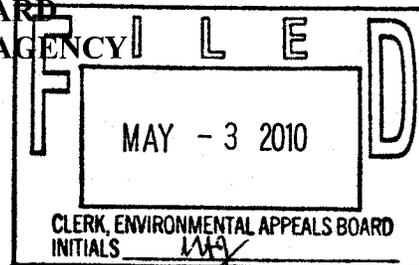


BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.



In re: )

Russell City Energy Center, LLC )

PSD Permit No. 15487 )

PSD Appeal Nos. 10-07, 10-08,  
10-09 & 10-10

**ORDER DISMISSING FOUR PETITIONS FOR REVIEW AS UNTIMELY**

Currently before the Environmental Appeals Board (“Board”) are ten petitions seeking review of a prevention of significant deterioration (“PSD”) permit (the “Final Permit”), Permit No. 15487, issued by the Bay Area Air Quality Management District’s (“District” or “BAAQMD”).<sup>1</sup> For the reasons discussed below, the Board dismisses four of these petitions for review – those submitted by Ms. Karen Kramer (PSD Appeal No. 10-07), the Hayward Area Recreation and Park District (“HARD”) (PSD Appeal No. 10-08), Ms. Minane Jameson (PSD Appeal No. 10-09), and Ms. Idojine J. Miller (PSD Appeal No. 10-10) – as untimely.

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<sup>1</sup> The federal PSD program is administered by the United States Environmental Protection Agency (“EPA” or the “Agency”). See 40 C.F.R. § 52.21(a)(1). When appropriate, EPA delegates federal PSD program authority to states and local agencies. See *id.* § 52.21(a)(1), (u). California is divided into Air Pollution Control Districts and Air Quality Management Districts; BAAQMD is one. These agencies are county or regional governing authorities that have primary responsibility for controlling air pollution from stationary sources. See Cal. Health & Safety Code §§ 40000, 40200; <http://www.arb.ca.gov/ei/maps/statemap/dismap.htm>. The EPA has delegated authority to the BAAQMD to administer the federal PSD program. See U.S. EPA - BAAQMD Agreement for Delegation of Authority to Issue and Modify Prevention of Significant Deterioration Permits Subject to 40 C.F.R. § 52.21 (Feb. 6, 2008). PSD permits issued by BAAQMD under that delegation are considered EPA-issued permits and are governed by federal regulations. *In re Russell City Energy Ctr.*, PSD Appeal No. 08-01, slip op. at 4 n.1 (EAB July 29, 2008), 14 E.A.D. \_\_; *In re Gateway Generating Station*, PSD Appeal No. 09-02, at 1 n.1 (EAB Sept. 15, 2009) (Order Dismissing Petition for Review); see also *In re Christian County Generation, LLC*, 13 E.A.D. 449,450 n.1 (EAB 2008) (citing *In re SEI Birchwood, Inc.*, 5 E.A.D. 25, 26 (EAB 1994)); *In re Hadson Power 14-Buena Vista*, 4 E.A.D. 258, 259 (EAB 1992)).

## I. BACKGROUND

On February 3, 2010, the District issued the Final Permit to Russell City Energy Company, LLC (“RCEC”). The Final Permit authorizes the construction of a new natural gas-fired combined-cycle power plant in Hayward, California. *See* RCEC’s Response Seeking Summary Disposition (“RCEC Apr. 8 Response”), Exh. 4 (Apr. 8, 2010) (copy of Final Permit). Significantly, the Final Permit contained a discussion of permit appeal rights, explicitly stating that:

[A]ny person who filed comments or participated in a public hearing during either public comment period may appeal the permit by filing a Petition for Review with the EAB to review any condition of the permit decision. Any person who failed to file comments or to participate in a public hearing may file a Petition for Review with the EAB to review changes that the District has made from the draft permit to the final permit. Petitions for Review *must be received by the [Board] no later than March 22, 2010.*

*See id.* at 1-2 (emphasis added); *see also id.* at 1 (explaining that the Final Permit would become effective on March 22, 2010, unless an appeal is filed with the Board “by that date”).

On March 24, 2010, the Board received a letter from Ms. Karen Kramer challenging the issuance of the Final Permit primarily based on health and socioeconomic concerns. *See* Letter from Karen D. Kramer to the Clerk of the Board, U.S. EPA, at 1 (Mar. 18, 2010) (“Kramer Petition”). She also questions whether there is a need for new generating capacity. *Id.* She additionally appears to have concerns with increases in carbon dioxide levels that would result from the proposed facility. *Id.* The Board construed this document as a petition for review of the Final Permit<sup>2</sup> and asked the District to file a response addressing it as well as several other

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<sup>2</sup> Although, as noted above, the document is in the form of a letter, because Ms. Kramer is acting without the benefit of counsel, the Board construed this document as a petition for review. *See, e.g., In re Sutter Power Plant*, 8 E.A.D. 680, 684-85, 687 (EAB 1999) (explaining that the Board endeavors to

petitions. *See* Letter from Eurika Durr, Clerk of the Board, to Jack Broadbent, Officer, BAAQMD at 1 (Mar. 25, 2010) (noting receipt of seven petitions); *see also* EAB Practice Manual at 30 (June 2004) (explaining that the Board, upon receipt of a petition for review, typically sends a letter to the permit issuer requesting a response).

