

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

CALifornians for Renewable Energy, Inc.,  
(CARE)

Complainant,

v.

Pacific Gas and Electric Company (PG&E),  
And California Energy Commission (CEC)  
Respondents.

Docket No. EL09-\_\_\_\_-000

<b>DOCKET</b> <b>00-AFC-1C</b>
DATE <u>9/8/2009</u>
RECD. <u>9/9/2009</u>

**COMPLAINT OF CALIFORNIANS FOR RENEWABLE ENERGY**

Pursuant to the Federal Power Act (“FPA”), 16 U.S.C. 824d, 824e, 825e, and 825h, (2008) and Rule 206, 16 C.F.R. 385.206 (2008) of the Rules of Practice and Procedure (“Rules”) of the Federal Energy Regulatory Commission (“FERC”), CALifornians for Renewable Energy, Inc. (“CARE”)<sup>1</sup> hereby files this Complaint against the Pacific Gas and Electric Company (“PG&E”) for operating its Gateway Generating Station (“Gateway Facility”) without permits that limit emissions regulated by the Clean Air Act (“CAA”) and the California Energy Commission (“CEC”) for its August 26, 2009 actions to approve PG&E’s amended permit allowing continued operations of the Gateway project under CEC Docket Number 00-AFC-1C, Gateway Generating Station (“GGS”), without a PSD permit.

**Introduction**

Electric power industry restructuring has been sustained largely by technological improvements in gas turbines. It is no longer necessary to build a larger generating plant to gain operating efficiencies. Combined-cycle gas turbines reach maximum efficiency at 400 MW, while aero-derivative gas turbines can be efficient at sizes as low as 10 MW. These new gas-fired combined cycle plants can be more energy efficient and less costly than the older oil and

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<sup>1</sup> CARE in behalf of itself, and members Robert Sarvey, and Rob Simpson individually.

gas-fired plants.<sup>2</sup> Because of their smaller footprint and low emissions, gas turbine generators can often be located close to load, avoiding the need for additional transmission. Coupled with greater transmission access as a result of Order No. 888, it became feasible for generating plants hundreds of miles apart to compete with each other, giving customers more choices in electricity suppliers.<sup>3</sup>

The market participation of the vertically integrated investor owned utilities (“IOU”)’s like Pacific Gas and Electric Company (“PG&E”) <sup>4</sup> and other non-IOU generation suppliers began changing in response to increases in energy costs in the 1970-1990s and the passage of PURPA, which facilitated entry of non-IOU QFs as energy-efficient, environmentally-friendly, alternative sources of electric power. The change continued through Order No. 888, which opened up the transmission grid to competing wholesale electricity suppliers.<sup>5</sup> Until the early 1980s, electric IOUs’ share of electric power production increased steadily, reaching 97 percent in 1979.<sup>6</sup> By 1991, however, the trend had reversed itself, and the IOUs’ share declined to 91 percent.<sup>7</sup> By 2004, regulated electric utilities’ share of total generation continued to decline (63.1 percent in 2004 versus 63.4 percent in 2003) as non-IOUs’ share increased (28.2 percent versus

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<sup>2</sup> EIA 2000 Update at ix. The size of the cost improvements depends on the underlying fuel prices.

<sup>3</sup> Id.

<sup>4</sup> We also want incorporate administrative Testimony and Exhibits of CARE before FERC in *State of California, ex rel. Bill Lockyer, Attorney General of the State of California v. British Columbia Power Exchange Corporation et al.* under Docket EL02-71 et al.

<http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12067590>

<http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12067591>

<http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12067592>

<http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12067647>

This is relevant because CARE’s testimony shows PG&E overcharged its customers \$6,739,610,453 during the energy crisis of 2000-1.

<sup>5</sup> Id. at 23.

<sup>6</sup> EIA 1970-1991 at vii.

<sup>7</sup> Id.

27.4 percent in 2003).<sup>8</sup> While most of the existing capacity and most of the additions to capacity through the late 1980s were built by IOUs, their share of capacity additions declined in the 1990s. Between 1996 and 2004, roughly 74 percent of electricity capacity additions were made by non-IOU power producers.

For non-IOUs, natural gas has been the major fuel for new plant additions.<sup>9</sup> Indeed, in recent years, new capacity additions reflect the prevalence of natural gas.<sup>10</sup> The Clean Air Act Amendments of 1990 (CAA) and state clean air requirements also contributed to increased use of natural gas. The CAA sought to address the most widespread and persistent pollution problems caused by hydrocarbons and nitrogen oxides, both of which are prevalent with traditional coal and petroleum-based generation. The CAA fundamentally changed the generation business because emission of air pollutants would no longer be cost-free. As a result, many generation owners and new plant developers turned to cleaner-burning natural gas as the fuel source for new generation plants. California has depended heavily on gas-fired generation because of its specific air quality standards.<sup>11</sup>

### **Background Information**

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<sup>8</sup> U.S. Department of Energy, Energy Information Administration, *Electric Power Annual 2004*, at 2 (November 2005), available at <http://www.eia.doe.gov/cneaf/electricity/epa/epa.pdf> [hereinafter *EIA Electric Power Annual 2004*].

<sup>9</sup> During the 1990s, with natural gas prices at an all time low and availability of efficient, modular gas turbines, many non-IOUs built natural-gas generation facilities to enter wholesale markets. Today, as a result of restructuring-related asset sales and divestitures, non-IOUs own and operate a broad mix of nuclear, coal, natural-gas and renewable generation facilities that supply wholesale markets. Natural-gas-fired generating capacity was 57 percent of non-IOU generating capacity in 2004. According to EPSA, based on EIA data, 36 percent of electricity produced by competitive generators was coal-fired, 30 percent natural gas, 24 percent nuclear, 6 percent hydroelectric and other renewables, and four percent oil-fired. EPSA comments (2).

<sup>10</sup> EIA *Electric Power Annual 2004* at 2.

<sup>11</sup> Federal Energy Regulatory Commission, *The Western Energy Crisis, The Enron Bankruptcy, & FERC's Response*, at 1, available at <http://www.ferc.gov/industries/electric/indus-act/wec/chron/chronology.pdf>.

The Gateway facility is located on Wilbur Avenue, in Contra Costa County, California 94509 ("Gateway"). (The address for the facility is listed variously as 3225 Wilbur Avenue and, 1456 Wilbur Avenue, but they both appear to refer to the same facility.) It was first owned and designed by Mirant and was known as Contra Costa Unit 8. Some time in or about November 2006, PG&E acquired sole ownership of the Gateway facility, which it now owns and operates.

### **Mirant's Unit 8 Project Design<sup>12</sup>**

Some time in or about 2000, Mirant submitted an application to the Bay Area Air Quality Management District ("BAAQMD" or "District") for a Prevention of Significant Deterioration ("PSD") permit and an Authority to Construct ("ATC"). In that application, Mirant proposed constructing a 530-MW natural gas-fired station at the Wilbur Avenue site. On or about February 2, 2001, the District issued a final determination of compliance for Mirant's design based on the District's evaluation of the permit application. On July 24, 2001, the District issued a PSD permit and an ATC ("2001 ATC") for Mirant's Contra Costa Unit 8. As described and approved in the 2001 ATC, Mirant's Unit 8 project included: two General Electric Frame 7FA combustion gas turbines, each equipped with dry-low-NOx combustors and abated by a Selective Catalytic Reduction system and a CO Catalyst System; two heat recovery steam generators abated by a Selective Catalytic Reduction system and a CO catalyst system; a gas-fired fuel preheater; and a 10-cell wet cooling tower. BAAQMD determined that emissions limits of 2.5 ppmc per hour for NOx, 6.0 ppmc per hour for CO, and 13 lbs/hr of PM<sub>10</sub> constituted the best available control technology ("BACT") at that time. In late 2001, Mirant apparently began constructing Unit 8, but in February 2002, the construction was suspended. Upon suspension of construction, 7 percent of

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<sup>12</sup> See <http://www.energy.ca.gov/sitingcases/gateway/index.html>

the facility had been completed. It appears that the work involved pouring concrete pads. Construction was not restarted until years later when Mirant transferred ownership of the facility.

