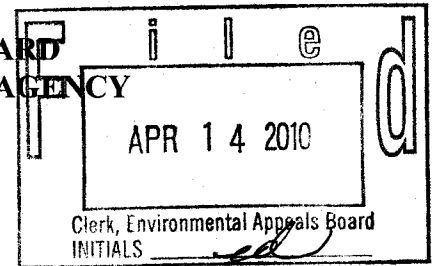


BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.



In re: )

Russell City Energy Center, LLC )

PSD Permit No. 15487 )

PSD Appeal No. 10-06

**ORDER TO SHOW CAUSE WHY PETITION SHOULD NOT BE DISMISSED**

On March 23, 2010, the Environmental Appeals Board (“Board”) received a letter from Ms. Juanita Gutierrez questioning the issuance of the above-captioned prevention of significant deterioration (“PSD”) permit (the “Final Permit”) by the Bay Area Air Quality Management District’s (“District”). *See generally* Letter from Juanita Gutierrez to the Clerk of the Board, U.S. EPA (Mar. 15, 2010) (“Gutierrez Petition”). The Board construed this document as a petition for review (“Petition”) of the Final Permit.<sup>1</sup> The Final Permit authorizes Russell City Energy Company, LLC (“RCEC”) to construct a new natural gas-fired combined-cycle power plant in Hayward, California.

On April 8, 2010, the District filed a response requesting the summary dismissal of the Petition filed by Juanita Gutierrez, PSD Appeal No. 10-06, on timeliness grounds. *See* District’s Response to Petition for Review Requesting Summary Dismissal (“District Response to

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<sup>1</sup> 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. 260, 268 (EAB 1996) (same).

Gutierrez Petition”) at 1, 3-6. RCEC also filed a motion requesting that the Board dismiss this Petition for this same reason.<sup>2</sup> See RCEC’s Response Seeking Summary Disposition (“RCEC Response”) at 1, 3-4, 17-19. The District and RCEC both argue that Ms. Gutierrez’s Petition should also be dismissed because it lacks specificity. District Response to Gutierrez Petition at 6-8; RCEC Response at 17-19.

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); *In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04, slip op. at 23 (EAB Sept. 27, 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. 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). As the Board has consistently held, petitions are considered “filed” when they are *received* by the Board, not when they are mailed. E.g., *In re AES Puerto Rico L.P.*, 8 E.A.D. 325, 329 n.5 (EAB 1999), *aff’d*, *Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 124 n.23 (EAB 1997); *In re Beckman Prod. Servs., Inc.*, 5 E.A.D. 10, 15 & n.8

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<sup>2</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 6-17. The Board will address RCEC’s requests concerning these other petitions in separate orders.

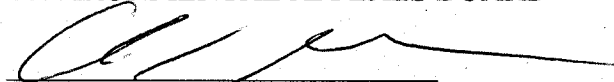
(EAB 1994). Failure to submit a petition within the time provided will ordinarily result in the dismissal of the petition. *E.g.*, *In re Envotech*, 6 E.A.D. at 266; *Beckman*, 5 E.A.D. at 15-16.

The Final Permit states that "Petitions for Review must be *received* by the [Board] no later than March 22, 2010."<sup>3</sup> *See* RCEC Response, Exh. 4 at 2 (copy of Final Permit) (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"). Because Ms. Gutierrez's Petition was received by the Board on March 23, 2010, one day after the filing deadline, it appears to be untimely.<sup>4</sup>

Before making a final decision, the Board has decided to provide Ms. Gutierrez with the opportunity to provide evidence demonstrating why her Petition should not be dismissed as untimely. Should Ms. Gutierrez choose to file for this purpose, such brief or other document must be filed by April 23, 2010.

So ordered.

ENVIRONMENTAL APPEALS BOARD



Edward E. Reich

Environmental Appeals Judge

Date:

4/14/10

<sup>3</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.

<sup>4</sup> The Board notes that Ms. Gutierrez's Petition was sent by first class mail and not via CDX, the Agency's electronic filing portal. Thus, the Board's investigation into filing delays alleged to be caused by problems with CDX, *see* Board's Order Denying Request for Summary Dismissal of CARE Petition and Requesting Response on the Merits (April 14, 2010), is not relevant to this Petition.

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Order to Show Cause Why Petition Should Not Be Dismissed 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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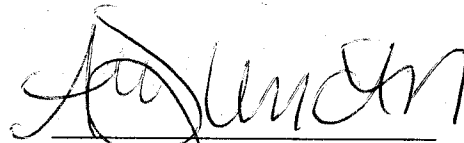
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