The following week, on April 1, 2010, the Board received two additional letters, one from the Hayward Area Recreation and Park District (“HARD”)<sup>3</sup> and one from Ms. Minane Jameson, which the Board similarly construed as a petitions for review of the Final Permit, PSD Appeal Nos. 10-08 and 10-09, respectively. *See generally* Letter from HARD to Clerk of the Board, U.S. EPA (Mar. 26, 2010) (“HARD Petition”); Letter from Minane Jameson (Mar. 17, 2010) (“Jameson Petition”). These two petitions raise concerns about the impacts the proposed facility would have on the Hayward Shoreline and the Interpretive Center programs therein. HARD Petition at 1; Jameson Petition at 1.

Several days later, on April 6, 2010, the Board received another letter, this one from Ms. Idojine Miller, which the Board also construed as a petition for review, PSD Appeal No. 10-10. *See generally* Letter from Idojine J. Miller (Mar. 29, 2010) (“Miller Petition”). Ms. Miller lists several “issues of concern” that she has, including health concerns, impacts on minorities, traffic concerns, noise concerns, aircraft safety, lighting concerns, size concerns, and greenhouse gas emissions concerns. *Id.* at 2.

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liberally construe petitions filed by persons who are unrepresented by legal counsel and considering letters from pro se parties as petitions for review); *see also In re Envotech, L.P.*, 6 E.A.D. 260, 268 (EAB 1996) (same).

<sup>3</sup> The HARD letter was signed by Minane Jameson, in her capacity as the Vice-President of HARD’s Board of Directors.

Following receipt of these latter three petitions, the Board requested that the District respond to them as well. Letter from Eurika Durr, Clerk of the Board, to Jack Broadbent, Officer, BAAQMD at 1 (Apr. 8, 2010) (requesting response to three additional petitions).

On April 8, 2010, the District filed a response requesting the summary dismissal of the Petition filed by Karen D. Kramer, PSD Appeal No. 10-07, on timeliness grounds. *See* District's Response to Petition for Review Requesting Summary Dismissal [of PSD Appeal No. 10-07] ("District Response to Kramer Petition") at 1, 3-6. RCEC also filed a motion requesting that the Board dismiss this Petition for the same reason.<sup>4</sup> *See* RCEC Apr. 8 Response at 1, 19-21. Both assert that the Final Permit established an appeal deadline of March 22, 2010, and that Ms. Kramer filed her petition late. District Response to Kramer Petition at 1, 3-4; RCEC Apr. 8 Response at 3-4, 20. In addition, the District and RCEC both argue that Ms. Kramer's Petition should be dismissed because it lacks specificity. District Response to Kramer Petition at 6-8; RCEC Apr. 8 Response at 19. RCEC also argues that Ms. Kramer fails to demonstrate that the District's responses to comments on the issues that she raises on appeal were clearly erroneous or otherwise warrant review. RCEC Apr. 8 Response at 20-21. Finally, RCEC argues that Ms. Kramer's concerns "about the need for generating capacity do not relate to any condition of the PSD permit and are therefore beyond the scope of this proceeding." *Id.* at 21.

On April 23, 2010, the District filed another response with Board; this response requests the summary dismissal of the petitions for review filed by HARD, Ms. Jameson, and Ms. Miller, PSD Appeal Nos. 10-08, 10-09, and 10-10. *See* District Response to Petitions for Review 10-08,

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<sup>4</sup> RCEC's Response also asks the Board to dismiss several other petitions for review filed in connection with this PSD permit. *See, e.g.*, RCEC Response at 6-19. Those are not addressed in this Order.

10-09 & 10-10 Requesting Summary Dismissal (“District Response to Three Petitions”) at 1. RCEC also filed a motion requesting that the Board dismiss these three petitions. *See* RCEC’s Response Seeking Summary Disposition of Petitions for Review Filed by HARD, Minane Jameson, and Idojine J. Miller (“RCEC Apr. 23 Response”) at 1 (Apr. 23, 2010).

