

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

In re:

Russell City Energy Center

PSD Permit No. 15487

) PSD Appeal No. 10-07 (Karen D. Kramer,
) Petitioner)

) [Related to PSD Appeals No. 10-01, 10-02,
) 10-03, 10-04, 10-05, & 10-06.]
)

**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 Petitioner Karen D. Kramer in PSD Appeal No. 10-07. As explained herein, this Petition should be summarily dismissed because (i) it was not timely filed and (ii) because it does not set forth with specificity any grounds on which the Board could grant review.

BACKGROUND

The District issued the PSD Permit that is the subject of this Petition for Review on February 3, 2010. (*See* Final PSD Permit, Exh. 1 to Declaration of Alexander G. Crockett In Support of Responses Requesting Summary Dismissal (hereinafter, “Crockett Decl.”).) At the time of issuance, the District established an effective date of the permit of March 22, 2010. This effective date gave interested members of the public until March 22, 2010 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 any appeals, and it expressly stated that Petitions for Review must be actually received by the EAB by that date. (*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.) Petitioner did not file her Petition for review during that time period, however. Petitioner’s Petition for Review of the permit was not received by

and filed with the Environmental Appeals Board until March 24, 2010. (Petition for Review 10-07, Docket Entry No. 7.¹)

The Petition for Review that Petitioner filed on March 24, 2010, consists of just over one page of text stating generalized objections to the Russell City Energy Center. The Petition claims that because of existing sources of air pollution in the vicinity of the facility, residents in the area have elevated rates of asthma, coronary heart disease, and congestive obstructive pulmonary disease compared to the rest of the county. (Petition 10-07 at 1.) The Petition also claims that residents are socioeconomically more heavily impacted by “other stressors; such as noise, pollution, and FEAR of nearby huge power plants.” (*Id.*) The Petition also implies that electrical generating capacity may be “overbuilt” and that the facility may not be needed; and that new CO₂-emitting facilities are a “step back”. (*Id.*)

Notably, the Petition does not cite any condition of the Final PSD Permit that Petitioner believes was erroneously implemented, and does not cite any element of the federal PSD program that it alleges the District may have mis-applied in issuing the Final PSD Permit. It similarly does not identify any area in which Petitioner may have submitted comments on the draft permit where Petitioner believes that the District did not provide an adequate response. The Petition simply concludes with the request “DO NOT PERMIT THIS.” (*Id.*)

STANDARD OF REVIEW

The Environmental Appeals Board may review a permit decision under 40 C.F.R. Section 124.19(a) if it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. (*See* 40 C.F.R. § 124.19(a).)

Before considering the merits of a permit appeal, however, the Board must first ensure that the petitioner has satisfied the important jurisdictional prerequisites to EAB review,

¹ The March 24, 2010, filing date is indicated both by the docketing information on the EAB’s docket website in this matter and by the “received” date stamp on the Petition itself.

including timeliness, standing, preservation of issues for review, and articulation of the challenged permit conditions with sufficient specificity.² The burden rests with the petitioner to show that these procedural requirements have been satisfied sufficient to warrant review³ by “includ[ing] specific information supporting their allegations.”⁴ The Board has made clear that it “strictly construes” these threshold procedural requirements.⁵ In doing so, it 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 Petition has not satisfied the minimum prerequisites for a permit appeal, the Board must decline review.

**THE EAB SHOULD DISMISS THE PETITION AS UNTIMELY,
AND ALSO BECAUSE IT DOES NOT SPECIFICALLY ALLEGE ANY ERROR BY
THE DISTRICT RELATED TO ANY PSD PERMITTING REQUIREMENT**

The Environmental Appeals Board should summarily dismiss the Petition (i) because it was not timely filed and (ii) because it does not set forth with any specificity whatsoever any grounds on which it seeks review. The Petition should be dismissed for failure to satisfy these important and mandatory threshold procedural prerequisites for EAB review under 40 C.F.R. Section 124.19.

I. The Petition Should Be Dismissed 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 received and filed by the Environmental Appeals Board until March 24,

² See *In re Beeland Group, LLC*, UIC Appeal No. 08-02, 14 E.A.D. ___, Slip. Op. at 9 (EAB Oct. 3, 2008).

³ 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).

⁴ *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999).

⁵ *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).

2010, which was after the end of the appeals period, which closed on March 22, 2010.⁶

Petitioner has failed to satisfy the basic procedural requirements necessary to have her Petition for Review considered by the Environmental Appeals Board under 124.19. The Environmental Appeals Board should dismiss this Petition as untimely.

The Board has made clear on numerous occasions that threshold procedural requirements, such as timely filing of petitions for review, should be strictly construed.⁷ 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."⁸ The Board should continue to adhere to this

⁶ 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 In re Town of Hampton, New Hampshire*, 10 E.A.D. 131, 132-34 (EAB 2001) (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).)

