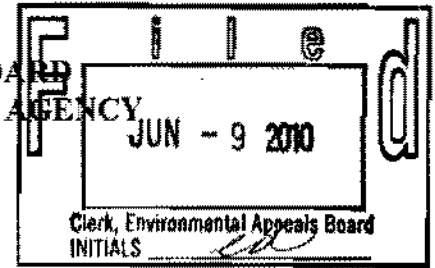


BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.



In re: )  
)  
)  
Russell City Energy Center, LLC ) PSD Appeal Nos. 10-12 & 10-13  
)  
)  
PSD Permit No. 15487 )  
)

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

The Environmental Appeals Board (“Board”) recently received two petitions for review in the above-captioned matter, one from Mr. Earnest A. Pacheco, PSD Appeal No. 10-12, and one from Mr. Raymond Pietrorazio, PSD Appeal No. 10-13. The two petitions seek 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> Five additional petitions for review of this Final Permit are also currently pending before the Board. The Board has previously dismissed five other petitions for review of this Final Permit on timeliness grounds. *See* Order Dismissing Four Petitions for Review as Untimely (May 3, 2010)

<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)).

(dismissing PSD appeal numbers 10-07 through 10-10); Order Dismissing Petition for Review as Untimely (May 17, 2010) (dismissing PSD appeal number 10-06). For the reasons discussed below, the Board dismisses Mr. Pacheco's and Mr. Pietrorazio's petitions for review as untimely as well.

### I. FACTS

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 June 1, 2010, co-Petitioners Californians for Renewable Energy, Inc. ("CARE") and Rob Simpson (PSD Appeal No. 10-05) [hereinafter CARE/Simpson] filed a reply brief in this matter. In their reply brief, in connection with an argument concerning alleged "violation[s] of due process of law and 42 U.S.C. § 1983," CARE/Simpson note that they have attached, "[f]or

additional clarity \* \* \* a Declaration in response by Earnest Pacheco.” See CARE/Simpson Reply Br. at 18 & n.27. Upon examination, however, Mr. Pacheco’s “declaration” actually appears to be Mr. Pacheco’s petition for review of the Final Permit and his reply to RCEC’s response to the other petitions that have been filed in this matter. See Declaration of E. Pacheco at 1-15.<sup>2</sup> The second half of the “declaration” is clearly stylized as a petition for review, *see id.* at 7-15,<sup>3</sup> and the first half disputes statements RCEC made on pages 49 and 50 of its Response to CARE/Simpson’s and Mr. Sarvey’s petitions, *see id.* at 1-6. Moreover, Mr. Pacheco begins his declaration with the following statements: “I intended to submit a petition for review of the PSD permit for the Russel [sic] City Energy Center in Hayward. I did not know how to submit it on my own so I shared it with Mr. Simpson who incorporated it into his petition. \* \* \* I do have issues that I would like heard by the Board. In reply to the response to Mr. Simpson’s petition I offer the following.” *Id.* at 1. In light of the nature of this document, and despite its title, the Board has construed it as Mr. Pacheco’s petition for review of the Final Permit, PSD Appeal No. 10-12.

On June 1, 2010, the Board also received a letter from Mr. Raymond Pietrorazio challenging the issuance of the Final Permit primarily based on concerns he has concerning the effects the proposed facility’s “exhaust stacks would have on aviation.” See Letter from Raymond Pietrorazio to the Clerk of the Board, U.S. EPA, at 1 (dated May 27, 2010)

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<sup>2</sup> Although the “declaration” contained no pagination, for simplicity, the Board has numbered the fifteen pages in order.

<sup>3</sup> This part of his “declaration” includes both a caption and a section entitled “Issues Presented for Review,” and also contains several arguments for remand of the Final Permit.

("Pietrorazio Petition"). Mr. Pietrorazio requests the Board to deny the PSD permit. *Id.* The Board also construed this document as a petition for review of the Final Permit.<sup>4</sup>

Because both of these petitions were submitted two months past the deadline, and thus are clearly untimely, see discussion below, the Board did not ask the District to file a response addressing them. *See generally* 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).

## II. DISCUSSION

### A. 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),

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<sup>4</sup> Although the document is in the form of a letter, because Mr. Pietrorazio 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 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).

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

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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.

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

### B. *Analysis and Conclusion*

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>

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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.

Mr. Pacheco's Petition was received by the Board on June 1, 2010, more than two months after the filing deadline. The Board is not persuaded that special circumstances exist to excuse the lateness of the petition. The Board therefore concludes that his petition was untimely filed.<sup>8</sup>

Likewise, Mr. Pietrorazio's Petition was received by the Board on June 1, 2010, over two months late. Mr. Pietrorazio has not provided the Board with any explanation why his petition was filed late, and no special circumstances appear to exist excusing the petition's untimeliness. The Board therefore concludes that his petition was untimely filed.

### III. ORDER

Based on the foregoing, the Board concludes that the petitions for review submitted by Earnest Pacheco, PSD Appeal No. 10-12, and Raymond Pietrorazio, PSD Appeal No. 10-13, are untimely. As such, these two petitions are DISMISSED.

So ordered.<sup>9</sup>

ENVIRONMENTAL APPEALS BOARD



Edward E. Reich  
Environmental Appeals Judge

Date:

6/9/10

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<sup>8</sup> The Board will not allow petitioners to file late petitions under the guise of another petitioner's exhibits. Nor may any reply brief raise issues not raised by the original petition. Therefore, to the extent Mr. Pacheco raises issues not covered by the CARE/Simpson petition, those issues will not be considered even in conjunction with the CARE/Simpson petition despite inclusion of the Pacheco "declaration" as an exhibit to that petition.

<sup>9</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 Two Petitions for Review as Untimely in the matter of Russell City Energy Center, PSD Appeal Nos. 10-12 and 10-13, were sent to the following persons in the manner indicated:

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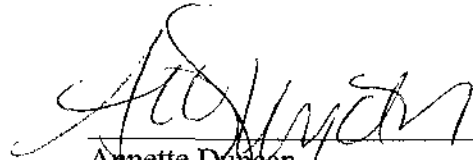
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