

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

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In re:	)	
Russell City Energy Center	)	PSD Appeal No. 10-05 (CARE, Rob Simpson & Robert Sarvey, Petitioners)
	)	
PSD Permit No. 15487	)	[Related to PSD Appeals No. 10-01, 10-02, 10-03, 10-04, 10-06, & 10-07.]

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**RESPONSE TO PETITION FOR REVIEW  
REQUESTING SUMMARY DISMISSAL**

Pursuant to the March 25, 2010, letter from the Clerk of the Board, Respondent the Bay Area Air Quality Management District (“District”) hereby submits this Response Requesting Summary Dismissal of the Petition for Review filed by Petitioners CALifornians for Renewable Energy, Inc. (“CARE”), Rob Simpson and Robert Sarvey in PSD Appeal No. 10-05. As explained herein, this Petition should be summarily dismissed because it was not timely filed by the March 22, 2010, filing deadline in this matter.

**BACKGROUND**

This Petition for Review seeks to appeal a Prevention of Significant Deterioration (“PSD”) Permit issued by the District for the Russell City Energy Center. This PSD Permit was issued in response to a Remand Order issued by the Environmental Appeals Board in PSD Appeal No. 08-01, which remanded an earlier version of the permit to the District to provide additional public notice and comment opportunities. (*See* Remand Order, *In re Russell City Energy Center*, 14 E.A.D. \_\_\_, PSD Appeal No. 08-01 (EAB July 29, 2008) (hereinafter, “Remand Order”).)

In response to the Remand Order, the District re-issued a draft PSD permit and conducted a great deal of public outreach notifying the public of the draft PSD permit and inviting public

comment. The District initially published its draft PSD permit, along with a Statement of Basis explaining the District's basis for the draft permit, on December 8, 2008. The District provided a comment period of well over the minimum 30 days required under 40 C.F.R. Part 124, accepting written comments until February 6, 2009. The District also held a public hearing during this time period to receive verbal comment, on January 21, 2009. The District then reviewed and considered the public comments it received, and based on the public comments (and other new information) it revised and re-issued the draft permit for a further round of public review and comment. The District issued the revised draft, along with an Additional Statement of Basis, on August 3, 2009, and again provided a comment period of well over the minimum 30 days required, accepting written comments until September 16, 2009. The District also held a second public hearing, on September 2, 2009. (*See generally* Responses to Public Comments, Exh. 3 to Declaration of Alexander G. Crockett In Support of Responses Requesting Summary Dismissal (hereinafter, "Crockett Decl."), at p. 1 (summarizing the notice and public participation opportunities provided).)

The District then issued the Final PSD Permit that is the subject of this Petition for Review on February 3, 2010 (*see* Final PSD Permit, Crockett Decl. Exh. 1, at p. 2.), along with comprehensive responses to all public comments it received (*see* Responses to Public Comments, Crockett Decl. Exh. 3). At the time of issuance, the District established an effective date of the permit of March 22, 2010, pursuant to 40 C.F.R. Section 124.15(b)(1). (*See* Final PSD Permit, Crockett Decl. Exh. 1, at p. 2.) This effective date gave interested members of the public until March 22, 2010 – again, more than the minimum 30 days required under 40 C.F.R. Part 124 – to file any appeals of the permit under 40 C.F.R. Section 124.19. In issuing the permit, the District made clear that March 22, 2010, was the deadline for filing an appeal, and it expressly advised interested members of the public that Petitions for Review must be actually received by the EAB by that date to be considered timely under Section 124.19. (*See* Final PSD Permit, Crockett Decl. Exh. 1, at p. 2; Notice of Final Permit Issuance, Crockett Decl. Exh. 2; Responses to Public Comments, Crockett Decl. Exh. 3, at p. i.)