⁷ *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.

⁸ *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)).

well-established rule here and should dismiss this Petition for failure to comply with the requirement of timely filing.⁹

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;¹⁰ where a hurricane hit the affected area during the appeal period and prevented potential petitioners from filing on time;¹¹ where a petition was received one day late because of aircraft problems experienced by the third-party overnight delivery service the petition 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;¹² or where the delay was attributable to failures the permitting authority, such as where the permitting authority mistakenly instructed the petitioner to file its petition with the wrong person¹³ or where the permitting agency failed to properly notify members of the public who were entitled to notice of the permit.¹⁴ But 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

⁹ 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)).

¹⁰ See *Avon Custom Mixing*, 10 E.A.D. at 703 n.6.

¹¹ 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 (1st Cir. 2000).

¹² See *id.* at 329.

¹³ See *Kawaihae Cogeneration Project*, 7 E.A.D. at 123-24 (EAB 1997).

¹⁴ See *In re Hillman Power Co., L.L.C.*, 10 E.A.D. 673, 680 n. 4 (EAB 2002).

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 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.)¹⁵ Petitioner’s failure to file by the deadline was entirely within her own control, and she should therefore not be excused from complying with this important threshold procedural requirement.

II. The Petition Should Be Dismissed Because It Fails To Allege Any Defect In The Permit With Any Specificity Whatsoever

In addition to the requirement that petitions for review must be timely filed, the Board also requires that petitions set forth with specificity grounds for EAB review. As the Board has explained, in order to meet the standard of specificity, the Petition must at a minimum contain “two essential components: (1) clear identification of the conditions of the permit that [are at] issue, and (2) argument that the conditions warrant review.”¹⁶ Petitioner’s one-page Petition stating “DO NOT PERMIT THIS” fails to satisfy these requirements.

First, the Petition fails to identify a single condition in the Permit that it claims is defective because of any of the issues discussed in the Petition. To the contrary, the Petition simply presents generalized concerns about residents’ health, questions the need for additional electrical generation capacity in general, and asserts generally that additional CO₂ emissions are a “step back”. (Petition 10-07 at 1.) The Board has recognized that petitions for review such as this, which do not discuss how permit terms could be inadequate as a result of the issues raised in

¹⁵ Note also that the District provided Petitioner more than the minimum 30 days required by 40 C.F.R. Part 124 for filing their appeal, but the Petition was still not filed on time.

¹⁶ *Beeland*, UIC Appeal No. 08-02, 14 E.A.D. ___, Slip. Op. at 9 (quoting *In re Puna Geothermal Venture*, 9 E.A.D. 243, 274 (EAB 2000)).

the petition, “fall far short” of satisfying the specificity requirement.¹⁷ As the Board has explained, “generalized concerns that are not tied to particular permit terms are not suitable for Board review.”¹⁸

Second, the Petition fails to provide any specific argument as to why the Permit warrants review. The Board’s requirement is clear that “[i]n order to establish that review of a permit is warranted, a petitioner must, pursuant to section 124.19(a), both state the objections to the permit that are being raised for review *and explain why the permit decision maker’s . . . basis for the decision . . . is clearly erroneous or otherwise warrants review.*”¹⁹ Here, Petitioner is essentially just objecting to the project *per se*, rather than providing any concrete reasoning as to how the District’s PSD permitting analysis may be flawed. As the Board has made clear, general statements of concern about a project, “rather than specific arguments as to why the [permitting agency’s] responses are erroneous or an abuse of discretion,” are not enough to satisfy the jurisdictional prerequisites for Board review.²⁰

For both of these reasons, the Petition fails to satisfy the Board’s minimum standards for specificity and thus fails to satisfy the threshold procedural requirements for EAB review.

¹⁷ *In re Knauf Fiber Glass GmbH*, 9 E.A.D. 1, 6 (EAB 2000) (Petitions failing to identify any permit conditions being challenged failed to satisfy the specificity requirement, and others that alluded to relevant issues were inadequate where they did specifically discuss why the permitting agency’s responses on these issues were incorrect or inadequate, because the Board “must insist that minimum specificity standards are adhered to.”)

¹⁸ *Beeland*, UIC Appeal No. 08-02, 14 E.A.D. ___, Slip. Op. at 24 (quoting *In re American Soda*, 9 E.A.D. 280, 295 n. 17 (EAB 2000)).

¹⁹ *Encogen Cogeneration Facility*, 8 E.A.D. at 251-52 (emphasis added) (citing *Kawaihae Cogeneration Project*, 7 E.A.D. at 114, *In re Puerto Rico Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995), & *In re Genesee Power Station, L.P.*, 4 E.A.D. 832, 866 (EAB 1993)); *see also In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999).