In their responses requesting summary dismissal of these three petitions, both the District and RCEC argue that they should be dismissed because they were untimely filed. District Response to Three Petitions at 1-7; RCEC Apr. 23 Response at 1, 3-4. The District raises other concerns it has with these petitions, including deficiencies in petitioners’ standing and the failure of petitioners to demonstrate why the District’s response to comments were clearly erroneous or otherwise warrant review. District Response to Three Petitions at 4 n.3 (reserving the right to raise certain issues later should the Board decline to dismiss the petitions on timeliness grounds). Similarly, RCEC asserts that these petitions should be dismissed based on several other grounds, including their failure to articulate any specific objections to any condition of the permit, their failure to explain why the District’s responses to comments on the issues they raise were clearly erroneous or otherwise warrants review, and/or their raising of issues outside the Board’s jurisdiction. *See* RCEC Apr. 23 Response at 8-17.

On April 14, 2010, the Board issued an order providing Ms. Kramer with an opportunity to provide evidence demonstrating why her Petition should not be dismissed as untimely. *See* Order to Show Cause Why Petition Should Not Be Dismissed. Ms. Kramer filed a response to that Order on April 21, 2010. *See* Request to Not Dismiss My Petition (“Kramer Reply”). In her response, she explains that “when I became aware of the deadline, I worked on [the petition] as fast as my disabilities allowed, and then mailed it first class at the post office early on 3/19/10.”

*Id.* She also states that, at that time, she had no knowledge about CDX or “that the mail could take so long.” *Id.*

## II. DISCUSSION

### A. Board's Standard of Review

When PSD permits are issued by a state pursuant to a delegation of the federal PSD program, as is the case here, such permits are considered EPA-issued permits and are therefore subject to administrative appeal to the Board in accordance with 40 C.F.R. § 124.19. *See In re Christian County Generation, LLC*, 13 E.A.D. 449, 450 n.1 (EAB 2008); *In re Hillman Power Co.*, 10 E.A.D. 673, 675 (EAB 2002). In determining whether to grant review of a petition filed under 40 C.F.R. § 124.19(a), the Board first considers whether the petitioner has met threshold pleading requirements such as timeliness, standing, and issue preservation. *See* 40 C.F.R. § 124.19; *In re Beeland Group LLC*, UIC Appeal No. 08-02, slip op. at 8 (EAB Oct. 3, 2008), 14 E.A.D. \_\_; *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006); *In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 704-08 (EAB 2002); *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000).

With respect to timeliness, the Agency's permit regulations generally require petitions for review to be filed “[w]ithin 30 days after” a final permit decision has been issued. 40 C.F.R. § 124.19(a). The regulations alternatively allow a permit issuer to specify a later deadline for the

filing of a petition for review.<sup>5</sup> *See id.*; *In re Envotech, L.P.*, 6 E.A.D. 260, 265 (EAB 1996); *see also In re Town of Hampton*, 10 E.A.D. 131, 133-34 (EAB 2001).

Failure to submit a petition within the time provided will ordinarily result in the dismissal of the petition. *E.g.*, *In re Envotech*, 6 E.A.D. at 266; *In re Beckman Prod. Servs., Inc.*, 5 E.A.D. 10, 15-16 (EAB 1994). In general, the Board strictly construes threshold procedural requirements and “will relax a filing deadline only where special circumstances exist.” *In re AES Puerto Rico L.P.*, 8 E.A.D. 325, 329 (EAB 1999), *aff’d*, *Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000)); *accord In re BHP Billiton Navajo Coal Co.*, NPDES Appeal No. 08-06, at 2 (EAB Apr. 24, 2008) (Order Denying Extension of Time to File Petition for Review); *In re Town of Marshfield*, NPDES Appeal No. 07-03, at 4-5 (EAB Mar. 27, 2007) (Order Denying Review). The Board has found “special circumstances” to exist in cases where the delay stemmed “from causes not attributable to the petitioner, such as problems with the delivery service” or problems due to U.S. Postal Service anthrax sterilization procedures. *Town of Marshfield*, at 5; *see, e.g., In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 703 n.6 (EAB 2002) (delay caused by anthrax sterilization); *AES Puerto Rico*, 8 E.A.D. at 328-29 (delays due to hurricane and to aircraft problems experienced by overnight carrier); *see also In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 123-24 (EAB 1997) (delay attributable to

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<sup>5</sup> The permitting regulations provide that, when the time frame for filing a petition for review begins “after the service of notice \* \* \* [of the final decision] by mail,” three additional days shall be added onto the prescribed time (i.e., three days would be added to the thirty days). 40 C.F.R. § 124.20(d). However, where the deadline for filing the petition is based on an alternate date specified in the permit issuer’s notice, as is the case here, the three additional days are not added to the deadline. *See id.* §§ 124.19(a), 124.20(d); *Hampton*, 10 E.A.D. at 133; *Beckman*, 5 E.A.D. at 16 n.9; *In re Bethlehem Steel Corp.*, 3 E.A.D. 611, 614 & n.11 (Adm’r 1991); *see also Envotech*, 6 E.A.D. at 265-66.

permitting authority that mistakenly instructed petitioners to file appeals with EPA's Headquarter's Hearing Clerk).