### **PG&E's Purchase and Redesign of Unit 8**

In or about November 2006, PG&E acquired sole ownership of the Unit 8 project and renamed the project the Gateway Generating Station. In late 2007, PG&E notified the District that its construction plans had changed and applied for a new PSD permit and a new ATC. PG&E stated in the new application that PG&E had made several changes to the design and operating assumptions of the facility. PG&E also stated that it was not planning to begin construction of the modified units until a new permit was issued. The proposed changes included: replacing the permitted preheater with a dewpoint heater and increasing allowable daily hours of operation; increasing the allowable emission rates for the gas turbines during startup; reducing the permitted hourly emission rates for NO<sub>x</sub>, CO, and PM, based on technology represented to be BACT at the time of the 2007 application and on operating experience at other facilities; and substituting a 300-hp diesel fire pump for the previously planned electrical pump. Although the District started the permitting process at that time, the District has not issued a PSD permit or an ATC.

### **PG&E's Construction and Operation of Unit 8**

Despite not having received a PSD permit, ATC, or a determination of compliance, PG&E finished construction of Gateway and started operating on or before November 10, 2008 or, at the latest, on January 4, 2009. The Gateway facility appears to be substantially similar to the facility it proposed to construct in its 2007 permit application to the District. Specifically, the facility includes all of the equipment that was described in its 2007 permit application, including the dewpoint heater and the diesel engine.

In February 2009, PG&E withdrew the 2007 permit application from the District, claiming that it was no longer necessary. In response, the District notified PG&E that any further review by the District of the project would require a new permit application.

Then, by letter dated April 14, 2009 to BAAQMD, PG&E requested modification of its 2001 ATC to conform to the facility it had constructed and began operating. In the letter, PG&E seeks to obtain approval for, among other things, the substitution of the dewpoint heater for a natural gas-fired preheater, but does not seek to modify the BACT as PG&E had in its 2007 permit application.

On or about May 1, 2009, BAAQMD and PG&E entered into a Compliance Agreement allowing PG&E to continue operating without a Permit to Operate. BAAQMD and PG&E extended this Compliance Agreement on or about June 1, 2009.

During an August 5, 2009 evidentiary hearing before the California Energy Commission (“CEC”) on the Gateway Complaint the Chief Counsel of the Bay Area Air Quality Management District, Mr. Crockett's public statements where that US EPA Region IX had stated that there was no PSD Permit for the Gateway project and PG&E did not seem to indicate that it planned to stop operating the facility since there was no PSD Permit and this was on the record.

9 MR. CROCKETT: This is Mr. Crockett and  
10 I am here. I apologize, I have been joining and  
11 dropping off because of other commitments.  
12 HEARING OFFICER CELLI: Please,  
13 Mr. Crockett, you have the floor, go ahead.  
14 MR. CROCKETT: Let me just clarify what  
15 representation we made in the Environmental  
16 Appeals Board proceeding. We have been in  
17 discussions with EPA Region 9. EPA Region 9 is  
18 ultimately the agency that has the authority to  
19 issue the federal PSD permit. They delegate that

20 authority to us to issue the PSD permit.  
21 When the question of whether the PSD  
22 permit had expired or not, whether it has been  
23 validly extended. When that question arose we  
24 brought it to the attention of EPA Region 9 and  
25 asked for their interpretation. And they gave us  
1 their interpretation, which was that it was not  
2 validly extended.  
3 And so what we have represented in the  
4 Environmental Appeals Board is that we have  
5 discussed the issue with EPA Region 9 and they  
6 have given us their interpretation.  
7 Really we are bound to follow EPA's  
8 interpretation on this question. In the  
9 delegation agreement it says if any questions of  
10 interpretation of PSD requirements come up that we  
11 should seek guidance from Region 9 and be bound by  
12 that guidance. We have done that.  
13 And the interpretation we have gotten  
14 from EPA Region 9 is, as Mr. Sarvey said, that the  
15 PSD permit expired, was not validly extended at  
16 the point of expiry. So that is what we have  
17 informed the Environmental Appeals Board, is of  
18 that interpretation that we got from EPA Region 9.  
[2009-08-05 Hearing Transcript<sup>13</sup>]

At the August 26, 2009 Business Meeting Mr. Galati of PG&E stated “[y]es, I first want to state that PG&E believes that it has all perfect permits” [2009-08-26 Business Meeting Transcript at page 32 lines 12 to 13] This was following CARE’s representative Mr. Boyd giving the Commission fair warning that its actions to approve the amendment allowed PG&E to continue operating the facility without a federal air permit under the Clean Air Act and that this subjected the CEC to liability under the Act.

21 CHAIRPERSON DOUGLAS: Thank you very much. And  
22 finally, Michael Boyd, are you on the line?  
23 MR. BOYD: Yes, ma'am. I am here.  
24 CHAIRPERSON DOUGLAS: All right, please --  
25 MR. BOYD: I am Mike Boyd, President of CARE. I

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<sup>13</sup> See [http://www.energy.ca.gov/sitingcases/gateway/compliance/2009-08-05\\_hearing\\_transcript.pdf](http://www.energy.ca.gov/sitingcases/gateway/compliance/2009-08-05_hearing_transcript.pdf)

1 [don't] want to duplicate what Rob said. I also would like to  
2 incorporate for the record on behalf of CARE, the comments  
3 of ACORN, that they submitted, as well. My comments are  
4 that I do not believe that the Commission has authority to  
5 approve this amendment because you have knowledge and have  
6 known for a significant amount of time that this facility  
7 is operating without a federal permit. And because of  
8 that, if you do decide to approve this, I wish to let you  
9 know that I am going to give you a notice that under the  
10 Clean Air Act, to take you guys to federal court for  
11 violating the Clean Air Act by giving them the permit to  
12 operate when, clearly, they do not have their federal  
13 permit. That is all I have to say. Thank you.  
[2009-08-26 Business Meeting Transcript at pages 25 to 26]<sup>14</sup>

On September 3, 2009 Mr. Boyd of CARE received a letter from Mr. Crockett of BAAQMD that included as an attachment a Notice of Violation of the CAA by USEPA to PG&E and BAAQMD date stamped received on August 13, 2009. This confirmed Mr. Crockett's August 5, 2009 public statements where correct. USEPA's statement of Statutory and Regulatory Authorities finds "PG&E failed to obtain a valid PSD permit prior to restarting construction of and operating GGS. PG&E's failure to have a valid permit continues to this time...PG&E violated the SIP and Act by restarting construction of and operating GGS, a major new source of air pollution, without obtaining a valid PSD permit."

The statutory authority cited criminal penalties "for any person who knowingly violates any SIP or permit requirement more than 30 days after the date of issuance of a FNOV, Section 113 (c) of the Act provides for criminal penalties, imprisonment, or both. 42 U.S.C. § 7413 (c) (3)."

