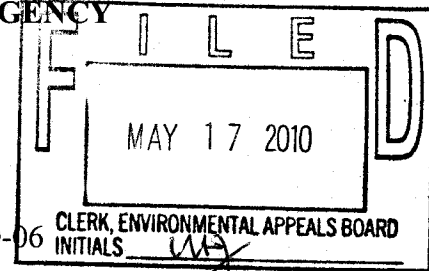


**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**



_____))
In re:))
))
Russell City Energy Center, LLC))
))
PSD Permit No. 15487))
_____))

PSD Appeal No. 10-06

ORDER DISMISSING PETITION FOR REVIEW AS UNTIMELY

Pending before the Environmental Appeals Board (“Board”) are six 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”).¹ The Board previously dismissed four other petitions for review of this PSD permit. *See* Order Dismissing Four Petitions for Review as Untimely (dismissing PSD appeal numbers 10-07 through 10-10). For the reasons discussed below, the Board also dismisses one additional petition for review – the one submitted by Ms. Juanita Gutierrez, PSD Appeal No. 10-06 – as untimely.

¹ 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. 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 March 23, 2010, the Board received a letter from Ms. Juanita Gutierrez challenging the issuance of the Final Permit primarily based on environmental concerns. *See* Letter from Juanita Gutierrez to the Clerk of the Board, U.S. EPA, at 1 (dated Mar. 15, 2010) (“Gutierrez Petition”) (raising concerns about impacts of the proposed plant on “the plan to preserve the wetlands” as well as on “the well being of the surrounding residents and wild life”). The Board construed this document as a petition for review of the Final Permit² and asked the District to file

² Although, as noted above, the document is in the form of a letter, because Ms. Gutierrez 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.

a response addressing it as well as several other 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).

On April 8, 2010, the District filed a response requesting the summary dismissal of the Petition filed by Juanita Gutierrez on timeliness grounds. *See* District's Response to Petition for Review Requesting Summary Dismissal [of PSD Appeal No. 10-06] ("District Response to Gutierrez Petition") at 1-6. RCEC also filed a motion requesting that the Board dismiss this Petition for the same reason.³ *See* RCEC Apr. 8 Response at 1, 17-19. Both assert that the Final Permit established an appeal deadline of March 22, 2010, and that Ms. Gutierrez filed her petition late. District Response to Gutierrez Petition at 1, 3-4; RCEC Apr. 8 Response at 3-4, 20. In addition, the District and RCEC both argue that the Petition should be dismissed because it lacks specificity. District Response to Gutierrez Petition at 6-8; RCEC Apr. 8 Response at 17. RCEC also argues that Ms. Gutierrez 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 17-18. Finally, RCEC argues that any of Ms. Gutierrez's concerns not related to air emissions "are not within the Board's jurisdiction." *Id.* at 19.

On April 14, 2010, the Board issued an order providing Ms. Gutierrez with an opportunity to provide evidence demonstrating why her Petition should not be dismissed as

260, 268 (EAB 1996) (same).

³ 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.

untimely. *See* Order to Show Cause Why Petition Should Not Be Dismissed. The Board later learned that Ms. Gutierrez was out of the country when it issued its original show cause order. Order Granting Extension of Time to Respond to Order to Show Cause at 2. Consequently, the Board granted Ms. Gutierrez additional time to respond to the show cause order, requiring that any such response be filed by May 12, 2010, a date beyond her anticipated return date. The deadline has now passed, and the Board has not received a response or any other communication from Ms. Gutierrez.

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), 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.⁴ *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

⁴ 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.

(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."⁵ *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.⁶

Ms. Gutierrez's Petition was received by the Board on March 23, 2010, one day after the filing deadline. Ms. Gutierrez has not provided the Board with any explanation why her petition was filed late, and no special circumstances appear to exist excusing the petition's untimeliness. The Board therefore concludes that Ms. Gutierrez's petition was untimely filed.

⁵ 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.

⁶ 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.

III. ORDER

Because the Board concludes that the petition for review submitted by Juanita Gutierrez was untimely, the Board DISMISSES her petition, PSD Appeal No. 10-06.^{7, 8}

So ordered.⁹

ENVIRONMENTAL APPEALS BOARD



Edward E. Reich
Environmental Appeals Judge

Date: 5/17/10

⁷ In light of the multiplicity of other petitions filed in this case, the Board believes that, despite this dismissal, there will nonetheless be a full airing of all significant issues. It appears that the issues mentioned by Ms. Gutierrez are also generally mentioned by the petition submitted by CALifornians for Renewable Energy, Inc. (PSD Appeal No. 10-05).

⁸ The District and RCEC raise several other bases for dismissing this petition. Because the Board is dismissing the petition on timeliness grounds, the Board does not discuss these other bases except to note that the petition generally does appear deficient in meeting other Board requirements that are prerequisites to obtaining Board review.

⁹ 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 Petition for Review as Untimely in the matter of Russell City Energy Center, PSD Appeal No. 10-06, were sent to the following persons in the manner indicated:

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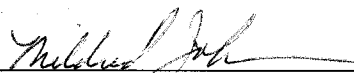
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