DOCKET
00-AFC-1C
DATE JUL 17 2009
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STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

	)	**COMPLAINT**
	)	**REQUEST FOR OFFICIAL**
	)	**NOTICE**
	)	**COMMENTS ON STAFF REPORT**
Docket Number: 00-AFC-1C	)	**COMMENTS ON AMENDMENT**
		PETITION TO INTERVENE

COMPLAINT

Pursuant to Section Title 20, Section 1231 and 1237 of the California Code of Regulations Petitioner Rob Simpson CARE and Bob Sarvey request the revocation of the California Energy Commission License and appropriate sanctions against PG&E for operation of the facility without necessary State and Federal Air Permits Also for construction and operation of the facility inconsistent with the Commissions Decision(s)

§ 1231. Complaints and Requests for Investigation; Filing.
Any person..may file a complaint alleging a violation of a statute,
regulation, order, program, or decision adopted, administered, or enforced by the commission... Any person may also file a request for investigation, including a request for a jurisdictional determination regarding a proposed or existing site and related facilities. (a) A complaint or request for investigation shall be filed with the Chief Counsel of the commission.

REQUEST FOR INVESTIGATION AND JURISDICTIONAL DETERMINATION
This is a request for investigation of the permitting scheme that has allowed PG&E to operate its Gateway facility without any air permits and the commissions jurisdiction to provide relief. Does the Commission have the jurisdiction to amend or continue to consider its license as valid while the facility violates state and federal laws. Has PG&E complied with the all of Commission's decisions and rules.

1) the name, address, and telephone number of the person filing the complaint
(complainant) and request for investigation (petitioner);
Petitioner is CARE, Bob Sarvey and Rob Simpson Address 27126 Grandview Avenue Hayward California 94542 510-909-1800 Rob@redwoodrob.com

(2) the name, address, and telephone number of the person allegedly violating the
statute, regulation, order, or decision (respondent) or, in the case of a request for a jurisdictional investigation, the name, address, and telephone number of the person owning or operating, or

proposing to own or operate, the project which is the subject of the request for investigation (respondent) Pacific Gas and Electric Gateway Generating Station 3225 Wilbur Avenue Antioch CA Plant Manager Steve Royall, 925- 522-7801

(3) a statement of the facts upon which the complaint or request for investigation is based;

The 530-megawatt project was certified by the Energy Commission on May 30, 2001. Construction of the facility started late in 2001 and was suspended in February of 2002 due to financial difficulties. On July 19, 2006, the Energy Commission approved the addition of Pacific Gas and Electric (PG&E) as co-owner of the project with Mirant Delta, LLC. On January 3, 2007, the Energy Commission approved PG&E's petition to remove Mirant as a co-owner and change the name of the facility to the Gateway Generating Station. PG&E restarted construction in February of 2007. The facility is located on Wilbur Avenue, east of the city of Antioch, in Contra Costa County.

We incorporate the complaint filed by Golden Gate University Environmental law and Justice Clinic (GGU) on behalf of Contra Costa branch of the Association of Community Organizations for Reform Now (ACORN). and GGU also submitted to the Commission a "Notice of relevant document" Dated June 25,2009 in it GGU identified "the Bay Area Air Quality Management District (BAAQMD) filed a pleading in a case involving the Gateway Generating Facility before Environmental Protection Agency's Environmental Appeals Board, which admitted "there is no PSD permit" for the Gateway Facility. I am the Petitioner in that appeal. CARE and Bob Sarvey have applied to intervene. CARE is an intervener in the original AFC proceeding Care and Bob Sarvey have also both commented to the Bay Area Air Quality Management District in its permitting actions regarding this facility, so we all have an interest in these proceedings.

REQUEST FOR OFFICIAL NOTICE
Pursuant to 1213 request for official notice of EAB Appeal 09-02 The appeal pertains to the Clean Air Act New Source Review provisions of Prevention of Significant Deterioration (PSD) regulations that are regularly considered in siting actions. To the extent that the Commission declines not to take official notice of these proceedings the following briefs are attached as part of this Declaration.
A EAB Petition
B Bob Sarvey comments on PSD permit
C EAB jurisdictional Brief

(4) a statement indicating the statute, regulation, order, or decision upon which the complaint or request for investigation is based;
The violations identified below are also incorporated into the § 1231complaint

§ 1237. Post-Certification Complaints.
(a) Any person must file any complaint alleging noncompliance with a commission decision adopted pursuant to Public Resources Code section 25500 and following solely in accordance with this section. All such complaints shall be filed with the Docket Unit and submitted to the designated compliance project manager for investigation and shall include the following information:

PG&E is in violation of many conditions of the Commission's;
Commission Final Decision on the Contra Costa Project Dated May 30, 2001
The Docket for these proceedings give no indication that any provisions of the commission's order have been complied with. We are requesting an item by item verification of each condition with the

following conditions to be most likely not in conformance.

"AQ-32 Within 60 days of initial operation of the CCPP Unit 8 and on an biennial basis (once every two years) thereafter, the owner/operator shall conduct a District approved source test on exhaust point P-11 or P-12 while the Gas Turbine and associated Heat Recovery Steam Generator are operating at maximum allowable operating rates to demonstrate compliance with Condition AQ-25. If three consecutive biennial source tests demonstrate that the annual emission rates calculated pursuant to condition AQ-28 for any of the compounds listed below are less than the BAAQMD Toxic Risk Management Policy trigger levels shown, then the owner/operator may discontinue future testing for that pollutant:
Benzene ≤ 26.8 pounds/year
Formaldehyde < 132 pounds/year
Specified PAHs ≤ 0.18 pounds/year (TRMP)

AQ-38 Within 180 days of the issuance of the Authority to Construct for the CCPP Unit 8, the Owner/Operator shall contact the BAAQMD Technical Services Division regarding requirements for the continuous monitors, sampling ports, platforms, and source tests required by conditions AQ-26, 29, 30, and 32. All source testing and monitoring shall be conducted in accordance with the BAAQMD Manual of Procedures. (Regulation 1-501)

AQ-39 Prior to the issuance of the BAAQMD Authority to Construct for the CCPP Unit 8, the Owner/Operator shall demonstrate that valid emission reduction credits in the amount of 200.5 tons/year of Nitrogen Oxides, 53.6 tons/year of Precursor Organic Compounds or equivalent (as defined by District Regulations 2-2-302.1 and 2-2-302.2), and 337 tons of Sulfur Oxides, under their control through enforceable contracts, option to purchase agreements, or equivalent binding legal documents. (Offsets)

AQ-40 Prior to the start of construction of the CCPP Unit 8, the Owner/Operator shall provide to the District valid emission reduction credit banking certificates in the amount of 200.5 tons/year of Nitrogen Oxides, 53.6 tons/year of Precursor Organic Compounds or equivalent (as defined by District Regulations 2-2-302.1 and 2-2-302.2) and 337 tons of Sulfur Oxides. (Offsets)
Verification: See verification of Condition AQ-39.

AQ-41 Pursuant to BAAQMD Regulation 2, Rule 6, section 404.3, the owner/operator of the CCPP Unit 8 shall submit an application to the BAAQMD for a significant revision to the existing Major Facility Review Permit prior to commencing operation.
(Regulation 2-6-404.3)

Verification: The owner/operator shall submit to the CEC CPM copies of the Federal (Title IV) Acid Rain and (Title V) Operating Permit within 30 days after they are issued by the District."

BAAQMD rule
2-6-404.3 An application for a significant permit revision shall be submitted by the applicant prior to commencing an operation associated with a significant

permit revision. Where an existing federally enforceable major facility review permit condition would prohibit such change in operation, the responsible official must request preconstruction review and obtain a major facility review permit revision before commencing the change.

PG&E appears to have no air permits whatsoever. It did not obtain any air permit prior to commencement of changes and has to date obtained no major facility review permit title IV or Title V permit no Permit to operate and as the Air District testified there is no PSD permit. They also completed Major revisions without a permit.

AQ-42 Pursuant to 40 CFR Part 72.30(b)(2)(ii) of the Federal Acid Rain Program, the owner/operator of the CCPP Unit 8 shall not operate either of the gas turbines until either: 1) a Title IV Operating Permit has been issued; 2) 24 months after a Title IV Operating Permit Application has been submitted, whichever is earlier. (Regulation 2, Rule 7)
Verification: See verification of Condition AQ-41.

Again PGE has no Title IV permit and while the staff response to ACORN Dated July 3,2009 states that PG&E ..began commercial operation on January 4, 2009 The facility apparently started to operate (commissioning) on November 1, 2008 BAAQMD reports that application 15777 initial Acid Rain was received on 02/20/07 and so PG&E was not eligible to "operate" the Facility under this provision until 02/20/09. Had they waited the 24 months the CEC and Air District would have had the benefit of review of the February 13, 2009 withdrawal of amendment(s) to realize that they were not eligible for a Title IV or V permit which is now self evident since they still do not have the permits.

FEDERAL
Clean Air Act The federal Clean Air Act requires any new major stationary sources of air pollution and any major modifications to major stationary sources to obtain a construction permit before commencing construction. This process is known as New Source Review (NSR). Title V of the federal Clean Air Act requires states to implement and administer an operating permit program to ensure that large sources operate in compliance with the requirements included in Title 40, Code of Federal Regulations, section 70. A Title V permit contains all of the requirements specified in different air quality regulations, which affect an individual project. The U.S. Environmental Protection Agency (EPA) has reviewed and approved the Bay Area Air Quality Management District's regulations and has delegated to the District the implementation of the federal Prevention of Significant Deterioration (PSD), Non-attainment NSR, and Title V programs. The District implements these programs through its own rules and regulations, which are, at a minimum, as stringent as the federal regulations.
The CCPP Unit 8's gas turbines are also subject to the federal New Source Performance Standards (NSPS). These standards include a NOx emissions concentration of no more than 75 parts per million (ppm) at 15 percent excess oxygen (ppm@15% O2), and a SOx emissions concentration of no more than 150 ppm@15% O2.
Decision 29

Since the Federal regulations are codified in BAAQMDS regulations they are also State law issues. To the extent the Commission rejects its Federal enforcement authority it should enforce pursuant to the

State law programs.

