

**STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**ANITA DAVIS and MORRIS DAVIS,**

**Petitioners,**

**vs.**

**OGC CASE NO. 08-2688**

**BIOMASS GAS AND ELECTRIC OF  
TALLAHASSEE, LLC, and  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION,**

**Respondents.**

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**ORDER DISMISSING PETITION WITH LEAVE TO AMEND**

On November 12, 2008, the Department of Environmental Protection (Department) received a petition for administrative hearing (Petition) from the Petitioners, Anita Davis and Morris Davis (Petitioners). The Petitioners challenge the Department's decision to issue Permit No. 0730109-001-AC to Biomass Gas and Electric of Tallahassee, LLC, to construct a biomass-fed integrated gasification and combined cycle unit alternative energy facility in Leon County, Florida.

The Petitioners state that they received notice of the Department's action on October 28, 2008; however, the Department's records indicate that Petitioners received notice on October 27, 2008. See Exhibit 1. Rule 62-110.106(3), Florida Administrative Code (F.A.C.), and the notice provided to the Petitioners require that persons whose substantial interests are affected by the agency's decision must file a petition for an administrative determination (hearing) in the

Department's Office of General Counsel within 14 days for Chapter 403, Florida Statutes (F.S.), permits. The applicable time period for Petitioners to petition ended on November 10, 2008.

Rule 62-110.106(3)(b), F.A.C., provides that the failure to file a petition within the applicable time period constitutes a waiver of any right to request an administrative proceeding under Chapter 120, F.S. The Petitioners' failure to timely file a petition in this proceeding constitutes such a waiver of their right to request an administrative proceeding under Chapter 120, F.S. Therefore, the Petition must be dismissed as required by Section 120.569(2)(c), F.S.

Nevertheless, principles of administrative due process and equity, as well as the Florida Administrative Procedure Act, require that an agency provide an opportunity to explain the reasons why a request for administrative hearing should be considered timely, or its untimeliness excused, before the agency can consider denying such request and dismissing the case. *See* Section 120.569(2)(c), F.S. (2008); *See also Phillip v. Univ. of Florida*, 680 So. 2d 508, 509 (Fla. 1st DCA 1996); *Castillo v. Dept. of Admin., Div. of Retirement*, 593 So. 2d 1116, 1117 (Fla. 2nd DCA 1992); and *Carter v. Vickers*, 22 F.A.L.R. 2814 (Fla. DEP 2000) (the Department's "timeliness" decision controlling in this matter). Accordingly, the Petitioners will be given an opportunity to file an amended petition showing why their Petition is timely, should be considered timely, or its untimeliness excused.

In addition, the Petition does not comply with Rule 28-106.201(2), F.A.C., or the notice provided to the Petitioners, which explain what must be included in a petition for an administrative proceeding. Therefore, the Petition does not contain sufficient information to enable the Department to determine whether a formal administrative proceeding should be held. Specifically, the Petition does not include:

- (a) A statement of the specific rules or statutes that the Petitioners contend require reversal or modification of the Department's proposed decision, including an explanation of how the alleged facts relate to the specific rules or statutes.

Without this information, the Petition under consideration in this order must be dismissed as required by Section 120.569(2)(c), F.S.

IT IS THEREFORE ORDERED:

A. The Petition is DISMISSED as being untimely filed. This dismissal is without prejudice to the Petitioners filing an amended petition showing why the Petition dismissed in this order should be considered timely. Any amended petition must comply with all the requirements of Rule 28-106.201(2), F. A. C.

B. The amended petition must be filed (received) in the Office of General Counsel, Department of Environmental Protection, 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, by the close of business (5pm) on December 4, 2008.

C. This order constitutes final agency action of the Department, unless a timely amended petition is filed in compliance with this order.

*(The remainder of this page is left intentionally blank.)*

Any party to this proceeding has the right to seek judicial review of this order under Section 120.68, Florida Statutes, by the filing of a notice of appeal under Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, and by filing a copy of the notice of appeal accompanied by the applicable filing fees with the appropriate district court of appeal. The notice of appeal must be filed within thirty days after the date this order is filed with the clerk of the Department.

DONE AND ORDERED this 20th day of November, 2008, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION



THOMAS M. BEASON

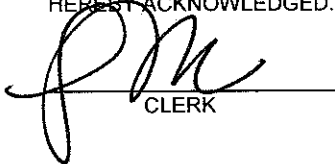
General Counsel

3900 Commonwealth Boulevard

Mail Station

Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52,  
FLORIDA STATUTES, WITH THE DESIGNATED  
DEPARTMENT CLERK, RECEIPT OF WHICH IS  
HEREBY ACKNOWLEDGED.