Petitioners did not file their Petition for Review during the period established for appeals under Section 124.19, however. It appears from the record that Petitioners initially submitted a copy of their Petition for Review to the Environmental Appeals Board in a word processing document attached to an e-mail message to the Clerk of the Board, which the Clerk received on March 23, 2010. (*See* Petition for Review – CALifornians for Renewable Energy, Inc (CARE), Bob Sarvey, and Rob Simpson, Docket Entry No. 5; *see also* e-mail message from Mr. Michael Boyd, president of Petitioner CARE, to Ms. Eurika Durr, Clerk of the Environmental Appeals Board, entitled “EAB Appeal RCEC by CARE and Rob Simpson”, attached as Exh. 4 to Crockett Decl.) Petitioners then followed up this e-mail submission with the hard-copy original version of their Petition, which was received and filed by the Board on March 30, 2010. (*See* Original – Petition for Review (HARD COPY ONLY), Docket Entry No. 18 (submitted by Michael E. Boyd).<sup>1</sup>)

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<sup>1</sup> Note that there is no indication on the EAB’s website for this proceeding that Petitioners submitted anything via the EPA’s “CDX” electronic document submission portal. CDX submissions are designated as “Received via CDX Electronic”, but neither of the entries for Petitioners’ Petition for Review (Nos. 5 and 18) bear this notation. The District attempted to clarify with the clerk’s office whether the Petition was received by CDX, but has not received a response as of the date of this filing. The District therefore presumes from the lack of “Received via CDX Electronic” notation that these submissions were not made using the CDX portal.

## STANDARD OF REVIEW

Before considering the merits of a petition for review under 40 C.F.R. Section 124.19, the Environmental Appeals Board must first ensure that the petitioner has satisfied the important jurisdictional prerequisites to EAB review, including the requirement that the Petition be timely filed within the appeal period established under Section 124.19.<sup>2</sup> The burden rests with the petitioner to show that this procedural requirements have been satisfied sufficient to warrant review.<sup>3</sup> The Board has made clear that it “strictly construes” these threshold procedural requirements.<sup>4</sup> In doing so, the Board has always been mindful of the direction in the Preamble to 40 C.F.R. Section 124.19, the regulation governing PSD permit appeals, which states that the Board’s power of review “should be only sparingly exercised.” (45 Fed. Reg. 33,412 (May 19, 1980).) Thus, where a petitioner has not satisfied the minimum prerequisite of filing its petition for review within the time period established under 40 C.F.R. Part 124, the Board should decline review.

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<sup>2</sup> *In re Beeland Group, LLC*, UIC Appeal No. 08-02, 14 E.A.D. \_\_\_, Slip. Op. at 8 (EAB Oct. 3, 2008).

<sup>3</sup> *See, e.g., In re Avon Custom Mixing Services, Inc.*, 10 E.A.D. 700, 706 and n.12 (EAB 2002); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 249 (EAB 1999); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 119-20 (EAB 1997).

<sup>4</sup> *In re Gateway Generating Station*, PSD Appeal No. 09-02, slip op. at 10 (EAB September 15, 2009); *In re Town of Marshfield, Mass.*, NPDES Appeal No. 07-03, slip op. at 8 (EAB, March 27, 2007) (collecting cases).

**THE ENVIRONMENTAL APPEALS BOARD SHOULD DISMISS PETITION NO. 10-05  
BECAUSE IT WAS NOT TIMELY FILED**

The Petition for Review in this matter should be dismissed because it was not timely filed. The Petition was not actually received and filed by the Board until March 30, 2010.<sup>5</sup> The Petition was therefore not filed until after the end of the time period established for appeals of this Permit, which closed on March 22, 2010.<sup>6</sup> The record is clear and undisputable on this point. Petitioners have not satisfied the basic procedural requirements necessary to have their Petition for Review considered by the Environmental Appeals Board under 40 C.F.R. Section 124.19. The Environmental Appeals Board should therefore dismiss this Petition as untimely.