²⁰ *See Beeland*, UIC Appeal No. 08-02, 14 E.A.D. ___, Slip. Op. at 15 (citing 40 C.F.R. § 124.19; *In re Puna Geothermal Venture*, 9 E.A.D. 243, 274 (EAB 2000)); *see also Sutter Power Plant*, 8 E.A.D. at 691-92 (denying review where the petition contained only “very general, unsupported statements that do not allege particular error or errors on [the permitting agency’s] part”).

Accordingly, even if the Petition had been timely filed, the Board should still dismiss it because it does not present any specific grounds for review under Section 124.19.²¹

III. Although Petitions By *Pro Se* Petitioners May Be Read Broadly, The Petition Still Fails To Satisfy The Minimum Requirements For EAB Review.

Finally, the District submits that the Petition's failure to satisfy these threshold procedural defects should not be excused because Petitioner is (apparently) a *pro se* litigant 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."²² Accordingly, Petitioner's *pro se* status does not excuse her from her burden of having to satisfy the threshold procedural requirements for EAB review. This point is especially salient with respect to the failure to timely file the Petition before the March 22, 2010, as the 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. (*See*

²¹ Furthermore, in a PSD permit appeal the Environmental Appeals Board can review only issues relevant to the Federal PSD permitting program and the requirements pertaining thereto set forth in 40 C.F.R. Section 52.21. *See Sutter Power Plant*, 8 E.A.D. at 685; *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 127, 161 (EAB 1999). Thus even if Petitioner had articulated and supported any of her concerns that have given rise to this Petition with any degree of specificity, the Board would still be required to dismiss the Petition for lack of jurisdiction under Section 124.19, because concerns about existing health problems and socioeconomic stressors, need for electrical generating capacity, and CO₂ emissions are not elements of the PSD permitting review.

²² *In re Rybond, Inc.*, 6 E.A.D. 614, 627 (EAB 1996); *see also AES Puerto Rico*, 8 E.A.D. at 329-30 (dismissing appeal of PSD permit by *pro se* petitioner Mr. Pedro J. Saade Lorens (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).

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.) (explaining that appeals had to be received by the EAB by March 22, 2010 to be considered timely.) There is no reason why Petitioner should not have been able to understand this deadline, regardless of whether or not she was represented by counsel. And with respect to the specificity requirement, the Board has made clear that even with *pro se* petitioners it “nonetheless does expect such petitions to provide sufficient specificity to apprise the Board of the issues being raised,” and it “expects the petitions to articulate some supportable reason or reasons as to why the permitting authority erred or why review is otherwise warranted.”²³ Here, even the broadest reading of the Petition fails to meet these minimum standards. Thus even giving this Petition the broadest possible reading in recognition of Petitioner’s *pro se* status, the Petition still must be dismissed for failure to comply with threshold procedural requirements.

²³ *Sutter Power Plant*, 8 E.A.D. at 687-88 (citing *In re Puerto Rico Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995) and *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 19 (EAB 1994)); *see also Encogen Cogeneration Facility*, 8 E.A.D. at 249 (although the Board broadly construes petitions filed without the aid of legal counsel, “the burden of demonstrating that review is warranted nonetheless inevitably rests with the petitioner challenging the permit decision.”) (citing 40 C.F.R. § 124.19(a) and EAB caselaw); *In re Knauf Insulation, GmbH*, PSD Appeal No. 06-01 through 06-06, Slip Op. at 6 n. 4 (EAB Nov. 14, 2006); *In re Diamond Wanapa I, L.P.*, PSD Appeal No. 05-06 Slip Op. at 15-16 n. 13 (EAB Feb. 9, 2006).

CONCLUSION

For the foregoing reasons, the Petition for Review in PSD Appeal No. 10-07 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:

Andy Wilson
California Pilots Association
P.O. Box 6868
San Carlos, CA 94070-6868

Jewell J. Hargleroad, Esq.
Law Office of Jewell Hargleroad
1090 B Street, No. 104
Hayward, CA 94541

Helen H. Kang, Esq.,
Kelli Shields, Patrick Sullivan, and
Lucas Williams, Esq.
Environmental Law and Justice Clinic
Golden Gate University School of Law
536 Mission Street
San Francisco, CA 94105

Lynne Brown
California for Renewable Energy, Inc.
24 Harbor Road
San Francisco, CA 94124

Robert Sarvey
501 W. Grantline Rd.
Tracy, CA 95376

Michael E. Boyd, President
CALifornians for Renewable Energy, Inc.
5439 Soquel Drive
Soquel, CA 95073

Juanita Gutierrez
2236 Occidental Road
Hayward, CA 94545

Karen D. Kramer
2215 Thayer Ave.
Hayward, CA 94545

Kevin P. Poloncarz, Esq.
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA, 94111

Rob Simpson
27126 Grandview Avenue
Hayward, CA 94542