Since to our knowledge US EPA Region IX has been aware of this matter since Mr. Simpson filed his Appeal to the US EPA Environmental Appeals Board<sup>15</sup>, PG&E has continued

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<sup>14</sup> See [http://www.energy.ca.gov/business\\_meetings/2009\\_transcripts/2009-08-26\\_TRANSCRIPT.PDF](http://www.energy.ca.gov/business_meetings/2009_transcripts/2009-08-26_TRANSCRIPT.PDF)



the Gateway project operations un-abated purportedly with the CEC's approval we with the utmost of caution notified the CEC on September 3, 2009 of 60-day Notice of Intent to bring Clean Air Act Citizens Suit Pursuant to 42 USC § 7604<sup>16</sup> for the CEC's approval of PG&E's amendment allowing continued operations of the Gateway project under CEC Docket Number 00-AFC-1C, Gateway Generating Station, without a PSD permit. Therefore this complaint includes CEC's August 26, 2009 actions to approve PG&E's amended permit to the degree CEC includes "any person" under 42 U.S.C. § 7413 (c) (3).

The Clean Air Act authorizes under this provision CARE to commence a civil action against CEC and this constituted 60 days notice to do so and additionally served as a complaint under the CAA against the CEC and as such a copy of this complaint was sent by US Mail to the US EPA Administrator Lisa Jackson, and Mr. Rios at US EPA Region IX by e-mail.

### **Violations of Emission Standards or Limitations**

The Clean Air Act authorizes citizen suits against any person who has violated or is in violation of an "emissions standard or limitation." Section 304(a)(1) of the Act, 42 U.S.C. § 7604(a)(1). The term "emission standard or limitation" is broadly defined to include an emission limitation; emission standard; "any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of air quality)" and any condition or requirement under an applicable implementation plan relating to . . . . air quality maintenance plans;" or any other standard or limitation established under "any applicable State implementation plan;" and any requirement to obtain a permit as a condition of operations. .Id. § 7604(f). PG&E has violated and continues to violate an emission standard or limitation within the meaning of the Act because PG&E has failed to comply with the Act's requirements that

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<sup>15</sup> See [http://yosemite.epa.gov/OA/EAB\\_WEB\\_Docket.nsf/Dockets/PSD+09-02](http://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Dockets/PSD+09-02)

<sup>16</sup> 42 USC § 7604. Citizen suits

major stationary sources obtain a permit before constructing, which would have established BACT current to that time, and an operation permit, which would have established emissions limits for the operation of the facility.

### **1. PSD Program**

The Clean Air Act requires a PSD permit program for the construction and operation of new or modified major stationary sources in attainment and unclassifiable areas. 42 U.S.C. § 7475 (barring commencement of construction of a major emitting facility without a permit). The purpose of these PSD provisions is to prevent the significant deterioration of air quality in these regions by performing a pre-construction review before new sources of pollution are permitted and built. 42 U.S.C. § 7471. A PSD permit may only be issued if, among other things, "the proposed facility is subject to the best available control technology for each pollutant subject to regulation; 42 U.S.C. § 7475 (a)(4).

Where 18 months have elapsed without continued construction or construction is not completed in a reasonable time, the PSD regulations require a demonstration of adequacy of previous BACT determinations. See 40 C.F.R. § 52.21(b)(9) & (r)(2) ("Construction shall become invalid . . . if construction is discontinued for a period of 18 months or more"); see also *Sierra Club v. Franklin County Power of Illinois*, 546 F.3d 918, 931 (7th Cir. 2008) (affirming invalidation of a PSD permit that was over 18 months old); EPA Region IX Policy on PSD Permit Extensions, subsection II (1),<sup>17</sup> ("[a] BACT analysis is required in all permit extension requests, as in an application for a new PSD permit"). The policy reason behind this requirement for a new analysis is to ensure that the emissions limitations reflect the most stringent controls available at the time the source is built. See *Arnold & Porter Legislative History*, S. Rep. No. 95-

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<sup>17</sup> Available at <http://epa.gov/region07/programs/artd/air/nsr/nsrmemos/extnsion.pdf>

127 (Part I of 2), at 18 (1977) (BACT intended to require "the latest technological developments as a requirement in granting the permit [to] lead to rapid adoption of improvements in technology as new sources are built"). Employment of the most up to date technology for new facilities allows more sources to be built in attainment areas without significant deterioration of air quality. The District's SIP rules also reflect this policy that BACT review be current, by including a provision that ATCs "expire two years after the date of issuance, unless substantial use of the authority has begun." BAAQMD SIP Rule 2-1-407, approved into the California SIP, 64 Fed. Reg. 3850 (Jan. 26,1999). In addition to requiring the most stringent technology to reduce pollution, PSD regulations require public participation in the permitting process. See 40 C.F.R. § 124.10.

Public participation is important to ensure that the permitting agency complies with the law and to provide an opportunity for the public to point out improvements that can be made in the permit terms. See EPA Region IX Policy on PSD Permit Extensions, subsection II (1), (the importance 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).

## **2. PG&E Has Violated and Is in Violation of an Emission Standard or Limitation by Operating Without a Prevention of Significant Deterioration Permit.**

The PSD permit that was issued for Gateway in 2001 is over eight years old. Construction on Gateway was discontinued for over 18 months since construction was suspended in February 2002 and not restarted until years later when PG&E owned the facility. Therefore, the 2001 PSD permit is invalid. PG&E finished construction of Gateway and started operating on or before November 10, 2008 or, at the latest, on January 4, 2009. PG&E finished construction

and started operating without a valid PSD permit. Consequently, PG&E is not in compliance with federal law requiring a PSD permit prior to commencing construction. See sections 165(a)(1) & 173, 42 U.S.C. §§ 7475(a)(1)& 7503; 40 C.F.R. § 52.21(r). This failure is a violation of an emission standard or limitation, which began on or before November 10, 2008, when PG&E began to construct without pre-construction review. PG&E's violation of an emission standard or limitation continues each and every day it operates without a valid PSD permit. A violation of the requirement to obtain a PSD permit is a violation of an "emission standard or limitation." The term "emission standard or limitation" is broadly defined to include an emission limitation; emission standard; "any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of air quality)". *Id.* § 7604(f). A violation of the requirement to obtain a PSD permit is a violation of an "emission standard or limitation" because it is a requirement to have a permit under the PSD provisions of the Clean Air Act.

Importantly, the District has stated that Gateway does not have a valid PSD permit. On June 12, 2009, BAAQMD filed a pleading in a case pending before EPA's Environmental Appeals Board involving the same facility, in which BAAQMD admitted that "there is no PSD permit" for Gateway.<sup>18</sup> BAAQMD also asserted in that brief that "there is in fact no current, valid permit, a point on which there is now no disagreement . . . between] EPA Region 9 and the District." *Id.*

### **3. PG&E Has Violated and Is in Violation of an Emission Standard or Limitation by Operating the Facility Without Best Available Control Technology.**

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<sup>18</sup> See BAAQMD Reply in Support of Motion to Stay Proceedings, PSD Appeal No. 09-02, available at [http://yosemite.epa.gov/oa/EAB\\_Web\\_Docket.nsf/Filings%20By%20Appeal%20Number/38485D1280B8FDCC852575D600600173/\\$File/Motion%20to%20Stay%20...25.pdf](http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Filings%20By%20Appeal%20Number/38485D1280B8FDCC852575D600600173/$File/Motion%20to%20Stay%20...25.pdf)

The Clean Air Act's PSD program bars construction in attainment areas of any major air pollutant emitting facility not equipped with BACT. Section 165(a)(a) of the Act, U.S.C. §§ 7475(a)(4). The Act defines BACT as "an emission limitation based on the maximum degree of [pollutant] reduction ... which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for [the] facility." Section 169(3) of the Act, 42 U.S.C. 5 7479(3). The District's definition of BACT is defined in SIP Rule 2-2-206.<sup>19</sup> It plainly indicates that BACT is "the most effective emission control" or "the most stringent emission limitation," by defining BACT as "the more stringent of":

- 206.1 The most effective emission control device or technique which has been successfully utilized for the type of equipment comprising such a source; or
- 206.2 The most stringent emission limitation achieved by an emission control device or technique for the type of equipment comprising such a source; or
- 206.3 Any emission control device or technique determined to be technologically feasible and cost-effective by the APCO; or
- 206.4 The most effective emission control limitation for the type of equipment comprising such a source which the EPA states, prior to or during the public comment period, is contained in an approved implementation plan of any state, unless the applicant demonstrates to the satisfaction of the APCO that such limitations are not achievable.