The Board has made clear on numerous occasions that the threshold procedural requirements, such as filing petitions for review in a timely manner, should be strictly

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<sup>5</sup> The Board's filing requirements are clear that a document is not considered filed until it is actually received by the Board. (*See Gateway Generating Station*, PSD Appeal No. 09-02, Slip. Op. at 3-4 n. 5 (citing *EAB Practice Manual* at 9-12, 34, *Citizens' Guide to EPA's Environmental Appeals Board* at 20); *see also In re Town of Hampton, New Hampshire*, 10 E.A.D. 131, 132 n. 2 (EAB 2001).) The hard-copy original document was not received by the Board in this case until March 30, 2010. (*See* Docket Entry No. 18.) Earlier receipt of by the Clerk of an e-mail from Petitioners on March 23, 2010, was not sufficient to effect filing as discussed *infra*, pp. 10-11; and in any event the Petition would still be untimely even if that were the effective date of filing.

<sup>6</sup> Note also that the provision in 40 C.F.R. Section 124.20(d), which allows an extra three days to file an appeal in cases where there is a 30-day appeal clock that runs from the date of service of notice by mail of the final permit action, is not applicable here. The District provided a longer appeal period than the minimum 30 days from service of notice pursuant to 40 C.F.R. Section 124.15(b)(1), and provided that the appeal period ended on a date certain, March 22, 2010. (*See* Final PSD Permit at 1.) The District did not provide that the appeal deadline was based on the date of service by mail, and so Section 124.20(d) is inapplicable by its terms. Moreover, the policy reason for the extra three days in case of service by mail – which is intended to protect potential petitioners' full 30 days to prepare appeals from being eroded by the time it takes to receive notice by mail – is not applicable here, since the District provided more than the minimum 30 days. (*See Town of Hampton, New Hampshire*, 10 E.A.D. at 132-34 (citing cases); *see also In re Envotech, L.P.*, 6 E.A.D. 260, 265-66 (permitting agency established that petitions for review must be received at EAB by a date certain, with no further extension because of notice by mail).) But of course, even if an extra three days were added to the March 22, 2010, deadline, a Petition received on March 30, 2010, would still be untimely.

construed.<sup>7</sup> The Board has routinely dismissed petitions where, as here, they failed to adhere scrupulously to threshold procedural requirements such as timely filing. As the Board has explained, strict compliance with this requirement is necessary in order to ensure procedural fairness and uniform application of Board's appeal provisions. "Uniform application of the requirement is necessary because of the various parties and permit that are subject to this provision and because important consequences flow from petitioning for review."<sup>8</sup> The Board should continue to adhere to this well-established rule here and should dismiss this Petition for failure to comply with the requirement of timely filing.<sup>9</sup>

The District is aware that the Board has allowed late-filed petitions for review to proceed under certain limited "special circumstances" where the tardiness was ultimately due to events that were entirely beyond the petitioner's control, for example where a late-filed petition was delayed in reaching the EAB for filing solely because of heightened security procedures to address anthrax terrorism concerns, and not because of any delay on the part of the petitioner;<sup>10</sup> where a hurricane hit the affected area during the appeal period and prevented potential petitioners from filing on time;<sup>11</sup> where a petition was received one day late because of aircraft problems experienced by the third-party overnight delivery service the petitioner had used, and where the petitioner had done everything reasonably necessary to get the petition filed on time and was prevented from doing so solely because of the delivery service's aircraft problems;<sup>12</sup> or

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<sup>7</sup> See, e.g., *Gateway Generating Station*, PSD Appeal No. 09-02, Slip Op. at 10; *Town of Marshfield, Mass.*, NPDES Appeal No. 07-03, Slip. Op. at 8; and cases cited therein.

<sup>8</sup> *Town of Hampton, New Hampshire*, 10 E.A.D. at 132 (quoting *In re Bethlehem Steel Corp.*, 3 E.A.D. 611, 613 n.9 (Adm'r 1991)).