STATE
California State Health and
Safety Code, Section 41700
Requires that: "no person shall discharge from any source whatsoever such quantities of air contaminants or other material which cause injury, detriment, nuisance, or annoyance to any considerate number of persons or to the public, or which endanger the comfort, repose, health, or safety of any such persons or the public, or which cause, or have a natural tendency to cause, injury or damage to business or property.
Decision 29

Because PG&E is operating without the required air discharge permits they are in violation of the Health and Safety code (above)

LOCAL
Bay Area Air Quality
Management District
(BAAQMD), Regulation 2
Specifically applicable to the project are Rules 1 (General Requirements), 2 (New Source Review), and 7 (Acid Rain). (See SA pp. 44-45)

BAAQMD, Regulation 6,
Particulate Matter and Visible Emission
The purpose of this regulation is to limit the quantity of particulate matter in the atmosphere. Sections 301 and 310 of Regulation 6 are directly applicable to this project. (SA pp. 44-4

BAAQMD, Regulation 9 Rule 1 (Limitations) and Rule 9 (Nitrogen Oxides from Stationary Gas Turbines) are directly applicable to this project. (SA pp. 45-46)

BAAQMD, Regulation 10, Gas Turbines, Standards of Performance for New Stationary Sources
This rule adopts the national maximum emission limits (40 C.F.R. §60) which are 75 ppm NOx and 150 ppm SO2 at 15 percent O2. Whenever any source is subject to more than one emission limitation rule, regulation, provision or requirement relating to the control of any air contaminant, the most stringent limitation applies.
Decision 29

Without Air permits the facility is in conflict with all of the above regulations

PUBLIC HEALTH-1 The project owner shall perform a visual inspection of the cooling tower drift eliminators once per calendar year, and repair or replace any drift eliminator components which are broken or missing. Prior to initial operation of the project, the project owner shall have the cooling tower vendor's field representative inspect the cooling tower drift eliminator and certify that the installation was performed in a satisfactory manner. The CPM may, in years 5 and 15 of project operation, require the project owner to perform a source test of the PM10 emissions

rate from the cooling tower to verify continued compliance with the vendor guaranteed drift rate.
Verification: The project owner shall include the results of the annual inspection of the cooling tower drift eliminators and a description of any repairs performed in the next required quarterly compliance report. The initial compliance report will include a copy of the cooling tower vendor's field representative's inspection report of the drift eliminator installation. If the CPM requires a source test as specified in Public Health-1, the project owner shall submit to the CPM for approval a detailed source test procedure 60 days prior to the test. The project owner shall incorporate the CPM's comments, conduct testing, and submit test results to the CPM within 60 days following the tests.

(6) the authority under which the commission may take the action requested is identified in the Warren Alquist act and;

ENFORCEMENT
The Energy Commission's legal authority to enforce the terms and conditions of its Decision is specified in Public Resources Code sections 25534 and 25900. The Energy Commission may amend or revoke the certification for any facility, and may impose a civil penalty for any significant failure to comply with the terms or conditions of the Commission Decision. The specific action and amount of any fines the Commission may impose would take into account the specific circumstances of the incident(s). This would include such factors as the previous compliance history, whether the cause of the incident involves willful disregard of LORS, inadvertence, unforseeable events, and other factors the Commission may consider.

Moreover, to ensure compliance with the terms and conditions of certification and applicable laws, ordinances, regulations, and standards, delegate agencies are authorized to take any action allowed by law in accordance with their statutory authority, regulations, and administrative procedures
Decision 185

POST CERTIFICATION CHANGES TO THE COMMISSION DECISION: AMENDMENTS, INSIGNIFICANT PROJECT CHANGES AND VERIFICATION CHANGES
The project owner must petition the Energy Commission, pursuant to Title 20, California Code of Regulations, section 1769, to 1) .. should be submitted to the Commission's Docket in accordance with Title 20, California Code of Regulations, section 1209. The criteria that determine which type of change process applies are explained below..

AMENDMENT (1769(a)(3))
A proposed project modification will be processed as an amendment if it alters the intent or purpose of a condition of certification, has potential for significant adverse environmental impact, may violate applicable laws, ordinances, regulations or standards, or involves an ownership change...
Decision 190

The Applicant has amended the facility and it has resulted in violation of laws, ordinances and regulations. The Commission should:

2. Issue a reprimand, recommend a fine pursuant to Public Resources Code sections 25534 and 25534.1, or take other appropriate remedial action..

3. Recommend, after consulting with the Energy Facility Siting and Environmental

Committee, that the Commission issue a finding that the project owner has forfeited the project's certification.
Decision 190

ADOPTION ORDER
1. The Conditions of Certification contained in this Decision, if implemented by the project owner, ensure that the whole of the project will be designed, sited and operated in conformity with applicable local, regional, state, and federal laws, ordinances, regulations, and standards, including applicable public health and safety standards, and air and water quality standards.
Decision 191

(5) the action the complainant or petitioner desires the commission to take;

Please revoke the certification for the facility, and impose a civil penalty for significant failure to comply with the terms or conditions of the Commission Decision. Tthe cause of the incident involves willful disregard of LORS and clearly foreseeable events. PG&E was clearly aware of how the facility was developed and its obligation to obtain permits. They have manipulated the Commission and BAAQMD to bring the facility on line without permits. They now seek forgiveness in the way of a post commencement amendment to the license. They already operate consistent with the amendment instead of obtaining required permission prior to operations.

(7) a statement by the complainant or petitioner specifically listing the names and addresses of any other individuals, organizations, and businesses which the complainant or petitioner knows or has reason to believe would be affected by the relief sought;

The public is affected, those parties noticed in this proceeding or who have commented throughout this process are affected. The governmental officials required to be noticed pursuant to federal PSD regulation et al are affected. Communities for a Better Environment is be affected.

COMMENTS ON:

STAFF RESPONSE AND RECOMMENDATIONS TO COMPLAINT BY ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW (ACORN) and Rory Cox.

1237 (d) Any person may submit written comments on the complaint or staff report within 14 days after issuance of the staff report.

all of the above is included in comments on "staff response"

That petition was withdrawn on February 13, 2009, and a new Petition to Amend was filed on May 8, 2009, again requesting certain minor changes to the project.
STAFF RESPONSE 2

The Commission should examine within the complaint proceeding the effects of PG&Es attenuation of amendments and withdrawals in this and BAAQMD permitting that resulted in its ability to bypass permitting of the facility prior to operation. PG&E appears to have skilfully manipulated the Commission and Air District to evade the scrutiny and safeguards of the commissions decision(s) and regulations. The timing of the May 8, 2009 Petition is suspect in that it was filed 3 days after the appeal to the EAB.

The Complaint, filed by ACORN under Title 20, California Code of Regulations, section 1237, fails to specify all the Conditions of Certification that it claims are being violated and, therefore, fails to provide all the information required in a complaint alleging noncompliance with a Commission decision. (*See*, Cal. Code Regs., tit. 20, § 1237, subd.(a)(4), which requires "a statement indicating the statute, regulation, order, decision or condition of certification upon which the complaint is based;" [emphasis added].) The complaint should be dismissed, therefore, for insufficiency of the complaint. ACORN instead asserts four "counts" against PG&E. In the following sections, staff addresses each of these counts separately to show that they should result in dismissal of the complaint for lack of merit.
STAFF RESPONSE 2

ACORN identifies AQ-6, AQ-20, AQ-26, Regulations."Cal. Code Regs .tit.20, $ 1744.5(b), 1709. 1720. Cal. Pub. Res. Code 25525. BAAQMD Reg. 2-l-301. 2-1-305, 2-1-305, 40 C.F.R. 51.166j(4), 52.21(b)(9), 52.21(r) 4 2 U.S.C. 7479(3) Section 42314.3 of the Health and Safety Code Cal. Pub. Res. Code 25523(d)(2) and 40 C.F.R. 81.305 These should provide sufficient clarity to satisfy 1237(a)(4) and so the complaint should not be dismissed on this basis.

COUNT 1. PG&E Is Violating the Law by Not Having a Valid Certification Before Constructing and Operating the Facility.
ACORN is correct in its assertion that "PG&E should have received approval from the commission for (the) modifications before beginning constructions of these modifications and commencing operation." (Complaint, p.10) But the 2001 certification for Gateway remains valid in the absence of a revocation under Public Resources Code section 25534.
STAFF RESPONSE 3

Staff has provided agreement with Acorn on this assertion this should be sufficient to sustain that complaint as the timing of construction and operation verses approval is paramount to adjudicating the legality of PG&Es actions and the commission should revoke the certification pursuant to Public Resources Code section 25534.

Staff notes that the owner has requested and received modifications from BAAQMD to the FDOC and the ATC since the initial release of those documents. Also, a current application for modification to both the FDOC and the ATC regarding the diesel fire pump engine is pending at BAAQMD, and that proposed modification also identifies the current, installed smaller dewpoint heater. Thus, the claim that the project owner did not obtain an FDOC or an ATC is incorrect.
STAFF RESPONSE 5

An application for modification is not in itself a permit. Staffs confusion on this issue is an important policy decision that the Commission should, in its discretion, consider in the context of these complaints. The PSD permit was an integral part of the original ATC. Now that BAAQMD has acknowledged that there is no PSD permit the ATC retains no validity and conveys no authority.

The enforcement authority over the specific terms and conditions of a PSD permit are with the USEPA.
STAFF RESPONSE 5

They are also codified in BAAQMD regulations and should be enforced by the Commission.
"The U.S. Environmental Protection Agency (EPA)
has reviewed and approved the Bay Area Air Quality Management District's
regulations and has delegated to the District the implementation of the federal

Prevention of Significant Deterioration (PSD), Non-attainment NSR, and Title V programs. The District implements these programs through its own rules and regulations, which are, at a minimum, as stringent as the federal regulations." Decision 29

ACORN makes no claim that any discrepancies between recently installed equipment and what is certified causes a violation of any condition of certification.
STAFF RESPONSE **6**

We claim that discrepancies between recently installed equipment and what is certified cause violation of conditions of certification as described herein. PG&E admits discrepancies in its amendment. The Amendment is not a request to do something it is a request for forgiveness for existing violations of certification.