Under no circumstances shall the emission control required be less stringent than the

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<sup>19</sup> Available at [http://yosemite.epa.gov/R9/r9sips.nsf/AgencyProvision/411642DA93F3D7A4882569900057D386/\\$file/BA+rg2-2sip.PDF](http://yosemite.epa.gov/R9/r9sips.nsf/AgencyProvision/411642DA93F3D7A4882569900057D386/$file/BA+rg2-2sip.PDF)

emission control required by any applicable provision of federal, state or District laws, rules or regulations.

SIP Rule 2-2, approved into the California SIP, 64 Fed. Reg. 3850 (Jan.26,1999). In the District's own words, "[c]learly the recurring theme in the above definitions of BACT. . . is 'the most effective emission control' or 'the most stringent emission limitation'" BAAQMD BACT Guideline,<sup>20</sup> (definition of BACT and TBACT). The limits in PG&E's expired 2001 permit do not reflect current BACT.

Indeed, PG&E has failed to comply with even what it believes to be current BACT. In its December 2007 application to the District, PG&E acknowledged that its limits in the old 2001 permit did not meet current definition of BACT. According to this submission, PG&E asserted, among other things, that 2 ppmvd @ 15% O<sub>2</sub> was BACT for NO<sub>x</sub> and 4 ppmvd @ 15% O<sub>2</sub> was BACT for CO. Despite this assertion, PG&E has stated in another proceeding before EPA's Environmental Appeals Board that it is operating under the old, expired emission rates of 2.5 ppmvd @ 15% O<sub>2</sub> for NO<sub>x</sub> emission and 6 ppmvd @ 15% O<sub>2</sub> for CO emissions See PG&E's Reply to Petitioner's Response to Motion for Stay, PSD Appeal No. 09-02, Filing No. 26 at 4.<sup>21</sup>

Thus, PG&E has not complied with BACT. As described above, under the Act and the applicable SIP rules, a new or modified major stationary source, such as Gateway, must comply with the requirements for BACT before constructing and operating a facility. PG&E's failure to comply with BACT requirements is a violation of an emissions standard or limit, which began on or before November 10, 2008. PG&E's violation of an emissions standard or limit continues each

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<sup>20</sup> Available at <http://www.baaqmd.gov/pmt/bactworkbook/default.htm>

<sup>21</sup> Available at [http://yosemite.epa.gov/oa/EAB\\_Web\\_Docket.nsf/f22b4b245fab46c6852570e6004df1bd/e21ed03510b6c284852575ae006ce856!OpenDocument](http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/f22b4b245fab46c6852570e6004df1bd/e21ed03510b6c284852575ae006ce856!OpenDocument)

and every day it operates without complying with the applicable BACT requirements. A violation of the requirement to obtain a PSD permit is a violation of an "emission standard or limitation." The term "emission standard or limitation" is broadly defined to include an emission limitation; emission standard; "any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of air quality)" and any standard or limitation "under any applicable State implementation plan approved by the Administrator. *Id.* § 7604(f). A violation of the requirement to obtain a PSD permit is a violation of an "emission standard or limitation" because it is a requirement to have a permit under the PSD provisions of the Clean Air Act and a violation of the applicable SIP.

#### **4. PG&E Has Violated and Is in Violation of an Emission Standard or Limitation by Operating the Facility Without a Permit to Operate.**

In addition to the requirements of the PSD program, the District's SIP rules require that before any person operates equipment which "may cause, reduce or control the emission of air contaminants, such person shall first secure written authorization from the APCO in the form of a permit to operate." BAAQMD SIP Rule 2-1-302, approved into the California SIP, 64 Fed. Reg. 3850 (Jan.26,1999).

The term "emission standard or limitation" is broadly defined to include any standard or limitation under any applicable State implementation plan approved by the Administrator, . . . and any requirement to obtain a permit as a condition of operations." Section 304(D(4) of the Act,42 U.S.C. § 7604(D(4). BAAMD SIP Rule 2-1-302 is an "emission standard or limitation" within the meaning of the Act because it is a standard established under the applicable SIP and it is a requirement to obtain a permit as a condition of operation.

At least as of June 1 ,2009, PG&E still had not obtained an operating permit pursuant to BAAQMD SIP Rule 2-1-302. PG&E's failure to comply with BAAQMD SIP Rule 2-1-302 is a violation of an emissions standard or limit, which began on or before November 10, 2008. PG&E's violation of an emissions standard or limit continues each and every day it operates without complying with the applicable SIP requirements.

### **Requests for Relief**

On September 3, 2009 CARE received the attached Notice of Violation of the CAA by USEPA to PG&E and BAAQMD date stamped received on August 13, 2009. USEPA's statement of Statutory and Regulatory Authorities finds "PG&E failed to obtain a valid PSD permit prior to restarting construction of and operating GGS. PG&E's failure to have a valid permit continues to this time...PG&E violated the SIP and Act by restarting construction of and operating GGS, a major new source of air pollution, without obtaining a valid PSD permit." The statutory authority cited criminal penalties "for any person who knowingly violates any SIP or permit requirement more than 30 days after the date of issuance of a FNOV, Section 113 (c) of the Act provides for criminal penalties, imprisonment, or both. 42 U.S.C. § 7413 (c) (3)." Since to our knowledge US EPA Region IX has been aware of this matter since Mr. Simpson filed his Appeal to the US EPA Environmental Appeals Board, PG&E has continued the Gateway project operations un-abated under a FERC tariff; therefore we must out of the utmost of caution notify you of 60-day Notice of Intent to bring Clean Air Act Citizens Suit Pursuant to 42 USC § 7604<sup>22</sup>

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<sup>22</sup> 42 USC § 7604. Citizen suits

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,



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(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607 (b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607 (b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation

(i) to the Administrator,

(ii) to the State in which the violation occurs, and

(iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412 (i)(3)(A) or (f)(4) of this title or an order issued by the Administrator pursuant to section 7413 (a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; service of complaint; consent judgment

(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In any action under this section, the Administrator, if not a party, may intervene as a matter of right at any time in the proceeding. A judgment in an action under this section to which the United States is not a party shall not, however, have any binding effect upon the United States.

(3) Whenever any action is brought under this section the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and on the Administrator. No consent judgment shall be entered in an action brought under this section in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator during which time the Government may submit its comments on the proposed consent judgment to the court and parties or may intervene as a matter of right.