<sup>9</sup> See also *In re B&L Plating, Inc.*, 11 E.A.D. 183, 191 (EAB 2003) (dismissing late-filed appeal because the EAB "will preserve its limited resources for parties who are diligent enough to follow its procedural rules.") (citing *In re Gary Dev. Co.*, 6 E.A.D. 526, 533-34 (EAB 1996)).

<sup>10</sup> See *In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 703 n.6 (EAB 2002).

<sup>11</sup> See *In re AES Puerto Rico L.P.*, 8 E.A.D. 315, 328 (EAB 1999), *aff'd*, *Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1<sup>st</sup> Cir. 2000).

<sup>12</sup> See *id.* at 329.

where the delay was attributable to failures the permitting authority, such as where the permitting authority mistakenly instructed the petitioner to file its petition at the wrong office<sup>13</sup> or where the permitting agency failed to properly notify members of the public who were entitled to notice of the permit.<sup>14</sup> But there are no such “special circumstances” here that rendered timely filing outside of Petitioners’ control. There have been no natural disasters or terrorism incidents that prevented Petitioners from filing on time; there is no indication that Petitioners’ delay was due to problems with a third-party delivery service; and there is no evidence that Petitioners were misinformed about the applicable filing requirements and procedures. To the contrary, the District clearly stated in the notice it provided on the issuance of the final PSD permit, in the final PSD permit itself, and in the Responses to Public Comments document, that appeals had to be actually received by the EAB in Washington D.C. by March 22, 2010, in order to be timely. (See Final PSD Permit, Crockett Decl. Exh. 1, at p. 2; Notice of Final Permit Issuance, Crockett Decl. Exh. 2; Responses to Public Comments, Crockett Decl. Exh. 3, at p. i.)<sup>15</sup> Petitioners’ failure to ensure that the Petition was received and filed by that date is solely attributable to their own delay and inattention to the filing requirements, and does not present the kind of “special circumstances” beyond Petitioners’ control that could be found to justify a late filing.

Furthermore, Petitioners’ late filing should not be excused because Petitioners are (apparently) *pro se* litigants unrepresented by counsel. Although the Board has recognized that “[a] *pro se* party . . . must be given reasonable latitude in effectuating its intent . . .,” the Board has consistently held that “[n]onetheless, a litigant who elects to appear *pro se* takes upon himself or herself the responsibility for complying with the procedural rules and may suffer adverse consequences in the event of noncompliance.”<sup>16</sup> Accordingly, Petitioners’ *pro se* status

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<sup>13</sup> See *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 123-124 (EAB 1997).

<sup>14</sup> See *In re Hillman Power Co., L.L.C.*, 10 EAD 673, 680 n. 4 (EAB 2002).

<sup>15</sup> Note also that the District provided Petitioners more than the minimum 30 days required by 40 C.F.R. Part 124 for filing their appeal, and they still did not meet the established filing deadline.

<sup>16</sup> *In re Rybond, Inc.*, 6 E.A.D. 614, 627 (EAB 1996); see also *AES Puerto Rico L.P.*, 8 E.A.D. at 329-330 (dismissing appeal of PSD permit by *pro se* petitioner Mr. Pedro J. Saade Lorens

does not excuse them from strict compliance with the Board’s timeliness and filing requirements – especially where the March 22, 2010, deadline was clearly set forth in the documentation the District issued with respect to the Final PSD Permit in a manner that any layperson could easily understand.