Any discrepancies between installed equipment and what was originally certified are, therefore, better addressed in the amendment process, rather than a complaint proceeding. For these reasons, Count 3 in ACORN's complaint is without merit and should be dismissed.
STAFF RESPONSE 6

Staff does not dispute the allegation yet concludes that it "is without merit and should be dismissed" Staff also cites no particular authority for combining an enforcement proceeding with an amendment and none likely exists. Time is of the essence in an Enforcement proceeding. The applicant has demonstrated skill in protracting amendment proceedings. By combining the enforcement and amendment these complaints could evade review for years while the facility operates in violation. 18 months has transpired since PG&E Petition to Amend Various Air Quality Conditions of Certification and they simply withdrew it and started over. There is nothing that prevents them from later withdrawing their present amendment and further quashing review. There is a facility that is operating in violation of the commissions decision plus state a Federal laws. The facility is operating to the detriment of public health and the environment. The Commission should also feel compelled to adjudicate the matter forthwith to protect the integrity of its certification program.

PG&E Violated the Commission's Requirements for the Opportunity of Public Participation Before the Construction and Operation of Facilities.
The current petition to Amend has not yet been heard at a business meeting, nor will it be approved by the commission without the opportunity for public participation. Thus, the public will be afforded the opportunity to participate in the current Amendment proceedings. Given the above, this count is without merit and should be dismissed.
STAFF RESPONSE **6**

PG&E is already operating consistent with the amendment. The opportunity for public participation after the fact is absurd. The facility is built and operating without permits in conflict with its license. The public participation must as stated by ACORN be "*Before the Construction and Operation of Facilities"* This is a valid complaint proceeding that should be heard by the Commission.

Staff notes that the issues raised in Count 3 of the Complaint are directly connected to the issues presented by PG&E's May 8, 2009 Petition to Amend.
STAFF RESPONSE 7

Staff should understand that it is the Amendment that is connected to the issues and not visa versa. It

was likely filed as a result of the EAB appeal in an effort to head off the impending CEC complaint(s). To allow PG&E to succeed in its manipulation now by dropping these complaints into the potential bottomless pit of amendment proceedings would only serve to continue to evade Review. It should be clear at this point that the amendment should not be approved without prior adjudication of these complaints and demonstration of the facility's ability to obtain air permits.

To the extent Count 3 sets forth allegations regarding the project's compliance with conditions of certification by not obtaining the required emission offsets, it raises issues that may be settled by the Commission approving the changes that are the subject of the current Petition to Amend. Count 3, if not dismissed, should therefore be addressed in the amendment proceeding for post-certification changes. Such consolidation of issues in the amendment proceeding would dispense with what could otherwise end up being duplicative or overlapping proceedings and would save valuable time and resources.
STAFF RESPONSE 7

Staff has not disputed ACORN's allegations, as such and for the reasons set forth herein this complaint should proceed. The issue of offsets in the amendment will require the participation of the air district and could be protracted Adjudicating these complaints first is more likely to save valuable time and resources. The applicant has much work to do to obtain air permits. Despite resource constraints there is no authority cited for consolidation.

PETITION TO INTERVENE

§ 1207. Intervenors.
(a) Any person may file with the Docket Unit or the presiding committee member a petition to intervene in any proceeding. The petition shall set forth the grounds for the intervention, the position and interest of the petitioner in the proceeding, the extent to which the petitioner desires to participate in the proceedings, and the name, address, and telephone number of the petitioner.

CARE is an intervener in the original siting proceeding. To unsure that this status extends to CARE and CARE members Simpson and Sarvey individually and as a group in the amendment and compliance proceedings. We desire to participate in the proceedings to the full extent allowable, on the grounds expressed in this petition.

CONCLUSION

To date PG&E has outmaneuvered the regulatory agencies charged with overseeing it and managed to operate its facility without permits. The commission should welcome the opportunity to exert its authority in correcting PG&Es transgressions. The commission certification time limits appear to be based upon the CEQA standards for protection of the environment; to ensure that actions utilize contemporaneous information and in this instance the Best Available Control Technology BACT. The Clean Air Act has similar requirements that were not met. The Commissions allowance of extensions of certifications without the environmental review provisions of section 1769 of the Warren Alquist Act helped facilitate this system failure and that practice should be reviewed to become consistent with CEQA and the Clean Air Act.

We certify under the penalty of perjury in the state of California that the above is true and correct and

that this document was signed on July 17, 2009

Respectfully submitted by,

_____	_____	_____
Rob Simpson	Robert Sarvey	Mike Boyd

Robert Sarvey
501 W. Grantline Rd
Tracy, Ca. 95376
209 835-7162

Comments on the proposed authority to construct for the Gateway Generating Station Application number 17182

Dear Mr. Lusher,

Thank you for the opportunity to comment on the proposed ATC and draft PSD Permit for the Gateway generating station. The project was certified by the CEC in May of 2001 and the CEQA equivalent documents that the district relies on in its permitting process are now over seven years old. The project has processed over six amendments since its approval. The project as proposed violates the California NO2 Standard, does not meet current requirements for Best Available Control Technology (BACT), and lacks a cumulative air quality impact analysis.

California NO2 Standard

The engineering evaluation for permit number 17182 provides no air quality impact modeling information for NO2, PM-10, and SO2. The only information is from the original permit for the Gateway Project, application 1000. In application 1000 the District performed a PSD analysis for the projects impacts for NO2. These results are presented below.

TABLE E-6
California and national ambient air quality standards and ambient air quality levels from the proposed ($\mu g/m^3$)

Pollutant	Averaging Time	Maximum Background	Maximum Project impact	Maximum Project impact plus maximum background	California Standards	National Standards
NO_2	1-hour	164	225	389	470	---

http://www.baaqmd.gov/pmt/public_notices/1999_2001/1000/A0018_nsr_1000_pdoc_append_e_102300.pdf E-5

On February 19, 2008 the office of administrative law approved the new State NO2 standard of 338 ug/m which goes into effect on March 20, 2008. (http://www.arb.ca.gov/research/aaqs/no2-rs/no2-rs.htm) The project's NO2 impact of 225 ug/m

combined with background of 164 ug/m3 exceeds the newly established California NO2 standard of 338 ug/m3. According to modeling from application 1000 the project violates the new California NO2 standard and BAAQMD regulation 1-301 public nuisance provisions. There may be other modeling that demonstrates compliance with the new NO2 standard but it is not presented in application 17182. The public cannot effectively evaluate the project without complete information. This information should be included in a revised permit and re-circulated to the public for a 30 day comment period. Any significant differences between the modeling results in application 1000 and the revised permit should independently evaluated by the district and fully explained in the second version of the revised ATC so the public can properly determine the projects effects on the environment.

Start Up Emissions

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Start up emission for NOx are increased from 452 pounds per start in the original application number 1000 to 600 pounds per start up in permit 17182. There is no discussion of this increase in startup emissions and no modeling for the 1 hour NO2 impacts in application 17182. The only evidence in the permit of this NO2 emissions increase is in condition 21 and no evaluation of the impacts from the increased cold start emissions are included in the evaluation. The permit also allows excursions to 3ppm for NOx during startup and shutdown and no modeling analysis is presented in permit 1000 or permit 17182 for that 1 hour NO2 impact.

The district also fails to provide a BACT determination for start up and shut down emissions in the permit. The emissions for start up represent the highest emissions from the project. There are hardware and software modifications to the project that can shorten startup and shutdown events and optimize emission control systems. Start up and shutdown emissions from the facility can be reduced significantly with design changes to the heat recovery steam generator (HRSG) units. With the use of once through HRSG (Benson Boiler) startup time for each turbine/HRSG units can be reduced from the proposed 300 minutes to about 50 minutes or less , resulting in a significant reduction in start up emissions. In addition to reducing the facilities NOx emission liabilities the use of the Fast Start technology at the G111GS Project would result in cost savings from less fossil fuel use to create steam that is vented during start-ups. According to one manufacturer the cost for the design changes is not significantly higher than the cost of the standard off the shelf HRSG.

The 600 MW combined cycle Palomar Project in Escondido has installed a proprietary control system, OpFlex from General electric, and injects ammonia earlier to shorten start-up times and reduce start-up emissions at the facility. Preliminary non optimized results from their March 7, 2007, Petition for Variance 4703 Extension indicated they have reduce NOx emissions form 120 lbs to 28 lbs for or warm start-up events. The Palomar project utilizes the same turbines as the GGS the GE Frame 7 turbines.

If design or process control changes to reduce the facility's start up and shutdown emissions are implemented, the GGS daily emissions also can be reduced. These design changes represent BACT for the proposed GGS.

CO BACT

The projects proposed CO limit does not comply with Best Available Control Requirements for CO. Two recent energy projects the Magnolia and the Malburg Energy facilities have been permitted at 2 ppm for CO. The SCAQMD has determined that 2 ppm for CO is BACT through the permitting of the Magnolia Power Project. http://www.aqmd.gov/bact/386305Magnolia.doc This represents the current BACT limit for combined cycle projects like the GGS.

Ammonia Emissions

The amended authority to construct allows an increase in ammonia slip from 5ppm to 10 ppm. Current BACT for ammonia slip for large combustion turbines is 5ppm. The 5ppm ammonia slip in combination with a 2ppm NOx limit has already been required for the following CEC licensed facilities: Malburg Vernon (10-AFC-25), El Segundo (00-AFC-14), Inland Empire (01-AFC-17), Magnolia (01-AFC-6), Morro Bay (00AFC-12), Palomar (01-AFC-24), Tesla (01-AFC-21), and Russell City 01-AFC-7). Moreover, the U.S. EPA, ARB, CEC Commission Staff, the South Coast Air Quality Management District and the San Luis Obispo Air District believe that the scientific evidence shows that ammonia slip from a project like GGS does contribute to secondary PM formation.