(d) Award of costs; security

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines

for FERC allowing PG&E's continued operations of the Gateway project under CEC Docket Number 00-AFC-1C, Gateway Generating Station, without a PSD permit.

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such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nonrestriction of other rights

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—

- (1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or
- (2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality, against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 7418 of this title.

(f) "Emission standard or limitation under this chapter" defined

For purposes of this section, the term "emission standard or limitation under this chapter" means—

- (1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,
- (2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or [1]
- (3) any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment), [2] section 7419 of this title (relating to primary nonferrous smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, section 7545 (e) and (f) of this title (relating to fuels and fuel additives), section 7491 of this title (relating to visibility protection), any condition or requirement under subchapter VI of this chapter (relating to ozone protection), or any requirement under section 7411 or 7412 of this title (without regard to whether such requirement is expressed as an emission standard or otherwise); [3] or
- (4) any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations [4] which is in effect under this chapter (including a requirement applicable by reason of section 7418 of this title) or under an applicable implementation plan.

(g) Penalty fund

(1) Penalties received under subsection (a) of this section shall be deposited in a special fund in the United States Treasury for licensing and other services. Amounts in such fund are authorized to be appropriated and shall remain available until expended, for use by the Administrator to finance air compliance and enforcement activities. The Administrator shall annually report to the Congress about the sums deposited into the fund, the sources thereof, and the actual and proposed uses thereof.

(2) Notwithstanding paragraph (1) the court in any action under this subsection to apply civil penalties shall have discretion to order that such civil penalties, in lieu of being deposited in the fund referred to in paragraph (1), be used in beneficial mitigation projects which are consistent with this chapter and enhance the public health or the environment. The court shall obtain the view of the Administrator in exercising such discretion and selecting any such projects. The amount of any such payment in any such action shall not exceed \$100,000.

We request FERC impose civil penalties against PG&E based on fraud and false statements which includes a \$1,000,000 per day for such.<sup>23</sup> We have reason to believe PG&E is subject to this penalty for each day it operates the Gateway Generation Station without a PSD permit approved by the BAAQMD or EPA Region IX. Under FPA Part II, the [FERC] can assess a penalty “of not more than \$1,000,000 for each day that such violation continues.”

During the 60-day Notice period CARE is requesting reconsideration of the CEC’s Decision to approve the PG&E amendment to 00-AFC-1C on August 26, 2009 that permitted PG&E to continue operating its Gateway Generating Station, without a PSD permit. CEC is free to investigate CARE’s complaint as part of CEC rehearing and join CARE in seeking these penalties against PG&E; and if their own investigation results support CARE’s requests for relief we are willing to drop CEC from this complaint in return for their support of the Complaint.

Pursuant to section 4A of the Natural Gas Act (NGA) and section 222 of the Federal Power Act (FPA), as added to the statutes by the Energy Policy Act of 2005 (EPAct 2005), the Commission proposed to add a Part 159 under Subchapter E and a Part 47 under Subchapter B to Title 18 of the Code of Federal Regulations. Under the regulations FERC adopted, it is unlawful for any entity, directly or indirectly, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, or in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, (1) to use or employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the

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<sup>23</sup> See Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1284(e), 314 (b)(1)(B), and 314(b)(2), 119 Stat. 594 at 950 and 691 (2005), respectively.

circumstances under which they were made, not misleading, or (3) to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.

As discussed below, any entity may be subject to the Final Rule if its fraudulent or manipulative conduct is “in connection with” a purchase or sale of natural gas, electric energy, transportation service, or transmission service that is subject to the Commission’s jurisdiction. Thus, the third aspect of the analysis is to consider whether the fraud is “in connection with” a jurisdictional transaction.

Section 10(b)’s “in connection with” requirement has been construed broadly by the Supreme Court to encompass many circumstances where securities transactions “coincide” with the overall scheme to defraud. However, the Supreme Court was careful to state that section 10(b) “must not be construed so broadly as to convert every common law fraud that happens to involve securities into a violation” of section 10(b) and Rule 10b-5. Guided by this precedent, the Commission views the “in connection with” element in the energy context as encompassing situations in which there is a nexus between the fraudulent conduct of an entity and a jurisdictional transaction. We note that, unlike the SEC, which has broad jurisdiction over securities transactions, our jurisdiction is limited to certain wholesale transactions that remain within the ambit of the NGA, NGPA, and FPA. At the same time, energy markets are made up of both jurisdictional and non-jurisdictional transactions. We do not intend to construe the Final Rule so broadly as to convert every common-law fraud that happens to touch a jurisdictional transaction into a violation of the Final Rule. Rather, in committing fraud, the entity must have intended to affect, or have acted recklessly to affect, a jurisdictional transaction. For example, any entity engaging in a non-jurisdictional transaction through a Commission-regulated RTO/ISO market, that acts with intent or with recklessness to affect the single price auction

clearing price (which sets the price of both non-jurisdictional and jurisdictional transactions), would be engaging in fraudulent conduct in connection with a jurisdictional transaction and, therefore, would be in violation of the Final Rule.

FPA section 31(a) grants the Commission the authority to monitor and investigate compliance with licenses, permits, and exemptions for hydropower projects issued under Part I. If the Commission finds a violation, it can assess civil penalties under section 31(c). Pursuant to section 31(a), the Commission can also issue compliance orders to the person who is in violation of the license, permit, or exemption. If the person violates a compliance order, the Commission can assess civil penalties under section 31(c) or issue a revocation order under section 31(b). Section 31(d) of the FPA establishes a process for assessing civil penalties issued pursuant to FPA section 31(c). This process is restated in greater detail in Rules 1501 through 1511 of the Commission's Rules of Practice and Procedure. Section 31(c) requires the Commission to notify the person of the violation and the proposed penalty, and to give the opportunity for a public hearing. The notice gives the person the option (unless the violation is of a final compliance order under section 31(a)) to choose between either (a) an administrative hearing before an ALJ at the Commission prior to the assessment of the penalty pursuant to section 31(d)(2) or, (b) an immediate penalty assessment by the Commission which may be reviewed de novo by a United States district court when the Commission files for a court order affirming the penalty assessment pursuant to section 31(d)(3). This election must be made within 30 days of receiving the notice of proposed penalty. If the violation is of a final compliance order under section 31(a), however, there is no choice and the penalty is assessed after an administrative hearing before an ALJ.

Respectfully we request the Commission accept CARE's complaint and grant the relief requested.

### **Additional Requirements of Rule 206**

#### 18 C.F.R. § 383.206(b)(1)-(2)

The price and non-price terms and conditions of the violations challenged herein are unjust and unreasonable and in violation of § 206 of the FPA, and to the extent applicable, are not in the public interest pursuant to § 206.

#### 18 C.F.R. § 383.206(b)(3)(5)

Collectively the challenged fraud by PG&E imposes a financial burden on California ratepayers on the order of more than \$6,739,610,453. Non-financial consequences include threats to reliability, as detailed supra.

#### 18 C.F.R. § 383.206(b)(6)

While some of the facts and legal arguments relevant to the instant Complaint may have been brought to FERC's attention in other pending proceedings, no pending proceeding provides an adequate opportunity for FERC to address the totality of Respondents' misconduct and fully address the injuries complained of herein. CARE has protested at the CEC said permit violations, identifying some potentially unjust and unreasonable prices, terms, and conditions, and requests that FERC set the matters for hearing in order to make a determination of whether and the extent to which the particular violations protested are just and reasonable, or to the extent applicable, in the public interest. CEC has not granted permission to file CARE's complaint against the CEC and PG&E at the FERC.