This point is particularly salient in this case, where Petitioners have much more experience in appealing PSD permits before this Board than a typical *pro se* petitioner, and where they have been reminded by the Board on numerous occasions of the Board’s filing requirements and of the importance of strict compliance with them. For example, when Petitioner Rob Simpson appealed the initial PSD Permit for the Russell City Energy Center in PSD Appeal No. 08-01, he e-mailed his Petition to the Clerk of the Board just as Petitioners did here.<sup>17</sup> In response, the Clerk explicitly informed him that simply e-mailing the petition is not sufficient, because the Board does not consider a document “filed” until it is actually received.<sup>18</sup> Furthermore, the District is aware of at least seven Orders issued by the Board in cases in which Mr. Simpson and his co-petitioners participated in which the Board has reminded the parties that

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(Appeal No. PSD-98-31), which was received after the filing deadline because petitioner mistakenly mailed it to the EPA regional office, not directly to the Environmental Appeals Board); *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 320-21 (EAB 1999) (rejecting argument that appellant should be excused from failure to comply with filing deadlines because, for the first failure at least, the appellant was proceeding *pro se*); *Envotech*, 6 E.A.D. at 268 n.13 (“While the Board does not expect or demand that [*pro se*] petitioner will necessarily conform to exacting and technical pleading requirements, a petitioner must nonetheless comply with the minimal pleading standards . . . .”) (citation omitted).

<sup>17</sup> See “Received via Electronic Mail – Petition for Review” (Jan. 2, 2008), Filing No. 1 in *In re Russell City Energy Center*, PSD Appeal No. 08-01.

<sup>18</sup> See e-mail message from Ms. Eurika Durr, Clerk of the Board, to Mr. Rob Simpson, Grandview Realty (Jan. 16, 2008), Filing No. 7 in *In re Russell City Energy Center*, PSD Appeal No. 08-01 (“[T]he document that you e-mailed me on January 2, 2008, was not considered ‘filed’. The Board does not consider a petition for review to be ‘filed’ until the hard copy is actually received by mail. . . . For more information about the Board’s filing procedures, please refer to the Environmental Appeals Board Home Page at [www.epa.gov/eab](http://www.epa.gov/eab) at the NOTICE paragraph.”).



documents are not considered filed with the Board until the date they are actually received.<sup>19</sup> Mr. Simpson has also been copied on the standard schedule letters sent by the Clerk of the Board to the respondent agency in each of these cases, which clearly explains the Board’s filing requirements. And in the most recent case – in which Petitioners CARE and Robert Sarvey sought to intervene – the Board declined to consider Mr. Simpson’s reply brief as properly filed because he failed to submit a hard copy to the clerk by the filing deadline as required by the Board’s rules.<sup>20</sup> Under the circumstances, Petitioners cannot claim an innocent misunderstanding of the Board’s filing requirements.<sup>21</sup> To the contrary, they had more than

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<sup>19</sup> See Order Dismissing Petition for Review, *In re Gateway Generating Station*, PSD Appeal No. 09-02, slip. op. at 3 n. 5 (EAB Sept. 15, 2009) (“Documents are considered filed on the date they are received by the Board . . . .”); Order Denying Review, *In re Humboldt Bay Repowering Project*, PSD Appeal No. 08-08, slip. op. at 1 n. 2 (EAB Dec. 10, 2008) (“Documents are ‘filed’ with the Board on the date they are *received*.”) (emphasis in original); Order Requiring Replies, *In re Humboldt Bay Repowering Project*, PSD Appeal No. 08-08, slip. op. at 1 n. 2 (EAB Nov. 25, 2008) (“Documents are ‘filed’ with the Board on the date they are *received*.”) (emphasis in original); Order Extending Time To File Response, *In re Humboldt Bay Repowering Project*, PSD Appeal No. 08-08, slip. op. at 1 n. 1 (EAB Nov. 3, 2008) (“Documents are ‘filed’ with the Board on the date they are *received*.”) (emphasis in original); Order Extending Time To File Response, *In re Russell City Energy Center*, PSD Appeal No. 08-07, slip. op. at 1 n. 1 (EAB Nov. 3, 2008) (“Documents are ‘filed’ with the Board on the date they are *received*.”) (emphasis in original); Order Requiring Response, *In re Russell City Energy Center*, PSD Appeal No. 08-01, slip. op. at 2 n. 1 (EAB Feb. 14, 2008) (“Documents are ‘filed’ with the Board on the date they are *received* by the Clerk of the Board.”) (emphasis in original); Order Denying Motion for Continuance And Granting Motion For Extension of Time To File Response, *In re Russell City Energy Center*, PSD Appeal No. 08-01, slip. op. at 2 n. 1 (EAB Jan. 29, 2008) (“Documents are ‘filed’ with the Board on the date they are *received* by the Clerk of the Board.”) (emphasis in original).

