of certification for the Gateway Generating Station in Antioch. With this letter, PG&E is withdrawing the petition.

PG&E acquired the Gateway Generating Station (GGS) project, which was licensed in 2001 as Contra Costa Unit #8, in late 2006. In December 2006, PG&E submitted to the CEC a Petition to Amend which requested approval of several proposed changes to the project design, including redesign of the cooling system to eliminate wet cooling and eliminating the use of steam power augmentation. This amendment was approved by the CEC on August 1, 2007. Because of the need to get the cooling system-related project changes approved quickly, the December 2006 Petition to Amend did not include any project modifications that required changes to the Authority to Construct (ATC) issued by the Bay Area Air Quality Management District (BAAQMD or District) for the project. PG&E subsequently submitted to the District an application to modify the Authority to Construct. Conforming changes to the air quality-related Conditions of Certification were requested in the January 2009 Petition to Amend.

The principal reason for the changes requested in the January 2009 Petition was because PG&E believed that the original conditions governing commissioning and startups were overly stringent and could not be complied with. In the application for modification and the Petition to Amend, 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, PG&E believes the amendments originally requested in the District permit application and the CEC petition are no longer necessary.

A copy of the letter to the BAAQMD withdrawing the District application is attached. If you have any questions regarding this request, please do not hesitate to call me or Gary Rubenstein of Sierra Research at (916) 444-6666.

Sincerely,



Thomas Allen
Project Manager

attachment

cc: Andrea Grenier, Grenier & Associates
Scott Galati, Galati Blek
Gary Rubenstein, Sierra Research