In the original decision on the Gateway Generating Station 00-AFC-1, the CEC on page 10 of the decision states:

"The project's ammonia emissions have a potential to contribute to the ammonium nitrate emissions, which may worsen the violation of the PM10 standard. Assuming a 30 percent NOx to nitrate conversion rate and a linear extrapolation of the project's PM10 modeling results, the NOx to nitrate impact from the project can be at a maximum 2 □g/m3. Because the area is nonattainment for the state 24-hr PM10 standard, the ammonium nitrate contribution, although small, is significant without providing emission reductions as offsets."
http://www.energy.ca.gov/sitingcases/contracosta/documents/2001-05-30_CONTRACOSTA.PDF

On page 13 of the engineering evaluation for application number 17182 it states with regard to particulate matter formation:

"The ammonia emissions resulting from the use of SCR may have another environmental impact through its potential to form secondary particulate matter

such as ammonium nitrate. Because of the complex nature of the chemical reactions and dynamics involved in the formation of secondary particulates, it is difficult to estimate the amount of secondary particulate matter that will be formed from the emission of a given amount of ammonia. However, it is the opinion of the Research and Modeling section of the BAAQMD Planning Division that the formation of ammonium nitrate in the Bay Area air basin is limited by the formation of nitric acid and not driven by the amount of ammonia in the atmosphere. Therefore, ammonia emissions from the proposed SCR system are not expected to contribute significantly to the formation of secondary particulate matter within the BAAQMD. **The potential impact on the formation of secondary particulate matter in the SJVAPCD is not known.**

It is well established in two Energy Commission licensing cases, the Tesla Power Project 01-AFC-21 and the East Altamont Energy Center 01-AFC-04 that 70% of emissions in the Contra Costa area transport to the Tracy area. Permit 17182 clearly states that the BAAQMD has not evaluated the impact of ammonia emissions on the SJVAPCD and as such should limit the ammonia emissions form the GGS to the lowest limit possible or else conduct a study to determine the effect of excess ammonia slip on the Tracy area and the SJVAPCD. When evaluating the potential significant effects of the secondary PM emissions from the ammonia slip, it is necessary to determine if any additional amount of PM emissions will be significant in light of the serious nature of the existing PM10 and PM2.5 problem in the SJVAPCD air basin. (*CEQA Guidelines, Cal. Code Regs., tit. 14, § 15064(b); Kings County Farm Bureau, 221 Cal.App.3d 687, 718*) Under state law, the secondary PM emissions must not prevent or interfere with the attainment or maintenance of the State's PM10 and PM2.5 Air Quality Standard. (*Health and Saf. Code § 42301(a))*

Application 17182 states on page 13 " A second potential environmental impact that may result from the use of SCR involves the storage and transport of ammonia. Although ammonia is toxic if swallowed or inhaled and can irritate or burn the skin, eyes, nose, or throat, it is a commonly used material that is typically handled safely and without incident. The GGS will utilize aqueous ammonia in a 19% (by weight) solution."

The GGS will also store transport and utilize up to 35,000 pounds of anhydrous ammonia. In 2004 the Blythe project experienced a leak in its ammonia system that shut down I-10 for over 4 hours. Fortunately there were no fatalities. The District needs to carefully evaluate the permits use of anhydrous ammonia and do a cumulative impact analysis of ammonia handling and transportation in this dense cluster of power plants.

Cumulative Air Quality Impacts

There are a significant number of projects within six miles of the Gateway Generating station. Los Medanos, PG&E Pittsburg, Delta Energy Center, Bio Energy, Contra Costa Units 7, 9,10, plus several GWF Power Plants are located

near the proposed GGS. In addition another 930 megawatt plant is being processed by the CEC and the BAAQMD. This new plant the Marsh landing Project is adjacent to the GGS. The amended ATC must address the ambient air quality impacts and the health risks of this large conglomeration of power plants surrounding the GGS.

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the matter of:	)	PSD Appeal No._____
	)	
Gateway Generating Station	)	
	)	
	)	
PSD Permit Number UNKNOWN	)	
	)	

PETITION FOR REVIEW

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EXHIBIT LIST

A copy of the Gateway Authority To Construct ("ATC"), dated July 24, 2001, is attached as Exhibit 1.

On June 4, 2008 the Bay Area Air Quality Management District (District) issued a "Public Notice" and "Engineering Evaluation For Proposed Amended Authority To Construct (ATC) And Draft PSD Permit" (Exhibit 2)

series of public requests in this and the Russell City Energy Center after the Remand attached (Exhibit 3)

ATC "renewals" (Exhibit 4)

EPA REGION IX POLICY ON PSD PERMIT EXTENSIONS
Guidance Document: 1-88 (Exhibit 5)

The Petition to Amend Air Quality Conditions in the Gateway Generating Station Project Final Decision, submitted to the California Energy Commission, dated January 15, 2008, which includes the Application to the Bay Area Air Quality Management District for Modifications to the Authority to Construct for the Gateway Generating Station, Antioch, California (Exhibit 6),

The Petition for Conditional Approval of Ownership Addition,
Request for Updated Construction Milestones, *and*
Petition for Approval of Equipment Enhancements (to CEC) (Exhibit7)

CPUC Resolution E-4054. Pacific Gas & Electric (PG&E) (Exhibit 8)

Public comments provided regarding the Amendment by Bob Sarvey (Exhibit 9)

PETITION FOR REVIEW AND REQUEST FOR ORAL ARGUMENT

INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), Rob Simpson petitions for review of the Prevention of Significant Deterioration ("PSD") Permit related to Gateway Generating Station (Gateway) issued by The Bay Area Air Quality Management District ("District"). A copy of the Gateway Authority To Construct ("ATC") dated July 24, 2001, is attached as Exhibit 1. The PSD permit is not identified.

Rob Simpson contends that the District committed numerous procedural and substantive errors in issuing and renewing the Gateway PSD Permit.

Despite serious errors in the initial permit, a five year suspension in construction, failure to provide opportunity for public participation, major modifications from permitted construction and operations, and lack of Best Available Control Technology (BACT) reanalysis, the District extended the permit biannually since it was issued. The Board should remand the permit and require the District to correct these flaws.

Rob Simpson requests oral argument in this matter. Oral argument would assist the Board in its deliberations on the issues presented by the case because the administrative record is unclear; the issues raised are generally a source of significant public interest and are of a nature such that oral argument would materially assist in their resolution.

Background

The Gateway ATC Permit authorized construction of a new 530-megawatt natural gas fired electric utility generating unit. The facility is located at 3201 Wilbur Avenue, east of the city of Antioch, in Contra Costa County, California. The project received an Authority To Construct (ATC) purportedly combined with a PSD permit on July 24, 2001. Construction of the facility started late in 2001 and was suspended in February of 2002, with approximately 7 percent of construction completed, due to financial difficulties of the original owner Mirant Delta, LLC. In November of 2006 Pacific Gas and Electric ("PG&E") completed an asset transfer agreement acquiring the project and changed the name of the facility to the Gateway Generating Station. PG&E restarted construction on February 5, 2007, five years after the suspension. On December 18, 2007 PG&E filed Permit Application No. 17182 "a Major Modification to a Major Source". On June 4, 2008 the Bay Area Air Quality Management District (District) issued a "Public Notice" and "Engineering Evaluation For Proposed Amended Authority To Construct (ATC) And Draft PSD Permit" (Exhibit 2) and received public comments. On July 29, 2008, the Environmental Appeals Board ("EAB") issued a (Remand) of the District-issued PSD permit for the Russell City Energy Center (RCEC) 08-01, citing "The District's complacent compliance approach". On November 1, 2008 PG&E commenced operations of the facility consistent with the amendment. The District did not respond to public comments or publish a final PSD permit or Authority to Construct consistent with the amendment.

THRESHOLD PROCEDURAL REQUIREMENTS

PETITIONER MUST BE EXCUSED FOR FAILURE TO PARTICIPATE IN THE PERMIT PROCESS BECAUSE THE DISTRICT DID NOT ISSUE REQUIRED PUBLIC NOTICE(S) OF THE PERMIT OR EXTENSIONS

The Board had previously determined in the Remand:

> Mr. Simpson may raise his notice claims for Board consideration despite Mr. Simpson's "failure" to meet the ordinary threshold for standing under 40 C.F.R. § 124.19(a), which limits standing to those who participate in a permit proceeding by filing comments on the draft permit or participating in a public hearing on a draft permit. Denying Board consideration of fundamental notice claims would deny parties the opportunity to vindicate before the Board potentially meritorious claims of notice violations and preclude the Board from remedying the harm to participation rights resulting from lack of notice. Such denial would be contrary to the CAA statutory directive emphasizing the importance of public participation in PSD permitting and section 124.10's expansive provision of notice and participation rights to the public (Remand).

Also:

> Obviously, a person who does not receive notice of a draft permit (and is otherwise unaware of its issuance) will not be able to participate to the extent of filing comments on the draft permit, and thereby satisfy the procedural threshold imposed by section 124.19(a), entitling that person to standing before the Board
> (Remand).

The time period for review should not be considered expired until after the public notice period, which has not yet occurred.

"The 30-day period within which a person may request review under this section begins with the service of notice of the Regional Administrator's action unless a later date is specified in that notice" (40 C.F.R. § 124.19(a)).

Petitioner demonstrated an interest in permitting activities and requested to be placed on the District's "mailing list of persons interested in permitting actions" 40cfr124.10(c)(1)(ix)(A)-(C), prior to the issuance of the public notice for the Amendment to the project.

> In order to correct serious and fundamental deficiencies in the District's public notice of the draft permit and to remedy the resulting harm to the PSD program's public participation process, the Board finds it necessary to remand the Permit to the District to ensure that the District fully complies with the public notice and comment provisions of section 124.10.30. On remand, the District must scrupulously adhere to all relevant requirements in section 124.10 concerning the initial notice of draft PSD permits (including development of mailing lists), as well as the proper content of such notice (Remand).

Petitioner did not receive notice of the opportunity for public participation until after close of the public comment period, and that notice was provided by Bob Sarvey, not the District.

Petitioner raised this issue with the District and was repeatedly assured that the PSD permit would be renoticed. In late April 2009, as a result of repeated inquiries to the District, Petitioner was informed that the Amendment was withdrawn and that Gateway had commenced operations under the original 2001 permit. If the petitioner had not been deceived by the District as to renoticing the Draft permit he could have acted sooner.

PETITIONER SATISFIES THRESHOLD PROCEDURAL REQUIREMENTS BECAUSE THIS PETITION CHALLENGES "CHANGES FROM THE DRAFT PERMIT TO THE FINAL DECISION".

Major modifications have occurred in the construction and operation of the facility that allow it to pollute more than the 2000-2001 BACT determinations. Petitioner also challenges the validity of "renewals" of the permit given the 5-year lapse in construction and lack of opportunity for public participation.

ARGUMENT

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

Petitioner's knowledge of the proceeding is limited by the District's secretive and deceptive permitting actions and failure to provide a copy of the administrative record for permitting action(s) Petitioner has had ongoing difficulty obtaining “public records” from the District as demonstrated in the series of public requests in this and the Russell City Energy Center (after the Remand) attached (Exhibit 3) . The present status of the permit is indiscernible. If the content of this petition is insufficient to earn a remand of any PSD permit for this facility, Petitioner requests that the Board compel the District to respond to petitioners Public Records request so that he could be informed in order to participate in this action.