<sup>20</sup> See Order Dismissing Petition for Review, *In re Gateway Generating Station*, PSD Appeal No. 09-02, slip. op. at p. 3 & nn. 5 and 17 (EAB Sept. 15, 2009) (“As noted before . . . the Board does not treat the reply brief as filed.”). Mr. Simpson’s co-petitioners in this case, CARE and Robert Sarvey, sought leave to intervene in the Gateway appeal. See Motion to Intervene of Californians for Renewable Energy, Inc. (CARE) and Robert Sarvey (July 16, 2009), Docket No. 43, *In re Gateway Generating Station*, PSD Appeal No. 09-02. The Board declined to rule on their motion to intervene because it dismissed the appeal, but it served a copy of its dismissal order – with the language about the importance of complying with the Board’s filing requirements – on CARE and Mr. Sarvey. See Certificate of Service, Order Dismissing Petition for Review, *In re Gateway Generating Station*, PSD Appeal No. 09-02 (EAB Sept. 15, 2009).

<sup>21</sup> Note that Petitioners have represented to the Board that Mr. Simpson is a member in good standing of CARE. (See Motion to Intervene of Californians for Renewable Energy, Inc.

sufficient notice that their Petition had to be received by the EAB by March 22, 2010, in order to be considered timely, but they failed to take adequate measures to ensure that the Petition was properly received and filed by that date.

The District does note that Petitioners apparently made some efforts to submit their Petition for Review to the Board by e-mail before March 30, 2010. But these efforts fell far short of what the Board requires for filing; and in any event, even if they had been sufficient to effect the filing, they still failed to meet the March 22, 2010 filing deadline. Specifically, the undersigned counsel for the District was copied on an e-mail message from Mr. Michael Boyd, president of Petitioner CARE, to Ms. Eurika Durr, Clerk of the Environmental Appeals Board, attaching what appears to be the Petition in an electronic word-processing format. (See Crockett Decl., ¶ 4 and Exh. 4.) The District presumes that this e-mail attachment may be the source of the Petition for Review that was filed as Docket Entry No. 5, which is a PDF version of the Petition and which is listed as having been filed on March 23, 2010. But simply e-mailing a word-processing document to the Clerk of the Board is not sufficient to satisfy the Board's filing requirements, as Petitioners are well aware from Mr. Simpson's experience in the appeal of the initial Russell City permit in 2008 as well as from other recent experience as described above. (See E-mail message from Ms. Eurika Durr, Clerk of the Board, to Mr. Rob Simpson, Grandview Realty (Jan. 16, 2008), Filing No. 7 in *In re Russell City Energy Center*, PSD Appeal No. 08-01.)

Moreover, simply e-mailing a word processing document to the Clerk is not sufficient even under the Board's recently-adopted Standing Order authorizing electronic filing in permit appeals. The Standing Order explicitly requires that a petitioner must use EPA's CDX electronic submission portal in order to file electronically in lieu of submitting a paper copy, and it states very clearly that "[s]ending a document directly to the Board via e-mail, rather than through the

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(CARE) and Robert Sarvey (July 16, 2009), *In re Gateway Generating Station*, PSD Appeal No. 09-02, Docket No. 43, at p. 1.) Mr. Simpson's knowledge of and experience with the Board's procedures is therefore fairly imputable to all Petitioners, to the extent that CARE and Mr. Sarvey's prior participation in their own right in EAB proceedings has not been quite as extensive as Mr. Simpson's. (Note also that Mr. Sarvey is CARE's treasurer. *Id.* at p. 4.)