#### 18 C.F.R. § 383.206(b)(7)

CARE submits that the violations challenged herein must be abrogated as they are unjust and unreasonable. In addition to unreasonable pricing, the non-price terms and conditions of the violations are unjust and unreasonable, and warrant abrogation of the discrimination. Abrogation of the violations should be implemented in an orderly fashion which will enable California to obtain such replacement energy supplies as are necessary at reasonable prices.

18 C.F.R. § 383.206(b)(8)

In support of the facts in this Complaint, CARE provides the Notice of Violation of the CAA by USEPA to PG&E and BAAQMD date stamped received on August 13, 2009.

18 C.F.R. § 383.206(b)(9)

CARE has not attempted to use any of FERC's alternative dispute resolution procedures, and does not believe that any such procedures could successfully resolve the Complaint.

18 C.F.R. § 383.206(b)(10)

A Form of Notice suitable for publication in the Federal Register is attached hereto as Exhibit 1.

**Service**

The following person should be included in the official service list in these proceedings and all notices and communications with respect to these proceedings should be addressed, by electronic service if available, to:

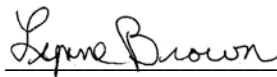
Michael E. Boyd – President, CARE  
5439 Soquel Drive  
Soquel, California 95073  
(831) 465-9809  
(408) 891-9677 (cell)  
E-mail: [michaelboyd@sbcglobal.net](mailto:michaelboyd@sbcglobal.net)

Lynne Brown – Vice-president, CARE  
24 Harbor Road  
San Francisco, California 94124  
(415) 285-4628  
E-mail: [l\\_brown369@yahoo.com](mailto:l_brown369@yahoo.com)

**Conclusion**

For the foregoing reasons, CARE respectfully requests that FERC grant the relief requested herein.

Respectfully submitted,



\_\_\_\_\_  
Lynne Brown Vice-President  
CALifornians for Renewable Energy, Inc. (CARE)  
Resident, Bayview Hunters Point  
24 Harbor Road  
San Francisco, CA 94124  
E-mail: [l\\_brown369@yahoo.com](mailto:l_brown369@yahoo.com)



\_\_\_\_\_  
Michael E. Boyd President  
CALifornians for Renewable Energy, Inc. (CARE)  
5439 Soquel Drive  
E-mail: [michaelboyd@sbcglobal.net](mailto:michaelboyd@sbcglobal.net)

**Verification**

I am an officer of the complaining corporation herein, and am authorized to make this verification on its 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 September 8<sup>th</sup> 2009, at Soquel, California



\_\_\_\_\_  
Michael E. Boyd – President, CARE  
CALifornians for Renewable Energy, Inc. (CARE)  
5439 Soquel Dr.  
Soquel, CA 95073-2659  
Tel: (408) 891-9677  
[michaelboyd@sbcglobal.net](mailto:michaelboyd@sbcglobal.net)



**Certificate of Service**

I hereby certify that I have this day served a true copy of the *Complaint of CARE v. PG&E and CEC including Notice of Intent to file Citizens Suit Pursuant to 42 USC § 7604* Service was affected by US mail or e-mail.

Executed this 8<sup>th</sup> day of September, 2009 at Soquel, California.



Carol Paramoure  
5439 Soquel Drive  
Soquel, California 95073  
(831) 465-9809

On this date, copies of document to which this certificate is attached were sent by fax or by first-class mail—to the following:

Ken Celli, [Kcelli@energy.state.ca.us](mailto:Kcelli@energy.state.ca.us),  
Robert Gladden, [BGlad@gb-llp.com](mailto:BGlad@gb-llp.com),  
David Wiseman, [DWiseman@gb-llp.com](mailto:DWiseman@gb-llp.com),  
Scott Galati, [SGalati@gb-llp.com](mailto:SGalati@gb-llp.com),  
Deborah Behles, [dbehles@ggu.edu](mailto:dbehles@ggu.edu),  
Lisa Jackson, [jackson.lisa@epa.gov](mailto:jackson.lisa@epa.gov),  
Gerardo Rios, [rios.gerardo@epa.gov](mailto:rios.gerardo@epa.gov),  
ACORN, [caacornbpro@acorn.org](mailto:caacornbpro@acorn.org),  
Bob Sarvey, [SarveyBob@aol.com](mailto:SarveyBob@aol.com),  
Lucas Williams, [lwilliams@ggu.edu](mailto:lwilliams@ggu.edu),  
Rory Cox, [RCox@pacificenvironment.org](mailto:RCox@pacificenvironment.org),  
Rob Simpson, [rob@redwoodrob.com](mailto:rob@redwoodrob.com),  
Sandy Crockett, [scrockett@baaqmd.gov](mailto:scrockett@baaqmd.gov),  
Martin Homec, [martinhomec@gmail.com](mailto:martinhomec@gmail.com),

Lisa P. Jackson Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Mail Code: 1101A  
Washington, DC 20460  
(US Mail)

Chair  
Karen Douglas, J.D.  
California Energy Commission  
1516 Ninth Street, MS-14  
Sacramento, CA 95814  
E-mail: [CGraber@energy.state.ca.us](mailto:CGraber@energy.state.ca.us),  
Executive Assistant,

Office of Chief Counsel  
California Energy Commission  
1516 Ninth Street, MS-14  
Sacramento, CA 95814  
E-mail: [mtran@energy.state.ca.us](mailto:mtran@energy.state.ca.us), Secretary

Exhibit 1

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

CALifornians for Renewable Energy, Inc.,  
(CARE)

Complainant,

v.

Pacific Gas and Electric Company (PG&E),  
And California Energy Commission (CEC)  
Respondents.

Docket No. EL09-\_\_\_\_-000

**NOTICE OF SECTION 206 COMPLAINT**

(September\_\_\_\_, 2009)

Take notice that on September\_\_, 2009, CALifornians for Renewable Energy, Inc. (CARE) (Complainant) submitted a complaint against the Pacific Gas and Electric Company (PG&E), for operating its Gateway Generation Station without permits that limit emissions regulated by the Clean Air Act (“CAA”) and the California Energy Commission (“CEC”) for its August 26, 2009 actions to approve PG&E’s amended permit allowing continued operations of the Gateway project under CEC Docket Number 00-AFC-1C, Gateway Generating Station (“GGS”), without a PSD permit.

Copies of this filing were served upon Respondents and other interested parties.

Any person desiring to be heard or to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests must be filed on or before \_\_\_\_\_, 2009. Protests will be considered by the Commission in determining

the appropriate action to be taken, but will not serve to make protestants parties to the proceeding.

Any person wishing to become a party must file a motion to intervene. Answers to the complaint shall also be due on or before \_\_\_\_\_, 2009. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at <http://www.ferc.gov> using the "RIMS" link, select "Docket#" and follow the instructions (call 202-208-2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the "e-Filing" link.

Magalie Roman Salas

Secretary



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**REGION IX**

**75 Hawthorne Street**

**San Francisco, CA 94105-3901**

**AUG 13 2009**

CERTIFIED MAIL # 7006 2150 00001 4941 2215  
RETURN RECEIPT REQUESTED

IN REPLY: AIR-5  
REFER TO: Docket No. R9-09-011

Mr. Randy S. Livingston  
Vice President – Power Generation  
Pacific Gas and Electric Company  
P.O. Box 770000, Mail Code N11E  
San Francisco, CA 94177

Re: PG & E Gateway Generating Station. Finding and Notice of Violation

Dear Mr. Livingston:

Enclosed is a copy of a Finding and Notice of Violation (“NOV”) issued pursuant to section 113(a)(1) of the Clean Air Act, 42 U.S.C. §§ 7401-7671q (the “Act”), notifying you that the United States Environmental Protection Agency (“EPA”), Region IX, finds that Pacific Gas and Electric Company’s (PG&E) Gateway Combined Cycle Generating Station located in Contra Costa County, California (the “Facility”) is in violation of the Clean Air Act (“Act”).