The District issues PSD Permits pursuant U.S. EPA -Bay Area Air Quality Management District Agreement for Delegation of Authority to Issue and Modify Prevention of Significant Deterioration Permits Subject to 40 CFR 52.21, which includes:

> For all applications for new or modified PSD permits other than those set forth in paragraph 1 above, the existing District regulations continue to generally meet the requirements of40 CFR 52.21 for issuing PSD permits; therefore District permits issued in accordance with the provisions of Regulation 2 -Rule 2 shall be deemed to meet federal PSD permit requirements pursuant to the provisions of this delegation agreement.
> Source:
> http://www.epa.gov/region/air/permit/pdf/baaqmd-delegation agreement.pdf

The District did not process the initial permit or extensions of the 2001 ATC

consistent with Regulation 2-Rule 2. They did apparently issue ATC "renewals" (Exhibit 4), pursuant to their Rule 2-1-407.3, which did not provide for public participation or provide any reference to the PSD permit. The District has offered no evidence that they ever issued any public notice for the ATC or PSD permit.

The permit and renewals did not incorporate any of the requirements contained in EPA Region IX Policy On PSD Permit Extensions Guidance Document: 1-88 (Exhibit 5), which states, "The import of this policy is to ensure that the proposed permit meets the current EPA requirements, and that the public is kept apprised of the proposed action (i.e. through the 30-day public comment period)." Additionally, regarding public participation, it states,

> EPA will require the same public comment procedure for extension requests as for permit modifications including a 30-day public comment period. Requests for public hearings and petitions for permit appeals shall follow the applicable procedures of 40 CFR Part 124.

II. THE BOARD SHOULD REMAND THE PSD PERMIT BECAUSE THE APPLICANT VIOLATES THE CONDITIONS OF THE PERMIT WITHIN FEDERAL AND STATE LAW; THE PROJECT IS NOT CONSTRUCTED OR OPERATED CONSISTENTLY WITH THE ATC OR THE ORIGINAL PSD ANALYSIS

Petitioner last inquired as to the status of the Amendment in April 2009. The District informed petitioner that the Amendment had been withdrawn that the facility was operating under the original permit. Because the facility is constructed and apparently operated consistent with the (withdrawn) amendment and not the original ATC or PSD analysis, it does not conform with the Clean Air Act, District Rules or original permit conditions.

District rule 2-1-305 Conformance with Authority to Construct:

> A person shall not put in place, build, erect, install, modify, modernize, alter or replace any article, machine, equipment, or other contrivance for which an authority to construct has been issued except in a manner substantially in conformance with the authority to construct. If the APCO finds, prior to the issuance of a permit to operate, that the subject of the application was not built substantially in conformance with the authority to construct, the APCO shall deny the permit to operate.

District rule : 2-1-307 Failure to Meet Permit Conditions:

> A person shall not operate any article, machine, equipment or other contrivance, for which an authority to construct or permit to operate has been issued, in violation of any permit condition imposed pursuant to Section 2-1-403.

III. THE BOARD SHOULD REMAND THE PSD PERMIT BECAUSE THE DISTRICT HAS OFFERED NO EVIDENCE THAT THEY EVER ISSUED A PSD PERMIT FOR THIS FACILITY.

The District gave no indication in any of the (unpublished) permits or renewals that the permit was in fact a PSD permit or included a PSD permit. The District has offered no evidence that it ever provided public notice or issued a PSD permit for this facility beyond the following statement sent to the petitioner by email from Alexander Crockett (District Assistant Counsel)

"I had a copy of the permit document scanned for you – it's attached. It was issued to Mirant Delta, who initially owned the project before selling it (and transferring the permits) to PG&E. Also, as you'll see it states only that it is an Authority to Construct and does not mention the fact that it's the federal PSD permit as well. That is a relic from the old days where the District was less conscientious about acknowledging the distinction between the federal and state-law permits. But it was issued to serve as the federal PSD permit as well as the state-law Authority to Construct. EPA Region IX is reviewing the situation to confirm that there are no federal PSD compliance issues."

Petitioner agrees that it "is a relic" including the BACT analysis.

IV. THE BOARD SHOULD REMAND THE PERMIT BECAUSE MAJOR MODIFICATIONS HAVE OCCURRED IN THE CONSTRUCTION AND OPERATION OF THE FACILITY THAT ALLOW IT TO POLLUTE EVEN MORE THAN THE 2000-2001 BACT DETERMINATIONS.

The Petition to Amend Air Quality Conditions in the Gateway Generating Station Project Final Decision, submitted to the California Energy Commission,

dated January 15, 2008, *which includes* the Application to the Bay Area Air Quality Management District for Modifications to the Authority to Construct for the Gateway Generating Station, Antioch, California (Exhibit 6), *states*, "The proposed increase in annual CO emissions will exceed 100 tons per year, so the Project will be a major modification of the existing major source under District New Source Review regulations" (2). *It also states*, "PSD air quality analysis requirements (Rule 2-2-305.2) are applicable because the CO emissions increases resulting from the proposed modifications will be above the PSD *de minimis* level (see Section III)" (13). *The petition states*, "The GGS gas turbine units and heat recovery steam generators will be subject to the requirements of Title IV of the federal Clean Air Act. The requirements of the Acid Rain Program are outlined in 40 CFR Part 72. The specifications for the type and operation of continuous emission monitors (CEMs) for pollutants that contribute to the formation of acid rain are given in 40 CFR Part 75. District Regulation 2, Rule 7 incorporates by reference the provisions of 40 CFR Part 72. Pursuant to 40 CFR Part 72.30(b)(2)(ii), GGS must submit an Acid Rain Permit Application to the District at least 24 months prior to the date on which each unit commences operation. The required Acid Rain Permit Application was submitted to the District and to EPA in December 2006" (17).

The District indicated that they had not issued a title IV permit for the facility, yet the facility commenced operation prior to the end of the 24th month.

"When the project was originally permitted, the gas turbines were subject to the requirements of Subpart GG. However, since the facility did not commence construction as defined under the NSPS before February 18, 2005, the requirements of Subpart KKKK are now applicable" (4).

"The previous owner of the project, Mirant, commenced construction under a valid ATC in 2001, but suspended construction in 2002. Because substantial use had been made of the ATC, the BAAQMD renewed the ATC in accordance with Rule 2-1-407.3. However, the NSPS defines "commence" as "undertak[ing] a continuous program of construction…or…entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of

construction…" (40 CFR 60.2) A suspension in construction of longer than 18 months is generally used by EPA to determine that construction has not been continuous" (18).

"Since the net increase in emissions of this pollutant exceeds the applicable significance threshold, a revised ambient air quality analysis is required for CO. Because changes are being proposed to the emission rates during gas turbine startup and commissioning, new startup modeling has also been carried out" (20).

The District's Engineering Evaluation For Proposed Amended Authority To Construct (ATC) And Draft PSD Permit, dated June 2008 (Exhibit 2), states:

> Permit Application No. 17182 is considered a major modification to a major source per Regulation 2-2-405 due to an increase in carbon monoxide emissions from the proposed amended Authority to Construct and proposed draft PSD permit. The document is required to be subject to a 30 day public comment period in accordance with Regulation 2-2-405 and the PSD regulations and the PSD delegation agreement.
> The amendment of the Authority to Construct consists of:
> • Replacing the wet cooling tower and replacing it with a dry cooling system.
> • Reducing hourly emission rates of NOx (as NO2), CO, and PM10 during normal operations to levels consistent with current Best Available Control Technology (BACT) levels for similar projects.
> • Increasing startup emissions estimates based on data from facilities using identical turbines.
> • Reducing the maximum hourly emissions of CO during startup to 900 lb/hour.
> • Increasing the daily CO permit limit for the facility.
> • Increasing annual CO permit limits for the facility based on data from facilities using identical turbines.
> • Increasing the allowable commissioning emissions for the gas turbines and heat recovery steam generators (HRSGs).
> • Replace the natural gas fired preheater with a smaller unit that is exempt from District permit requirements.
> • Add a 300 HP Diesel Fire Pump engine to the facility. (1)

TABLE 1. MAXIMUM ANNUAL REGULATED CRITERIA AIR POLLUTANT EMISSIONS FOR THE FACILITY.

	NO_2 (ton/yr)	CO (ton/yr)	POC (ton/yr)	PM_{10} (ton/yr)	SO_2 (ton/yr)
Original Limits	174.3	259.1	46.6	112.2	48.5
New Limits	174.3	554.3	46.6	101.7	37.0

(4)

The Petition for Conditional Approval of Ownership Addition, Request for Updated Construction Milestones, Petition for Approval of Equipment Enhancements to

the CEC (Exhibit 7) States:

> **Air Quality**: The oil water separator is expected to require an authority to construct permit from the BAAQMD because the above-ground components of the separator are considered to be a source of emissions. The oil water separator will not extend the 22-month construction period assumed for Unit 8 or result in additional site disturbance. Any construction impact on air quality therefore will be mitigated by existing conditions of certification.

PG&E has repeatedly acknowledged awareness of the necessity of an amendment as they built a facility that was not what had been permitted by the previous owner. They used this as the basis for approval of additional funding from ratepayers through the California Public Utilities Commission (CPUC).

CPUC Resolution E-4054. Pacific Gas & Electric (PG&E) (Exhibit 8) states the following: "This Resolution conditionally approves PG&E's request for approval of an increase of $75.5 million in the capital costs and resulting revenue requirement increase of $13.2 million" (1). It also states, ""The ATA also stipulated that all biological issues associated with constructing and operating the facility must be resolved with the appropriate federal and state resources agencies" (2).

