

Environmental Law and Justice Clinic

August 13, 2009

SUBMITTED BY E-MAIL AND FIRST CLASS MAIL

Mr. Ron Yasney
California Energy Commission
1516 Ninth Street, MS4
Sacramento, CA 95814

DOCKET
00-AFC-1C

DATE	Aug 13 2009
RECD.	Aug 17 2009

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

Subject: Comments to Staff Analysis of Proposed Air Quality Amendment

Dear Mr. Yasney:

On behalf of the Contra Costa branch of ACORN, the Environmental Law and Justice Clinic at Golden Gate University School of Law submits these comments. PG&E is currently emitting hundreds of tons of harmful air pollution from the Gateway Generating Station without a valid certification or air permit. In its May 7, 2009 amendment, PG&E is attempting to remedy some of these violations after the fact. PG&E's belated attempt to change its certification after it has started operating does not change the fact that PG&E violated its certification and the law. Further, PG&E's application will not bring the GGS into compliance with the applicable air quality requirements. The Commission should reject PG&E's attempt to amend its certification here and require PG&E to come into compliance with the applicable air quality requirements before it can receive approval of its certification amendment.

I. PG&E's Late Amendment Does Not Change the Fact that PG&E is in Violation of this Commission's Requirements.

As discussed in our Complaint filed on June 5, 2009 and further supported in our Exhibits 1-24 accepted into evidence during the August 5, 2009 evidentiary hearing at the Commission, PG&E has violated and is currently violating the law by not having a valid certification before constructing and operating its facility. To avoid unnecessary duplication, we hereby incorporate our allegations in the June 5, 2009 Complaint and Exhibits 1-24 into our comments. Specifically, we draw your attention to Exhibit 20, which outlines statements from our Exhibits which demonstrate that PG&E is out of compliance with its certification. In addition, we draw your attention to Exhibit 21, in which Robert Sarvey outlines his support of the Complaint and the reasons he believes PG&E is in non-compliance with its certification.

This evidence demonstrates that PG&E is in non-compliance with its certification and the requirements for that certification. Under the Warren-Alquist act, the Commission's regulations, and the general conditions of PG&E's certification, companies, such as PG&E, are required to amend their certification,

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even for insignificant changes, when a company plans to change the equipment and operational conditions of its facility. *See* Cal. Pub. Res. Code Section 25500; Ex. 2 at 186 (General Conditions from May 2001 Certification) (stating that “[a] petition is required for amendments and insignificant project changes”). PG&E is aware of this requirement as it has amended its certification for the facility at issue here, the Gateway facility, many times.

In this instance, however, PG&E decided to finish construction and start operating while many of the changes it is currently in non-compliance with were pending before this Commission. *See* Ex. 6 (PG&E’s January 15, 2008 Petition to Amend Conditions). PG&E then withdrew those changes stating that they were unnecessary even though months later it is now asking for many of the exact same changes. Ex. 13; *compare* Ex. 14 (May 7, 2009 Amendment Request) *with* Ex. 6 (January 15, 2008 Amendment Request). As the Staff notes, “the project has already been modified (i.e., the equipment has already been installed prior to processing and/or approving the proposed changes) and the current amendment request addresses the difference between the decision and what is “as built.” July 30, 2009 Staff Analysis at 1. In addition, PG&E violated certification conditions during the commissioning period without the Commission’s approval. *See* Ex. 10, 12, PG&E Exhibit 315.

PG&E’s decision to construct, operate and seek permission later is a circumvention of this Commission’s authority, a violation of its certifications and of the law.

II. PG&E’s Amendment Will Not Bring It Into Compliance with the Applicable Laws, Ordinances, Regulation and Standards.

PG&E constructed and is currently operating a facility that has violated and is violating the applicable laws, ordinances, regulation and standards (LORS).

Importantly, PG&E’s Gateway Facility was constructed and is operating without a valid PSD or NSR permit. As BAAQMD admitted in a related proceeding, “there is in fact no current, valid permit, a point on which there is now no disagreement among Petition, EPA Region 9, and the District.” Ex. 15. This is because, as required by the federal PSD regulations at 40 C.F.R. 52.21(r)(2), the PSD permit “shall become invalid . . . if construction is discontinued for a period of 18 months or more.” *See also Sierra Club v. Franklin County Power of Illinois*, 546 F.3d 918, 931 (7th Cir. 2008) (affirming invalidation of a PSD permit occurs when construction is discontinued for longer than 18 months). Construction at the Gateway Facility was discontinued in February 2002, and was not restarted until PG&E acquired the facility years later. *See* PG&E’s Answer to ACORN Complaint (admitting that construction was discontinued). Consequently, the 2001 permit is invalid.