You should be aware that section 113(a)(1) of the Act authorizes EPA to issue an order requiring compliance with the requirements of the Act, issue an administrative penalty order, or commence a civil action seeking an injunction and/or a civil penalty. Furthermore, section 113(c) of the Act provides for criminal penalties in certain cases.

In addition, section 306 of the Act, 42 U.S.C. § 7606, the regulations promulgated thereunder (2 C.F.R. Part 180), and Executive Order 11738 provide that facilities to be utilized in federal contracts, grants, and loans must be in full compliance with the Act and all regulations promulgated pursuant to it. A violation of the Act may result in the PG&E Facility being declared ineligible for participation in any federal contract, grant, or loan.

If you wish to discuss the enclosed NOV, you may request a conference with EPA within ten (10) working days of receipt of this NOV. The conference will afford PG&E an opportunity to present information bearing on the finding of violation, the nature of the violations, and any efforts it may have taken or proposes to take to achieve compliance.

If you have any questions pertaining to this NOV, please contact Steve Frey of the Air Enforcement Office at (415) 972-3796, or have your attorney contact Allan Zabel, Office of Regional Counsel, at (415) 972-3902.

Thank you for your cooperation in this matter.

Sincerely,



Deborah Jordan  
Director, Air Division

Enclosure

cc: \* Mr. Jack Broadbent (BAAQMD)  
Mr. Jim Ryden (CARB)  
Mr. Dave Farabee (e-mail)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street

San Francisco, CA 94105-3901

AUG 13 2009

IN REPLY: AIR-5

REFER TO: Docket No. R9-09-11

Mr. Jack Broadbent  
Executive Officer/Air Pollution Control Officer  
Bay Area Air Quality Management District District  
939 Ellis Street  
San Francisco, CA 94109

Dear Mr. Broadbent:

Enclosed for your information is a copy of a Finding and Notice of Violation ("NOV") that the United States Environmental Protection Agency ("EPA"), Region IX, issued to Pacific Gas and Electric (PG&E) for violations of the Clean Air Act ("Act") at its Gateway Combined Cycle Generating Station located in Contra Costa County, California.

The purpose of the NOV is to notify PG&E that EPA finds that it has violated certain provisions of the California State Implementation Plan. The violations are set forth more specifically in the enclosed NOV. The NOV has been issued pursuant to section 113(a)(1) of the Act, 42 U.S.C. §§ 7401-7671q.

The Act also provides that after 30 days from the issuance of an NOV, EPA may determine if any further action will be taken pursuant to section 113 of the Act.

If you have any questions concerning this NOV, please contact Steve Frey, Air Enforcement Office, at (415) 972-3796, or [frey.steve@epa.gov](mailto:frey.steve@epa.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Deborah Jordan".

Deborah Jordan  
Director, Air Division

Enclosure



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**REGION IX**

**75 Hawthorne Street**

**San Francisco, CA 94105-3901**

**AUG 18 2009**

IN REPLY: AIR-5

REFER TO: Docket No. R9-09-11

Mr. Jim Ryden  
Chief, Enforcement Division  
California Air Resources Board  
P.O. Box 2815  
Sacramento, CA 95812

Dear Mr. Ryden:

Enclosed for your information is a copy of a Finding and Notice of Violation ("NOV") that the United States Environmental Protection Agency ("EPA"), Region IX, issued to Pacific Gas and Electric (PG&E) for violations of the Clean Air Act ("Act") at its Gateway Combined Cycle Generating Station located in Contra Costa County, California.

The purpose of the NOV is to notify PG&E that EPA finds that it has violated certain provisions of the California State Implementation Plan. The violations are set forth more specifically in the enclosed NOV. The NOV has been issued pursuant to section 113(a)(1) of the Act, 42 U.S.C. §§ 7401-7671q.

The Act also provides that after 30 days from the issuance of an NOV, EPA may determine if any further action will be taken pursuant to section 113 of the Act.

If you have any questions concerning this NOV, please contact Steve Frey, Air Enforcement Office, at (415) 972-3796, or [frey.steve@epa.gov](mailto:frey.steve@epa.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Deborah Jordan".

Deborah Jordan  
Director, Air Division

Enclosure

1 UNITED STATES  
2 ENVIRONMENTAL PROTECTION AGENCY  
3 REGION IX

3 In the Matter of: )  
4 PACIFIC GAS AND ELECTRIC COMPANY ) Docket No. R9-09-11  
5 Proceeding under Section 113(a) ) FINDING AND  
6 of the Clean Air Act, ) NOTICE OF VIOLATION  
7 42 U.S.C. § 9613(a) )

8 STATUTORY AND REGULATORY AUTHORITY

9 1. This Finding and Notice of Violation ("FNOV") is issued  
10 to the Pacific Gas and Electric Company ("PG&E") for violations  
11 of the Clean Air Act at PG&E's Gateway Generating Station ("GGS")  
12 located in Contra Costa County near Antioch, California. This  
13 FNOV is issued pursuant to Section 113(a)(1) of the Act, 42  
14 U.S.C. § 7413(a)(1). Section 113(a)(1) of the Act requires the  
15 Administrator of the United States Environmental Protection  
16 Agency ("EPA") to notify any person in violation of an applicable  
17 state implementation plan ("SIP") or a permit when the  
18 Administrator finds that person to be in such violation. The  
19 authority to issue this FNOV has been delegated to the Regional  
20 Administrator of EPA, Region IX, and re-delegated to the Director  
21 of the Air Division of EPA, Region IX.

22 2. The Administrator of the Environmental Protection  
23 Agency ("EPA"), pursuant to authority under Section 109 of the  
24 Clean Air Act (the "Act"), 42 U.S.C. § 7409, promulgated National  
25 Ambient Air Quality Standards ("NAAQS") for certain criteria  
26 pollutants, including PM<sub>10</sub>, carbon monoxide, and nitrogen  
27 dioxide. 40 C.F.R. §§ 50.6, 50.8, and 50.11.

28 3. Pursuant to Section 107(d) of the Act, 42 U.S.C.



1 § 7407(d), the Administrator promulgated lists of attainment  
2 status designations for each air quality control region ("AQCR")  
3 in every State. These lists identify the attainment status of  
4 each AQCR for each of the criteria pollutants. The carbon  
5 dioxide, PM<sub>10</sub>, and nitrogen dioxide attainment status  
6 designations for the California AQCRs are listed at 40 C.F.R.  
7 § 81.305.

8 4. The Bay Area Air Quality Management District ("BAAQMD")  
9 has primary jurisdiction over major stationary sources of air  
10 pollution sources in the San Francisco Bay Area Intrastate AQCR.  
11 40 C.F.R. 81.21. This jurisdiction includes GGS.

12 5. Section 161 of the Act, 42 U.S.C. § 7471, requires that  
13 each state implementation plan ("SIP") contain provisions to  
14 implement the Act's Prevention of Significant Deterioration  
15 ("PSD") program for areas of that state which are designated as  
16 being in attainment with any NAAQS for a criteria pollutant. The  
17 PSD program applies to major new sources of air pollution.