"In a July 19, 2006 order amending its prior decision in order to add PG&E as an owner of CC8, the CEC adopted the following staff recommendations:

> PG&E and Mirant will obtain Energy Commission approval of an amendment reflecting a new mitigation program which mitigates the cooling system impacts to a less than significant level and is acceptable to the federal and state resource agencies and obtain all required permits prior to the start of operation. (The previously drafted Biological Opinions from the USFWS and the National Marine Fisheries Service would not satisfy this requirement. (3)

> PG&E notes that the Settling Parties were fully aware, and made the Commission aware, that other regulatory agencies might modify CC8's environmental permits in a way which could lead to an increase in costs either because of a change in design or delay in construction. (7)

V. THE BOARD SHOULD REMAND THE PERMIT BECAUSE IT DOES NOT UTILIZE BEST AVAILABLE CONTROL TECHNOLOGY (BACT).

EPA Region IX Policy On PSD Permit Extensions Guidance Document: 1-88

(Exhibit 5) states:

> **"BACT Analysis** A BACT reanalysis is required in all permit extension requests, as in an application for a new PSD permit. It should also be noted that, according to a recent EPA policy, any new BACT determination being prescribed for any regulated pollutant must also consider the impact of the proposed BACT on the emissions of unregulated or toxic pollutants. "

The permit appears to rely on the BACT analysis from 2001.

The BACT determinations for the Gateway project PSD and ATC do not meet BACT requirements established as far back as July 18, 2003. Part of Federal Regulations require that the PSD permit be renewed every 18 months with the BACT determinations adjusted accordingly and the public comment period allowed for each PSD extension.

	2001 BACT Determination	2009 District BACT
NOx	2.5 ppm average over 1 hour	2 PPM averaged over 1 hour
CO	6 ppm averaged over 1 hour	4 PPM averaged over 1 hour

The Greenhouse Gas and Particulate Matter (PM) output of this facility is significantly higher than current technology would offer.

Public comments provided regarding the Amendment by Bob Sarvey (Exhibit 9). Mr Sarvey identified significant flaws in the draft permit amendment and demonstrated that the plan, even with the amendment, does not comply with the Clean Air Act. Mr Sarvey indicated to the Petitioner that he had not received a response to his comments.

It is notable that the similar facility, form the same era, in the same air basin, with a similar permitting scheme, that was the subject of the Remand to the District received hundreds of extensive comments on the reissue of the Draft permit, that are absolutely germane to this permit including:

> "The proposed PSD permit fails to meet federal requirements regarding the use of best available control technology ("BACT"). (3 pages)
>
> Pete Stark, Member of Congress

"The draft permit fails to meet federal PSD requirements relating to the need for best available control technology ("BACT")." (220 pages)

Paul Cort, Staff Attorney, Earthjustice

"The District has failed to properly fulfill its duty, under the BACT requirements." (404 pages)

Sanjay Narayan, Senior Attorney, Serria Club

the District should not issue the permit as proposed because it fails to meet federal PSD and nonattainment new source review (NSR) requirements. (75 pages)

Golden Gate University Environmental Law and Justice Clinic

Helen Kang, Deborah Behles, Ashling McAnaney,
James Barringer and Ethan Wimert

the project does not propose to use the Best Available Control Technology (95 pages)

Simpson/CAlifornians for Renewable Energy (CARE) Michael E. Boyd President
Lynne Brown Vice-President

Petitioner requests the opportunity to more fully brief his BACT argument after he has been provided access to the administrative record for the permit and incorporates the Public comments from the RCEC Draft permit presently under review by the District into this present BACT argument. They are available at: http://www.baaqmd.gov/pmt/public_notices/2009/15487/letters/index.htm.

The District indicated that they have not issued a permit to operate despite the fact over over 180 days have elapsed since start up. District rule 2-2-411 indicates that this may be “deemed a denial of the permit.”

2-2-411 Permit to Operate, Final Action: The APCO shall take final action to approve, approve with conditions, or disapprove a permit to operate a source subject to this Rule within 60 days after start-up of the new or modified source. However, failure to act within the 60 day period, unless the time period is extended with the written concurrence of the applicant, shall be deemed to be a denial of the permit. Such denial may be appealed to the Hearing Board in accordance with the provisions of
Regulation 2-1-410.

Conclusion

I tried to resolve these concerns without dependence on the Board. I outlined my concerns, without resolution, to the District Assistant Counsel, Alexander Crockett , District Air Quality Engineer, Brian Lusher, EPA Region 9, Attorney, Anne Lyons, EPA Region 9, Chief of Permits Gerardo Rios and CEC Compliance Project Manager, Ron Yasny, They all seemed aware and comfortable with the scheme, except, to his credit, Mr. Rios who indicated that he would look into it.

It appears that the District and applicant acknowledged the need for a current PSD permit in multiple proceedings. The District issued a draft permit, received comments on the Draft permit. Then they received the Remand for a similar project. They realized they could not permit this facility as planned and chose to quietly allow its operation, in spite of the Remand and lack of valid permit. They profited greatly, through purporting to obtain necessary permits.

The egregious nature of these actions extend well beyond “The District’s complacent compliance approach” identified in the Remand.. They are more akin to Racketeering and an ongoing criminal conspiracy to defraud the public and to

circumvent the Clean Air Act. They attempt to undermine to peoples ability “to petition the Government for a redress of grievances.”

The Board bestowed ample and clear guidance to the District in the Remand. The districts actions are not a result of ignorance. The District chose concealment rather than disclosure. They intentionally allow this facility to operate in violation of the Clean Air Act. I ask that the Board impose appropriate sanctions against the District and applicant for their actions.

The District has likely, never issued a PSD permit correctly. Unless the District can demonstrate that they have issued at least one PSD permit that conforms to the Clean Air Act, the EPA should revoke the Districts authority to issue PSD permits

The Board is requested to remand the permit.

Respectfully Submitted,

Verification

I am the Appellant herein, and am authorized to make this verification on my own behalf. The statements in the foregoing document are true of my own knowledge, except matters, which are therein stated on information and belief, and as to those matters I believe them to be true.

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

Executed on this 5th day of May 2009, at Hayward, California.

Rob Simpson
Petitioner
27126 Grandview Avenue
Hayward CA. 94542
510-909-1800
Rob@redwoodrob.com

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMETAL PROTECTION AGENCY
WASHINGTON D.C.

In the Matter Of:	)	**PSD 09-02**
	)	**PETITIONERS ROB SIMPSON ET AL**
	)	**REPLY TO JURISDICTIONAL BRIEFS**
Gateway Generating Station	)	**AND**
	)	**REPLY TO OBJECTION OF BAAQMD**

INTRODUCTION

On June 18, 2009 the Environmental Appeals Board order required Briefs on jurisdictional Issues from EPA Region 9 and Bay Area Air Quality Management District (BAAQMD) Region 9 and BAAQMD complied. Intervenor Pacific Gas and Electric (PG&E) also filed a brief. The Board also created the opportunity that Petitioner may file a reply by no later than July 17, 2009.

SUMMARY

The Board received 3 distinctly disparate briefs from BAAQMD, Region 9 and PG&E It is not possible that the conflicting briefs are all correct. They certainly do demonstrate a permit dispute that could be solved through the Boards adjudication. While my brief is also distinctly disparate from the above it is entirely consistent with my petition and the facts in this proceeding. My petition states "Rob Simpson contends that the District committed numerous procedural and substantive errors in issuing and renewing the Gateway PSD Permit." Petition Page 5. BAAQMD seems to agree with this statement at this point (at least regarding renewals) PG&E vigorously opposes it and Region 9 seems ignorant of the controversy. They all give great weight to the original permit (which PG&E was not even a party to) and largely ignore the subsequent series of permitting actions that have culminated in

PG&E operating a facility illegally to the detriment of the community, environment and integrity of the Clean Air Act.

ARGUMENT

The final permitting action is likely that which permits the facility's present operation. It bears little resemblance to the 2001 permit. Major differences include the facility ownership, the equipment used, and commencement dates. The facility does not employ BACT and poses a hazard to the public and the environment. The present permit may or may not be in writing and may or may not be identified as a PSD permit. The District has clarified that being in writing and identified as a PSD permit has not been a requisite for a PSD permit. The evidence of the permit is prima facie in the fact that the facility is operating and PG&E claims to have a permit. The Final action was likely after the February 13, 2009 letter when PG&E allegedly "withdrew" its Major Amendment of the permit and went ahead and operated the facility consistent with the withdrawn amendment. My petition was filed less than 90 days after this action. The Final Action could have been the District's failure to abate the operation within 60 days of the letter from PG&E. My petition would then be within 30 days of this final action. The PSD permit may take a more affirmative form in some document that has not been introduced or is contained in the administrative record that has been kept a secret or some document that will be subsequently characterized as a PSD permit.

As an example of BAAQMD re-characterizing, the latest edition of the Russell City Draft statement of basis states "the District has concluded that when the facility was initially permitted in 2002, the District did not issue a final Federal PSD permit along with its state-law Authority to Construct, as is the District's normal practice. The record indicates that the District did not finalize the Federal PSD permit at the time it issued the Authority to Construct because EPA Region 9 had not completed its Endangered Species Act consultation with the US Fish & Wildlife Service." This permit is from the same era and was a subject in the Russell City Remand. BAAQMD defended its permitting action before the EAB and now attempts to render the Board's decision moot by re-characterizing its

prior actions. So Sometimes a permit identified as a PSD permit is not a PSD permit and sometimes a permit that is not identified as a PSD permit is a PSD permit. Without action from the Board on Gateway there would be nothing stopping BAAQMD from flip flopping again on its position that there is no permit and deciding that PG&E is correct that there is a permit based upon some withheld document or reconstruction of events. If BAAQMD's real position is that there is no permit then why would they not seek the Board's assistance in clarifying this fact for the applicant. Although the BAAQMD brief effectively is briefing in favor of a remand, BAAQMD should be requesting a remand and acknowledging that their Authority To Construct or whatever action they have taken that is permitting this facility to operate is void without a PSD permit. There is clearly a permitting dispute and the EAB is the correct forum to settle it.

The briefs purport to rely on the state law ATC as if it retained some validity in the absence of a PSD permit. Any state permit could not take precedence over the federal PSD permit and should be void without it. There are state law issues contained in the NSR provisions of the Clean Air act that are very similar to the requirements for an extension under PSD provision that I have not raised in this venue based upon my belief that the EAB chooses to review aspects of the PSD permit. There has been no indication that the facility posseses any other required Permit to Operate, Title IV or Title V permits and BAAQMD has given no indication that it would be taking action on any state law violations. Access to the Administrative record may prove otherwise.