Because it is operating without a valid PSD permit, the Gateway Facility is not complying with the best available control technology requirements. PSD

requires, among other things, the proposed facility to install “the best available control technology for each pollutant subject to regulation.” 42 U.S.C. § 7475(a)(4). As described by the air district, “[c]learly the recurring theme in the above definitions of BACT . . . is ‘the most effective emission control’ or ‘the most stringent emission limitation.’” Bay Area Air Quality Management District Best Available Control Technology (BACT) Guideline (“BACT Guideline”), *available at* <http://www.baaqmd.gov/pmt/bactworkbook/default.htm> (definition of BACT and TBACT).

The limits in PG&E’s expired 2001 permit do not reflect current BACT. Indeed, PG&E has failed to comply with even what it believes to be current BACT. In its December 2007 application to the District, PG&E acknowledged that its limits in the old 2001 permit did not meet current definition of BACT. According to this submission, PG&E asserted, among other things, that 2 ppmvd @ 15% O₂ was BACT for NO_x and 4 ppmvd @ 15% O₂ was BACT for CO. Despite this assertion, PG&E has stated in another proceeding before EPA’s Environmental Appeals Board that its operating under the old, expired emission rates of 2.5 ppmvd @ 15% O₂ for NO_x emissions and 6 ppmvd @ 15% O₂ for CO emissions. *See* PG&E’s Response to Motion for Stay in EAB Proceeding PSD-09-02, Filing No. 26 at 4, *available at* www.epa.gov/eab/. Thus, PG&E has not complied with LAER or BACT.

PG&E’s amendment request similarly fails to comply with BACT. The Commission need look no farther than the Russell City Generating Station’s proposed limitations to see that a similar facility being constructed around the same time has very different emission limitations. *See* Ex. 18. PG&E’s amendment, by not proposing emission limitations that comply with BACT, thus fails to comply with the applicable LORS.

In addition, PG&E has violated and is violating other LORS. The Air District has recently issued two notices of violation. *See* Notices of Violation (attached to this letter). One of these violations is a violation of the NO_x emission standard. *Id.* This is especially concerning here because the Gateway NO_x emission standard does not meet BACT and the Bay Area is in non-attainment for NO_x.

In addition, this is an area with a number of industries and therefore is sensitive to increases. In fact, Contra Costa County is currently the second most industrialized area in California. *See* Hallissy, Erin, *Contra Costa County Chemical Stockpiles Raise Terror Attack Concerns*, San Francisco Chronicle (July 7, 2005). This is in part because Contra Costa County has 29 active power plants that generate more than .1 megawatts of electricity each. *See* Database of California Power Plants, *available at* http://energyalmanac.ca.gov/powerplants/POWER_PLANTS.XLS. We request that the Commission fully assess the cumulative impacts that will result from the operation of this facility and the other power plants proposed including Mirant’s proposed stations at Willow Pass and Marsh Landing and the new Contra Costa Power Plant.

PG&E also violated the law by constructing a diesel fire pump. *See* Notices of Violation (attached to this letter). This fire pump, which causes health risks, should not be allowed to run for reliability purposes. This engine is not controlled to BACT levels and should be limited to operate in only emergency situations. As described above, this area is already significantly impacted by pollution, and therefore, we request that the Commission limit the operation of this fire pump to only truly emergency situations.

Finally, PG&E is operating without a valid state or federal operating permit from the air district. PG&E still does not have a valid permit to operation even though it has been operating for over 180 days. This is a violation of the LORS including BAAQMD Regulation 2-1-304.

In sum, due to PG&E's violations of the law, the Commission should reject PG&E's attempt to amend its certification here and require PG&E to come into compliance with the applicable air quality requirements before it can receive approval of its certification amendment.

Thank you for your consideration of our comments and concerns.

Sincerely,

/s/ Deborah Behles

Deborah Behles

cc: Scott Galati (via email)
Richard Ratcliff (via email)
CEC Docket Unit (via email and first class mail)
Kenneth Celli (via email)
Rory Cox (via email)
Rob Simpson (via email)
Bob Sarvey (via email)
Mike Boyd (via email)



BAY AREA AIR QUALITY MANAGEMENT DISTRICT
 939 ELLIS STREET · SAN FRANCISCO, CA 94109
 (415) 749-4795

NOTICE OF VIOLATION

No. **A 49324**

ISSUED TO: GATEWAY GENERATING STN P G N# B8143
 ADDRESS: 3225 WILBUR AVENUE
 CITY: ANTIOCH STATE: CA ZIP: 94609
 PHONE: (925) 206-9037
 N# Mailing Address on F61