18 6. The PSD permitting program for the San Francisco Bay  
19 Area Intrastate AQCR is the federal PSD program, which is set  
20 forth at 40 C.F.R. § 52.21 ("PSD Program").

21 7. The PSD Program requires, among other things, that the  
22 owner or operator of a new major stationary source of air  
23 pollution obtain a PSD permit, which complies with the  
24 requirements of 40 C.F.R. § 52.21, prior to constructing a new  
25 major source of air pollution. The PSD permit must require,  
26 among other things, that the best available control technology  
27 ("BACT") be installed at the source being constructed or  
28 modified. The definition of a major modification is set forth in

1 40 C.F.R. § 52.21.

2 FINDINGS OF FACT AND LAW

3 8. PG&E generates electricity at GGS, which is a nominal  
4 530 megawatt, natural gas-fired, combined cycle, combustion  
5 turbine power plant. At all times relevant to this FNOV, GGS has  
6 been and continues to be a major source of air pollution. GGS is  
7 located in Contra Costa County near Antioch, California, which is  
8 under the jurisdiction of BAAQMD and EPA.

9 9. On July 24, 2001, PG&E's predecessor in interest,  
10 Delta, LLC ("Mirant"), obtained a PSD permit from the BAAQMD as  
11 part of a single, comprehensive Authority to Construct. BAAQMD  
12 issued that PSD permit pursuant to the authority set forth in 40  
13 C.F.R. 52.21 and a delegation of authority from EPA dated April  
14 26, 1986. Such delegation of authority to issue PSD permits and  
15 implement the PSD Program is allowed under 40 C.F.R. 52.21(u).

16 10. The delegation of authority to BAAQMD to implement the  
17 PSD Program was revoked on March 3, 2003. A partial re-  
18 delegation of authority to BAAQMD to implement the PSD Program  
19 was issued on June 21, 2004.

20 11. At some point during the time period between February  
21 2002 and September 2002, Mirant ceased construction of GGS. This  
22 cessation of construction lasted more than 18 months.

23 12. Pursuant to the PSD Program, 40 C.F.R. 52.21(r), where  
24 construction of a major new source pursuant to a PSD permit is  
25 discontinued for 18 months or more, the PSD permit automatically  
26 expires unless an extension is granted by the Administrator of  
27 EPA or someone who currently possesses a valid delegation of  
28 authority from the Administrator to grant such an extension.

1 13. Between the time the PSD permit for GGS was issued to  
2 Mirant and the latest time that PSD permit would have  
3 automatically expired due to discontinued construction of GGS, no  
4 valid extension of the PSD permit was requested from or issued by  
5 the Administrator of EPA or someone who currently possessed a  
6 valid delegation of authority from the Administrator to grant  
7 such an extension. Therefore, the PSD permit automatically  
8 expired when construction of GGS had ceased for 18 months.

9 14. PG&E took over ownership of GGS from Mirant on November  
10 30, 2006, and restarted construction of GGS in January 2007. At  
11 the time PG&E took over ownership of GGS and restarted  
12 construction of GGS, the PSD permit for the construction and  
13 operation of GGS had expired. PG&E has not applied for a new PSD  
14 permit.

15 15. PG&E failed to obtain a valid PSD permit prior to  
16 restarting construction of and operating GGS. PG&E's failure to  
17 have a valid PSD permit continues to this time.

18 FINDING OF VIOLATIONS

19 16. PG&E violated the SIP and the Act by restarting  
20 construction of and operating GGS, a major new source of air  
21 pollution, without obtaining a valid PSD permit.

22 ENFORCEMENT

23 17. Section 113(a)(1) of the Act provides that at any time  
24 after the expiration of 30 days following the date of the  
25 issuance of this FNOV, EPA may, without regard to the period of  
26 violation:

27 - issue an order requiring compliance with the  
28 requirements of the SIP or permit, or

1 - issue an administrative penalty order pursuant to  
2 Section 113(d) of the Act for civil administrative  
3 penalties of up to \$32,500 per day of violation, or  
4 - bring a civil action pursuant to Section 113(b) for  
5 injunctive relief and/or civil penalties of not more  
6 than \$32,500 per day for each violation.

7 42 U.S.C. § 7413(a)(1), as amended by the Federal Civil Penalties  
8 Inflation Adjustment Act of 1990, Pub. L. 101-410, as amended, &  
9 40 C.F.R. § 19. Furthermore, for any person who knowingly  
10 violates any SIP or permit requirement more than 30 days after  
11 the date of the issuance of a FNOV, Section 113(c) of the Act  
12 provides for criminal penalties, imprisonment, or both. 42  
13 U.S.C. § 7413(c)(3).

14 In addition, under Section 306(a) of the Act, the  
15 regulations promulgated thereunder (40 C.F.R. Part 32), and  
16 Executive Order 11738, facilities to be used in federal  
17 contracts, grants, and loans must be in full compliance with the  
18 Act and all regulations promulgated pursuant to it. Violation of  
19 the Act may result in the GGS being declared ineligible for  
20 participation in any federal contract, grant, or loan.

21 PENALTY ASSESSMENT CRITERIA

22 18. Section 113(e)(1) of the Act states that the  
23 Administrator or a court, as appropriate, shall, in determining  
24 the amount of any penalty to be assessed, take into consideration  
25 (in addition to such other factors as justice may require) the  
26 size of the business, the economic impact of the penalty of the  
27 business, the violator's full compliance history and good faith  
28 efforts to comply, the duration of the violation as established

1 by any credible evidence (including evidence other than the  
2 applicable test method), payment by the violator of penalties  
3 previously assessed for the same violation, the economic benefit  
4 of noncompliance, and the seriousness of the violation. 42  
5 U.S.C. § 7413(e)(1).

6 Section 113(e)(2) of the Act allows the Administrator or a  
7 court to assess a penalty for each day of violation. 42 U.S.C.  
8 § 7413(e)(2). For the purpose of determining the number of days  
9 of violation, where EPA makes a prima facie showing that the  
10 conduct or events giving rise to a violation are likely to have  
11 continued or recurred past the date of the issuance of a FNOV,  
12 EPA shall presume the days of violation to include the date of  
13 issuance of the FNOV and each and every day thereafter until the  
14 violator establishes that continuous compliance has been  
15 achieved, except to the extent that the violator can prove by a  
16 preponderance of the evidence that there were intervening days  
17 during which no violation occurred or that the violation was not  
18 continuing in nature.

19 OPPORTUNITY FOR CONFERENCE


20 19. PG&E may, upon request, arrange to have a conference  
21 with EPA to discuss this matter. A conference would enable PG&E  
22 to present evidence bearing on the finding of violation, the  
23 nature of the violation, and any efforts that it may have taken  
24 or proposes to take to achieve compliance. If PG&E wishes to  
25 take advantage of this opportunity, it must make a request for a  
26 conference within ten (10) days of receipt of this FNOV. PG&E,  
27 if it chooses to request a conference, may choose to be  
28 represented by counsel at the conference. Any request for a

1 conference or other inquiries concerning this FNOV should be made  
2 in writing to:

3 Allan Zabel  
4 Office of Regional Counsel  
5 U.S. Environmental Protection Agency, Region 9  
6 75 Hawthorne Street (ORC-2)  
7 San Francisco, CA 94105  
8 (415) 972-3902

9 Date

8-12-09

  
10 Deborah Jordan  
11 Director, Air Division  
12 EPA Region IX  
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