CDX portal, does not constitute electronic filing unless otherwise specified by the Board.”<sup>22</sup> (This statement also appears very clearly on the EAB’s web page regarding electronic submissions under the Standing Order.) If Petitioners would like to avail themselves of the convenience of electronic filing, they bear the responsibility of following the Board’s established procedures for doing so. Furthermore, even if this e-mail submission to the Clerk could be construed as the equivalent of a filing through the CDX portal – or even if Docket Entry No. 5 was from an actual CDX submission that complied with the Standing Order that for some reason is not indicated on the docket web page – the submission would still not be sufficient to establish timeliness because it was not received until March 23, 2010, as shown by the filing date listed for Docket Entry No. 5.<sup>23</sup>

For all of these reasons, even if the Board were to look to Petitioners’ March 23, 2010, efforts for evidence of timeliness instead of actual receipt of their Petition on March 30, 2010, the Petition would still be untimely. Petitioners simply failed to ensure that their Petition complied with the important threshold procedural requirement of timely filing, and as a result the Petition should be dismissed.<sup>24</sup> There is no reason why Petitioners should not be held to the same strict procedural standards in appealing this permit that they have demanded from the District in issuing it.<sup>25</sup>

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<sup>22</sup> See Order Authorizing Electronic Filing In Proceedings Before The Environmental Appeals Board Not Governed By 40 C.F.R. Part 22 (EAB Jan. 28, 2010) at 3.

<sup>23</sup> Note that Petitioners’ e-mail message was not sent until well after close of business on March 22, 2010, and was not even sent until after the deadline that would apply for CDX filing under the Standing Order, which is 11:59 p.m. Eastern Time. (*See id.* at 2.) The e-mail was sent at 9:06 p.m. California time (*see* Crockett Decl., Exh. 4), which was after midnight in Washington, D.C.

<sup>24</sup> *AES Puerto Rico*, 8 E.A.D. at 328 (“It is a petitioner’s responsibility to ensure that filing deadlines are met . . .”).

<sup>25</sup> The District also observes that if the CARE/Simpson/Sarvey Petition in PSD Appeal No. 10-05 is dismissed, there will still be several other Petitions for Review of this PSD permit that have been timely filed that raise many of the same substantive issues. The Board has noted similar situations where other timely-filed petitions properly raised similar concerns in dismissing other untimely appeals in the past. *See, e.g., In re AES Puerto Rico, L.P.*, 8 E.A.D. 324, 330 n. 7 (EAB 1999); *In re Envotech*, 6 E.A.D. 260, 266 n. 10 (EAB 1996).

**CONCLUSION**

For the foregoing reasons, the Petition for Review in PSD Appeal No. 10-05 should be DISMISSED.

Dated: April 8, 2010

Respectfully Submitted

BRIAN C. BUNGER, ESQ.  
DISTRICT COUNSEL  
BAY AREA AIR QUALITY  
MANAGEMENT DISTRICT

\_\_\_\_\_/s/\_\_\_\_\_  
By: Alexander G. Crockett Esq.  
Assistant Counsel

**PROOF OF SERVICE**

I, Mildred Cabato, declare as follows:

I am over the age of 18, not a party to this action, and employed in the City and County of San Francisco, California, at 939 Ellis Street, San Francisco, CA 94109.

On the date set forth below, I served this document, **“Response To Petition For Review Requesting Summary Dismissal”**, by placing a copy of it in a sealed envelope, with First Class postage thereon fully paid, and depositing said envelope in the United States Mail at San Francisco, California, addressed to the person set forth below:

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I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on April 8, 2010, at San Francisco, California.

\_\_\_\_\_  
/s/  
Mildred Cabato