Each of their briefs chastises my lack of evidence. The Board should excuse any purported lack of evidence or order the Parties including Region 9 to produce all records for this facility prior to making a decision that is contrary to my appeal for a remand because BAAQMD and Region 9 have continued to withhold the administrative record for this proceeding. I again tried to obtain an index of the administrative record for this facility On June 22, 2009 I sent an email to Alexander Crockett BAAQMD attorney as follows: "data/discovery request. Pursuant to the present EAB appeal regarding Gateway. Please provide an index of the administrative record for this facility. Thank You Rob

Simpson" BAAQMD attorney Crockett responded. "As the District has represented elsewhere, it will file all appropriate materials in the Gateway EAB proceeding at the appropriate time. Thank you Sandy Crockett"

To adjudicate this petition without review of the closely guarded administrative record would be contrary to the EAB practice Manual "The EAB also asks the permitting authority to file with the Clerk of the Board, and to serve upon the petitioner, a certified index of all documents in the administrative record of the permit decision as well as copies of those parts of the record that pertain to the matters raised in the petition. The permitting authority should provide the petitioner and the Clerk of the Board with a Certificate of Service showing the date and method of service." The Board "asked" in its first letter to BAAQMD I asked repeatedly and the information should be available to the public. If BAAQMD is allowed to circumvent informed public participation and withhold evidence necessary for the Boards considerations it will be empowered to further push its permitting actions underground and the Board may make an error in a decision without review of the relevant facts.

See also In re City of Phoenix 9, 9 E.A.D. 515, 526 (EAB 2000) ("In NPDES proceedings, as well as other permit proceedings, the broad purpose behind the requirement of raising an issue during the public comment period is to alert the permit issuer to potential problems with a draft permit and to ensure that the permit issuer has an opportunity to address the problems before the permit becomes final."). This occurred in this case, fellow CARE member and proposed intervener Bob Sarvey raised issues during the comment period, See; Public comments provided regarding the Amendment by Bob Sarvey (Exhibit 9) of petition. I would have commented too if BAAQMD had responded to my requests for notice and interest in other permits. See; series of public requests (EXHIBIT 3) of petition Mike Boyd President of CARE commented. See Intervention request. BAAQMD has not responded to Mr. Sarvey and has not provided notice of any Final Action to CARE. The 30 day review period is supposed to begin when notice of the final permit is issued. "The 30-day period within which a person may request review under this section begins with the service of notice of the Regional Administrator's

action unless a later date is specified in that notice" (40 C.F.R. § 124.19(a) BAAQMD has offered no evidence of providing public notice of any proposed PSD or Final PSD permit. For the same reason allegations that the Board erred in my Russell City Appeal because the appeal was untimely are without merit because it was filed within 30 days of public notice of the final action and it earned a remand. The parties should review the record before making baseless claims.

Region 9 opens its "STATEMENT OF FACTS" with "The District issued a final permit to PG&E on July 24, 2001" Region IX brief page 2. This is false, the District may have issued a permit to Mirant at that time but PG&E was not a party. Region IX further states; "Petitioner makes several unsubstantiated and conclusory allegations of improper notice, Petitioner has not submitted any specific information regarding the Districts notice of the Gateway Generating Station" Region 9 brief page 7. Proposed intervener CARE/ Mike Boyd and Bob Sarvey substantiate my allegations in their request to intervene. Beyond that the evidence has been suppressed by BAAQMD and Region 9 by refusing to provide access to the administrative record. Allegations of not providing notice inherently could not include a copy of a notice since it was not provided. So Region 9 arguments would be a catch 22 effectively voiding any claim that notice was not provided. I have found no evidence of notice of the Extensions or original PSD permit.

BAAQMD states; "[t]he transmittal letter for the integrated permit document did not explicitly cite the PSD element of the District's permitting action, but the fact that the document was issued to serve as the PSD permit is clear in the actual permit conditions themselves, many of which cite 'PSD' as their legal basis, as well as from numerous discussions" BAAQMD Brief page 2. This proposal appears to infer that any document issued by BAAQMD that included reference to a PSD could in fact be a PSD permit, Perhaps a title V permit has PSD conditions. Perhaps the PSD permit was issued by the California Energy Commission, they gave extensive reference to PSD in their documents? It also claims that the record of a PSD permit can be justified based upon discussions buried in a hidden administrative record with no record on the permit or notice. I contend that there is likely some other

document that is still hidden in the administrative record that the parties now (or after this appeal will) rely on as a PSD permit. All record of "Gateway" has been removed from BAAQMD's website after this appeal was filed. There is an important policy decision that the Board in its discretion should review. How far can a permitting authority stray from its responsibility and still retain authority to issue PSD permits and how far can they stray in an individual permit without a remand.

"The project owner ultimately withdrew the application however, on February 13, 2009 ...the project owner therefore went ahead and completed construction, and began operating the facility, based on the California and Federal authorizations that were originally issued in 2001.." BAAQMD Brief page 3-4. This statement seems to claim that PG&E completed construction and began operation after the February 13, 2009 letter. While this position bolsters my claim of timeliness, it appears that the facility was completed and operational well before the letter date. The date of the letter appears to be part of an orchestrated effort to defraud the public by PG&E and BAAQMD to keep the public focused on the proposed amendment while running out the clock on any appeal. It was clear to the permitting authority and the applicant that a PSD permit was required and it would be problematic to issue in the applicant's time period so the calculated decision was made to just go for it and operate the plant before anybody could know to appeal, make it long enough for an appeal to be moot and they would completely circumvent the Clean Air Act. This is an exercise of discretion that the Board should in its discretion review.

BAAQMD stated; "Petitioner argues that he should be excused from the timeliness requirement because he claims he was not given adequate notice of the draft permit, and as a result did not have notice that the appeal clock had started to run at the time the final permit was issued." ... "by logical extension of his theory he would also claim to be able to challenge permits issued 18 years or 28 years ago or more" BAAQMD brief page 5. The logical extension of BAAQMD's argument as I see it would be that if they can keep their permitting action secret until after the appeal opportunity is expired then they do not need to comply with the Clean Air Act. This appears to be a part of the strategy here since

they must have known that they could not obtain a valid PSD permit for this facility after they reviewed the RCEC remand and comments of CARE member Sarvey. This is not a 18 or 28 year old action it is contemporaneous (which is more than what can be said for the emission credits used) with permitting action directly before the appeal.

BAAQMD claims "[t]he PSD permit is a preconstruction permit, and it would make no sense to have to adjudicate such permits where construction has already occurred." BAAQMD brief page 6. BAAQMD further supports my theory of "running out the clock" in the above statement but they ignore the EAB authority to review Modifications and extensions of PSD permits which both occurred here. Their claim is that waiting until construction is almost complete to apply to amend the permit then claiming to withdraw the amendment after the start of operation would serve to evade review.

BAAQMD states "Region 9 has informed the District that it does not consider the extensions of the Authority to Construct under District regulations to extend the facility's Federal PSD permit." BAAQMD Brief page 4. Region 9 had ample opportunity to express this themselves and chose not to. Instead they stated "the facility has been constructed and is operating in accordance with the federal PSD conditions in the permit" Region 9 brief page 6. Region 9 appears completely ignorant of the dispute or its position (as purported by BAAQMD and PG&E) and has offered no evidence that any enforcement action has occurred, is occurring, or will occur.

BAAQMD admits "his petition comes several months after the facility completed construction" BAAQMD Brief page 4-5 My petition came directly after I discovered that I had been deceived by the district with regard to the draft permit being reissued and that the facility had commenced operations consistent with the amendment. Evidence of the final action is withheld but is evident in the fact that the agencies are continuing to permit the facility to operate. BAAQMD has given no indication that it would be pursuing enforcement action based upon its void state actions.

BAAQMD attempts to place the blame on me. "Petitioner has attempted to create confusion over this issue by pointing out that the cover letter transmitting the permit states that it is the "Authority

to Construct" but does not explicitly state that it is also the federal PSD permit" BAAQMD Brief page 8. While there is certainly confusion and the Board can provide clarity. I have not attempted to create it. It is the actions of BAAQMD likely in collusion with PG&E and perhaps the CEC that created the confusion and now seek to use it to their advantage, profiting by it. It is not just a cover letter at issue there is no permit or notice provided that a reasonable person would identify as a PSD permit or notice. I apologize to the Board if I have in fact created any confusion or undue difficulty for the Board to understand the basis for my petition. I am not paid by CARE to represent them and I am not an attorney. I feel that a crime is being perpetrated by BAAQMD and PG&E against myself, CARE (the organization of which I am a member) and the public. The Clean Air Act is being violated by a major corporation in conjunction with its governmental oversight agency to the detriment of all and I am trying to report it to the proper authority, the EAB.

BAAQMD and PG&E propose different theories; "Because there is no dispute on the issue of whether the initial PSD permit was validly extended, the petition should be dismissed as moot" BAAQMD brief page 11. If PG&E had not become a party to this action BAAQMD 's contention of no valid permit may have weight but given the obvious dispute "PG&E unequivocally disagrees with any implication that the facility's PSD permit expired or that all of 'the parties' are in agreement on this point." PG&E brief page 4. There is finding of fact or conclusion of law that is clearly erroneous by at least one of the parties that the Board in its discretion should review.

BAAQMD would like the EAB to believe that; "Petitioner Does Not Have Standing Even if the EAB waives the requirement for timeliness, Section 124.19(a) grants standing only to a 'person who filed comments on that draft permit or participated in the public hearing.' Petitioner did neither, and has not provided any evidence that he participated or sought to participate in the facility's 2001 PSD permitting process in any manner." PGE page 7 I am a member of CARE authorized to represent CARE in these proceedings (see CARE intervention document) CARE has standing and so do I. The 3 briefs also ignore the standing conferred in:

EPA REGION 9 POLICY ON PSD PERMIT EXTENSIONS
(2) Public Comment EPA will require the same public comment procedure for extension requests as for permit modifications including a 30-day public comment period. Requests for public hearings and petitions for permit appeals shall follow the applicable procedures of 40 CFR Part 124

This appeal is of all PSD permits, extensions or modifications for the Facility. PG&E stated "[t]he permit issued to the facility in 2001 was a joint ATC/PSD permit. To the extent that the Petitioner may be appealing the 2001 ATC or later versions of the District-only portions of the facility's permit, the EAB does not have jurisdiction over such an appeal." PG&E page 8. I have not claimed to be appealing the "District-only portions" and the statement does not deny standing to appeal "later versions" of the PSD permit. The original Petition states; "[p]etitioner also challenges the validity of 'renewals' of the permit given the 5-year lapse in construction and lack of opportunity for public participation." Petition page 8 *and* "[i]f the content of this petition is insufficient to earn a remand of any PSD permit for this facility, Petitioner requests that the Board compel the District to respond to Petitioner's Public Records request so that he could be informed in order to participate in this action."