OCCURRENCE
 NAME: _____
 ADDRESS: _____ Same As Above
 CITY: _____ ZIP: _____
 SOURCE: S# 44 NAME: Heat Recovery Steam Generator
 EMISSION PT: P# _____ NAME: _____
 DATE: 3/16/09 TIME: 0944 HRS

<input type="checkbox"/> REG 2 RULE 1 SEC 301 No Authority to Construct	<input type="checkbox"/> REG 2 RULE 1 SEC 301 No Permit to Operate
<input type="checkbox"/> REG 1 SEC 301 H & S CODE - 41700 Public Nuisance	<input checked="" type="checkbox"/> REG 2 RULE 1 SEC 307 Failure to Meet Permit Condition
<input type="checkbox"/> REG 5 SEC 301 Prohibited Open Burning	<input type="checkbox"/> REG 6 SEC 301 Excessive Visible Emissions
<input type="checkbox"/> REG _____ RULE _____ SECTION _____ CODE _____	<input type="checkbox"/> REG _____ RULE _____ SECTION _____ CODE _____

Details: NOx CEM excess > 2.5ppm @ 15%O2

RECIPIENT NAME: STEVE ROYALL
 TITLE: PLANT MANAGER
 SIGNING THIS NOTICE IS NOT AN ADMISSION OF GUILT [Signature]
SIGNATURE

→ WITHIN 10 DAYS, RETURN A COPY OF THIS NOTICE WITH A WRITTEN DESCRIPTION OF THE IMMEDIATE CORRECTIVE ACTION YOU HAVE TAKEN TO PREVENT CONTINUED OR RECURRENT VIOLATION. **THIS VIOLATION IS SUBJECT TO SUBSTANTIAL PENALTY.** YOUR RESPONSE DOES NOT PRECLUDE FURTHER LEGAL ACTION.

ISSUED BY: E. GIACOMETTI INSP # 806
 DATE: 5/7/09 TIME: 1035 HRS MAILED

PLEASE PRESS HARD



BAY AREA AIR QUALITY MANAGEMENT DISTRICT
 939 ELLIS STREET · SAN FRANCISCO, CA 94109
 (415) 749-4795

NOTICE OF VIOLATION

No. **A 49323**

ISSUED TO: GATEWAY GENERATING STN P G N# B8143
 ADDRESS: 3201 WILBUR AVENUE
 CITY: ANTIOCH STATE: CA ZIP: 94609
 PHONE: (925) 206-9037
 N# Mailing Address on F61

OCCURRENCE
 NAME: _____
 ADDRESS: _____ Same As Above
 CITY: _____ ZIP: _____
 SOURCE: S# _____ NAME: _____
 EMISSION PT: P# _____ NAME: _____
 DATE: 5/13/2008 TIME: 6000 HRS

<input checked="" type="checkbox"/> REG 2 RULE 1 SEC 301 No Authority to Construct	<input type="checkbox"/> REG 2 RULE 1 SEC 301 No Permit to Operate
<input type="checkbox"/> REG 1 SEC 301 H & S CODE - 41700 Public Nuisance	<input type="checkbox"/> REG 2 RULE 1 SEC 307 Failure to Meet Permit Condition
<input type="checkbox"/> REG 5 SEC 301 Prohibited Open Burning	<input type="checkbox"/> REG 6 SEC 301 Excessive Visible Emissions
<input type="checkbox"/> REG _____ RULE _____ SECTION _____ CODE _____	<input type="checkbox"/> REG _____ RULE _____ SECTION _____ CODE _____

Details: INSTALLATION OF FIRE PUMP W/D AUTHORITY TO CONSTRUCT

RECIPIENT NAME: STEVE ROYALL
 TITLE: PLANT MANAGER
 SIGNING THIS NOTICE IS NOT AN ADMISSION OF GUILT [Signature]
SIGNATURE

→ WITHIN 10 DAYS, RETURN A COPY OF THIS NOTICE WITH A WRITTEN DESCRIPTION OF THE IMMEDIATE CORRECTIVE ACTION YOU HAVE TAKEN TO PREVENT CONTINUED OR RECURRENT VIOLATION. **THIS VIOLATION IS SUBJECT TO SUBSTANTIAL PENALTY.** YOUR RESPONSE DOES NOT PRECLUDE FURTHER LEGAL ACTION.

ISSUED BY: E. GIACOMETTI INSP # 806
 DATE: 2/24/09 TIME: 1440 HRS MAILED

PLEASE PRESS HARD