### B. Analysis

As noted above, the Final Permit was issued on February 3, 2010, and specifically states that "Petitions for Review must be *received* by the [Board] no later than March 22, 2010."<sup>6</sup> See RCEC Response, Exh. 4 at 2 (copy of Final Permit) (emphasis added); see also *id.* at 1 ("[T]his PSD Permit becomes effective March 22, 2010, unless a Petition for Review (appeal) is filed with [the Board] by that date \* \* \* ."). Thus, in this case, the deadline – March 22, 2010 – was established by the Final Permit.<sup>7</sup>

Ms. Kramer's Petition was received by the Board on March 24, 2010, two days after the filing deadline. The Board is not persuaded that special circumstances exist to excuse the petition's untimeliness. While Ms. Kramer claims that she worked on it as fast as she could, the Board notes that she had close to forty-five days in which to prepare her one-page petition. See Kramer Reply at 1. Her claim that she did not realize that "the mail could take so long" similarly fails to demonstrate that special circumstances exist to excuse the lateness of her petition. *Id.* Ms. Kramer mailed her petition from California by first class mail to the Board, which is located

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<sup>6</sup> The Board has consistently held that petitions are considered "filed" when they are *received* by the Board, not when they are mailed. *E.g.*, *AES Puerto Rico*, 8 E.A.D. at 329 n.5; *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 124 n.23 (EAB 1997); *Beckman*, 5 E.A.D. at 15 & n.8. Thus, the District's notice, which stated that petitions for review must be *received* by the Board to be timely, was consistent with the Board's procedures.

<sup>7</sup> Notably, had the District not established a deadline, petitions would likely have been due on or around March 8, 2010, depending on the date the Final Permit was mailed by the District. See 40 C.F.R. §§ 124.19(a), 124.20(d). Thus, the District provided approximately two extra weeks for the filing of petitions for review.

in Washington, D.C., on Friday, March 19, 2010, three days before it was due. By mailing her petition so close to the deadline, she risked that it could arrive late. The Board therefore finds that Ms. Kramer's petition was untimely.

The petitions submitted by HARD and by Ms. Jameson in her personal capacity both were received by the Board on April 1, 2010, ten days after the deadline. Ms. Miller's petition arrived on April 6, 2010, fifteen days after the deadline. None of these petitioners have claimed that special circumstances existed that should excuse their lateness. The Board therefore finds that these three petitions for review are also untimely.

### III. CONCLUSION

Based on the foregoing, the Board concludes that the petitions for review submitted by Karen Kramer (PSD Appeal No. 10-07), HARD (PSD Appeal No. 10-08), Minane Jameson (PSD Appeal No. 10-09), and Idojine J. Miller (PSD Appeal No. 10-10) are untimely.<sup>8</sup> The

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<sup>8</sup> In light of the multiplicity of other petitions filed in this case, the Board believes that, despite these dismissals, there will nonetheless be a full airing of all significant issues. It appears that the issues mentioned in the HARD and Jameson Petitions are raised by the petition submitted by Californians for Renewable Energy, Inc. ("CARE") (PSD Appeal No. 10-05), the issues listed in the Miller Petition are raised by the petitions submitted by the California Pilots Association, the Chabot-Las Positas Community College District ("CCCD"), and CARE (PSD Appeal Nos. 10-01, 10-02, and 10-05), and the issues mentioned in the Kramer Petition are raised by the CCCD and CARE Petitions (PSD Appeal Nos. 10-02 and 10-05).

District notified persons of filing requirements and there are no special circumstances to justify their late arrival. As such, these four petitions are DISMISSED.<sup>9</sup>

So ordered.<sup>10</sup>

ENVIRONMENTAL APPEALS BOARD



Edward E. Reich  
Environmental Appeals Judge

Date: 5/3/10

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<sup>9</sup> The District and RCEC raise several other bases for dismissing these four petitions. Because the Board is dismissing these petitions on timeliness grounds, the Board does not discuss these other bases except to note that these petitions generally do appear deficient in meeting other Board requirements that are prerequisites to obtaining Board review.

<sup>10</sup> The three-member panel deciding this matter is comprised of Environmental Appeals Judges Edward E. Reich, Charles J. Sheehan, and Kathie A. Stein. *See* 40 C.F.R. § 1.25(e)(1).

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Order Dismissing Four Petitions for Review as Untimely in the matter of Russell City Energy Center, PSD Appeal Nos. 10-07, 10-08, 10-09, and 10-10, were sent to the following persons in the manner indicated:

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