PG&E discounts public participation "Petitioner's request for a remand so that he may participate in the permitting process is nonsensical since, as acknowledged in the Petition (Pet. at 10) and mentioned in the EAB Order (EAB Order at p. 2, n.1),the permit process ended when PG&E withdrew its application for the permit amendment. PG&E brief page10. I never acknowledged that the permit process "ended" but I do acknowledge that there was a permitting action when BAAQMD received the letter and apparently failed to act. If it ended, and since the facility is operating consistent with the amendment, it ended with a permit and this is an action being appealed that is much more timely than the claims of the defending parties.

PG&E is not stating the truth. "Whether or not Gateway complies with 2009 BACT standards is irrelevant because Gateway has not undergone any permitting activity that would require application of BACT since issuance of the PSD permit in 2001. Furthermore, there have been no major modifications to the facility since the issuance of the PSD permit in 2001." PG&E page 11. This is false. There is

ample evidence that there have been major modifications to the facility since the purported "issuance of the PSD permit" 2 days after the date of my Petition PG&E hastily filed a new Petition to Amend Air Quality Conditions with the California Energy Commission Dated May 7, 2009 (EXHIBIT 1) detailing extensive modifications that were made to the facility after the issuance of the purported "PSD permit in 2001."[1] PG&E is simply not being honest with the EAB in its above contention. In a February 13, 2009 Withdrawal of Petition to Amend Various Air Quality Conditions of Certification from PG&E to the CEC[2] (EXHIBIT 2) repeatedly references a January 2009 petition to amend that has not been produced "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." The document also describes some of the permitting scheme and changes to the project design.

PG&E bolsters its deceit by casting aspersions to my testimony "By alleging that BAAQMD "chose to quietly allow" operation of a modified facility without the necessary permits, Petitioner apparently is alleging that PG&E is operating its facility in violation of state and/or federal law. These allegations are simply untrue and unsupportable, and Petitioner has provided no evidence to support this position." PG&E brief page 11. PG&E is operating its facility in violation of state and federal law. I have provided ample evidence as has BAAQMD "there is in fact no current, valid permit" BAAQMD motion to stay page 3. PG&E has also provided ample evidence, albeit in another venue the CEC. They did not withdraw the amendment because the changed equipment magically changed back to what was purportedly permitted, they withdrew the amendment because they thought that they ran out the clock for an appeal.

PG&E would like to evade EPA policy. "The policy relied on by Petitioner (which has not been

[1] See http://www.energy.ca.gov/sitingcases/gateway/compliance/2009-05-07_PETITION_TO_AMEND_CONDITIONS_OF_CERTIFICATION_TN-51498.PDF

[2] See http://www.energy.ca.gov/sitingcases/gateway/compliance/2009-06-01_Withdrawal_of_Petiton_to_Amend_Air_Quality_Conditions_TN-50406.pdf

codified into regulation) refers to guidance applicable only to the process for renewing a PSD permit for a source that has not commenced construction. *See EPA Region 9 Policy on PSD Permit Extensions*, p. 1 (July 6, 1988) ("This policy clarifies the subject of extensions of the 18-month commencement of construction deadline found in 40 CFR 52.21(r)(2)."). Gateway commenced construction in 2001, shortly after it received the PSD permit, thus satisfying the deadline to commence construction." PG&E brief page10 PG&E's brief ignores the effect of: 40 CFR 52.21(r)(2) which states "approval to construct shall become invalid ... if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time." Although they seemed to understand this provision in the; *Petition to Amend Air Quality Conditions in the Gateway Generating Station submitted to the California Energy Commission*, dated January 15, 2008 Petition EXHIBIT 6[3] "[b]ecause substantial use had been made of the ATC, the BAAQMD renewed the ATC in accordance with Rule 2-1-407.3. However, the NSPS defines "commence" as "undertak[ing] a continuous program of construction…or…entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction…" (40 CFR 60.2) A suspension in construction of longer than 18 months is generally used by EPA to determine that construction has not been continuous" PG&E's brief associated footnote states: "The PSD regulations define "commence construction" as "*Commence* as applied to construction of a major stationary source . . . means that the 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)." PG&E brief page10

PG&E's statement appears to refer to 40 C.F.R. Part 52.21(b)(9)(i) yet that portion of the code is completely omitted from the footnote. If PG&E is contending that commencement pertains to some binding agreement that the previous owner Mirant entered in 2001 prior to the California attorney

[3] See http://www.energy.ca.gov/sitingcases/gateway/compliance/2008-01-15_PETITION_TO_AMEND_AIR_QUALITY_CONDITIONS.PDF

General finding them guilty of manipulating the energy market and their subsequent bankruptcy, which resulted in the transfer to PG&E, they have offered no evidence of this. If instead they are claiming that the commencement of construction was (as it appears) on-site construction; ample evidence has been provided that the construction was not "continuous" and not completed "within a reasonable time" and 40 CFR 52.21(r)(2) would be cause for the EAB to remand any purported permit. To the extent the applicant wishes to evade policy "which has not been codified into regulation" the below codified sections should be basis for a remand.

> 40C.F.R. Part 52.21(b)(9) (9) *Commence* as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:
>
> (i) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or
>
> (ii) Entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

RESPONSE TO DISTRICTS OBJECTION

In its opposition to motion to compel BAAQMD stated "[t]he District also objects to Petitioners inflammatory characterizations of the Districts actions and motives, in this motion and throughout this proceeding. The District does not intend to dignify them with a response, but notes for the record that it categorically disagrees." Page 4. It is difficult to understand exactly what the basis for this objection is or what relief is sought. I have tried to give the District the benefit of the doubt and have faith that they are merely incompetent and not dishonest. As my knowledge of the District grows and I continue to encounter groups and individuals having similar experiences with the District it is difficult to keep that faith. I have documented that Mr. Crockett has lied and attempted to deceive me from our very first conversation, this was not disputed in the first Russell City Energy Center Proceeding 08-01. I am proving repeated failure of their permitting actions. The District's refusal to act in good faith and

exercise their duties is costing the Board and petitioner valuable time, compromising the integrity of the Clean Air Act and harming air quality. It is absurd that given the District's present position they are not supporting the remand or taking some action on their (also invalid) State permit, pursuant to their mandated duties, to stop this polluter or bring it into compliance.

For the District to respond to the motion to compel without at least an index of the administrative record and claim to be "eminently reasonable" should warrant sanctions in itself. In the Board's letter to the District, the Board seemed to believe that 30 days was reasonable to produce an index of the administrative record. How then is it reasonable that I have been requesting the information for months. The District has recently removed all searchable reference to "Gateway" from it website. My participation on this proceeding continues to be compromised by the District's refusal to comply with reasonable discovery. Mr. Crockett contends the "District has already provided Petitioner with much relevant documentation regarding this facility based on Petitioners earlier inquiries." This is not true. When I went to the District I was placed in what can only be described a storage room piled with boxes, with my children and a jumbled box of documents. There was not space to sit down. The conditions were so abysmal and such a stark contrast to the luxurious conference rooms and offices in the rest of their high rise San Francisco complex that I photographed it. Mr. Crockett indicated that he may be able to copy 15-20 pages of the 2000 or so in the box so I got about 20 pages and those were the last documents provided. This was not an isolated event I have been thwarted many times from obtaining records from the District. These are not handwritten documents. They are generated on a computer. The District should be able to figure out a way to provide the documents electronically to the public if not to satisfy its Federal regulatory obligations for public participation opportunities, at least to prevent the pollution associated with travel to the air District and paper copies. The district Stated that I alluded to these issues. I am not alluding to anything I am stating that the District has been derelict in its duties and failed to provide the administrative record for their permitting action. Their failure is beyond incompetence and can only be construed as a deliberate effort to circumvent the rights

of the public to participate that are rooted in the Democratic principles of the first amendment and permeate throughout the Clean Air Act. Theses rights were reiterated to the District in the Russell City Remand with clear guidance that the Board provided in the Russell City Remand "the purpose of this remand order is to remedy the District's flawed public notice of the draft permit and thus allow the public to fully exercise its public participation rights under part 124" I object to any unfavorable decision based upon my lack of evidence or "good reason" as long as the administrative record is withheld.

I received a written response recently to a record request for the Russell City Energy Center that I made 9 months ago as part of a year long attempt to obtain records before the close of the public comment opportunity . The letter basically states that I can now come rifle through a big box of scattered papers but it is too late for me to comment about the permit.

The district indicated in its response to my comments "[t]he District does not intend to dignify them with a response." I disagree that I have made any undignified comments. I also contend that, if I had, the District is not in a position to dignify them. I certainly apologize to the Board if it considers any of my comments undignified. I have full respect for the authority and judgment of the Board. If my presentation of the issues is at all unprofessional I apologize to the Board as I am an unrepresented Citizen. I do believe that my issues are valid and warrant the Board's consideration and I do not intend to waste the Board's time. I would suggest that the District focus on the inflammatory characterizations "of fossil fuel burning facilities".

CONCLUSION

The Board has ample evidence to remand any PSD permit for this facility and is hereby requested to do so. The Board does not have ample evidence to dismiss the petition for lack of jurisdiction until such time as an administrative record is produced that provides such evidence. Perhaps the Board need not opine on the motives of the parties but to simply examine the factual basis of the permitting history for this facility. The facility has managed to bypass scrutiny, BACT, and now

intends to bypass review. There is an immediate and tangible harm by allowing the facility to continue to operate in violation of the Clean Air Act based upon purported permit(s) that could and should be remanded. Relegating this to another venue will only delay resolution and exacerbate the damage. I hope that the Board acts decisively with a remand that repairs the PSD permitting process in Region IX and enjoins parties from present violations or orders the parties to produce their records for further review.

I declare under the penalty of perjury that the above is true and correct. This declaration was executed on July 17, 2009

Always Respectfully submitted,

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February 13, 2009 Withdrawal of Petition to Amend Various Air Quality Conditions of Certification from PG&E to the CEC (EXHIBIT 1)

Petition to Amend Air Quality Conditions with the California Energy Commission Dated May 7, 2009 (EXHIBIT 2)