CLERK

11/20/08  
DATE

**CERTIFICATE OF SERVICE**

I CERTIFY that a true copy of the foregoing, Order Dismissing Petition with Leave to Amend, was sent via United States Postal Service to the following on this 20<sup>th</sup> day of November, 2008:

Anita and Morris Davis  
708 Bragg Drive  
Tallahassee, FL 32305

and via electronic mail to:

Angela Morrison Uhland  
123 South Calhoun Street  
Post Office Box 6526  
Tallahassee, FL 32314  
[AUhland@hgslaw.com](mailto:AUhland@hgslaw.com)

*Attorney for Biomass Gas and  
Electric of Tallahassee, LLC*



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RONDA L. MOORE  
Assistant General Counsel  
3900 Commonwealth Boulevard  
Mail Station 35  
Tallahassee, Florida 32399-3000  
Telephone: (850) 245-2193  
Facsimile: (850) 245-2302

cc via electronic mail:  
Trina Vielhauer – DEP  
Al Linero – DEP

**Moore, Ronni**

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**From:** ANITA & MORRIS DAVIS [mailto:anitald@embarqmail.com]  
**Sent:** Monday, October 27, 2008 1:11 PM  
**To:** Livingston, Sylvia  
**Subject:** Re: BG & E OF TALLAHASSEE, LLC - TALLAHASSEE RENEWABLE ENERGY CENTER; 0730109-001-AC

Received documents

Anita Davis, FCAN/Jake Gaither Community Center

----- Original Message -----

**From:** "Sylvia Livingston" <Sylvia.Livingston@dep.state.fl.us>  
**To:** glenn@biggreenenergy.com  
**Cc:** "Dick Fancher" <Dick.Fancher@dep.state.fl.us>, sosbourn@golder.com, "forney kathleen" <forney.kathleen@epamail.epa.gov>, "Abrams Heather" <Abrams.Heather@epa.gov>, saulsj@leoncountyfl.gov, proctorb@leoncountyfl.gov, "john marks" <john.marks@talgov.com>, "anita favors thompson" <anita.favors.thompson@talgov.com>, "Victoria Gibson" <Victoria.Gibson@dep.state.fl.us>, gibbyj@earthlink.net, hopeforcleanwater@yahoo.com, daswim@gmail.com, joecain1@comcast.net, ronsaff@aol.com, salters@magnet.fsu.edu, sth@magnet.fsu.edu, hluebkmann@comcast.net, shereitte@gmail.com, "richard gragg" <richard.gragg@fam.u.edu>, richardgraggi@mac.com, bobfulford@nettally.com, anitald@embarqmail.com, susiecaplowe@comcast.net, dave@no-burn.org, bradley@greenaction.org, nseldman@ilsr.org, dmellman@post.harvard.edu, ring@tampabay.rr.com, "Alvaro Linero" <Alvaro.Linero@dep.state.fl.us>, "David Read" <David.Read@dep.state.fl.us>, "Trina Vielhauer" <Trina.Vielhauer@dep.state.fl.us>, "Elizabeth Walker (AIR)" <Elizabeth.Walker@dep.state.fl.us>  
**Sent:** Monday, October 27, 2008 12:52:16 PM (GMT-0500) America/New\_York  
**Subject:** BG & E OF TALLAHASSEE, LLC - TALLAHASSEE RENEWABLE ENERGY CENTER; 0730109-001-AC

Dear Sir/ Madam:

Attached is the official **Notice of Draft Permit** for the project referenced below. Click on the link displayed below to access the permit project documents and send a "reply" message verifying receipt of the document(s) provided in the link; this may be done by selecting "Reply" on the menu bar of your e-mail software, noting that you can view the documents, and then selecting "Send". We must receive verification that you are able to access the documents. Your immediate reply will preclude subsequent e-mail transmissions to verify accessibility of the document(s).

**Click on the following link to access the permit project documents:**

[http://ARM-PERMIT2K.dep.state.fl.us/adh/prod/pdf\\_permit\\_zip\\_files/0730109.001.AC.D\\_pdf.zip](http://ARM-PERMIT2K.dep.state.fl.us/adh/prod/pdf_permit_zip_files/0730109.001.AC.D_pdf.zip)

Additional project information can be found at [www.dep.state.fl.us/Air/permitting/construction/tallahassee.htm](http://www.dep.state.fl.us/Air/permitting/construction/tallahassee.htm)

**Owner/Company Name:** BG and E OF TALLAHASSEE, LLC

**Facility Name:** TALLAHASSEE RENEWABLE ENERGY CENTER

**Project Number:** 0730109-001-AC

**Permit Status:** DRAFT

**Permit Activity:** CONSTRUCTION/ Biomass Integrated Gasification and Combined Cycle Unit

**Facility County:** LEON

The Bureau of Air Regulation is issuing electronic documents for permits, notices and other correspondence in lieu of hard copies through the United States Postal System, to provide greater service to the applicant and the engineering community. Access these documents by clicking on the link provided above, or search for other project documents using the "Air Permit Documents Search" website at <http://www.dep.state.fl.us/air/eproducts/apds/default.asp>.

Permit project documents addressed in this email may require immediate action within a specified time frame. Please open and review the document(s) as soon as possible, and verify that they are accessible. Please advise this office of any changes to your e-mail address or that of the Engineer-of-Record. If you have any problems opening the documents or would like further information, please contact the Florida Department of Environmental Protection, Bureau of Air Regulation at (850)488-0114.

<<BGECOVER.pdf>> <<BGEINTENT.pdf>>

Sylvia Livingston  
Bureau of Air Regulation  
Division of Air Resource Management (DARM)  
850/921-0771  
[sylvia.livingston@dep.state.fl.us](mailto:sylvia.livingston@dep.state.fl.us)

*The Department of Environmental Protection values your feedback as a customer. DEP Secretary Michael W. Sole is committed to continuously assessing and improving the level and quality of services provided to you. Please take a few minutes to comment on the quality of service you received. Simply click on [this link to the DEP Customer Survey](#). Thank you in advance for completing the survey.*