

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

BOB FULFORD,

Petitioner,

vs.

OGC CASE NO. 08-2726

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

Respondents.

ORDER DISMISSING PETITION WITH LEAVE TO AMEND

On November 17, 2008, the Department of Environmental Protection (Department) received a petition for administrative hearing (Petition) from the Petitioner, Bob Fulford. The Petitioner challenges the Department's decision to issue Permit No. 0730109-001-AC to Biomass Gas and Electric of Tallahassee, LLC (BG&E), to construct a biomass-fed integrated gasification and combined cycle unit alternative energy facility in Leon County, Florida.

The Petitioner states that he received notice of the Department's action by publication in the local newspaper. BG&E published the Notice of Intent to Issue Draft Air Construction Permit in the Tallahassee Democrat on November 4, 2008. If the Petitioner had received notice of the Department's action through the local newspaper Petitioner's Petition would be considered timely, however, the Department's records show that the Petitioner received notice of the Department's action by certified mail on October 29, 2008. See Exhibit I. The Department mailed its action to Petitioner because Petitioner was unable to open the Department's direct

notice of agency action sent to Petitioner on October 27, 2008 via electronic mail. See Exhibit 2. Rule 62-110.106(3), Florida Administrative Code (F.A.C.), and the notice provided to the Petitioner requires that a person 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 Petitioner to petition ended on November 12, 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 Petitioner's 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 Petitioner will be given an opportunity to file an amended petition showing why his Petition was 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 Petitioner, 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 Petitioner contends 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 Petitioner 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.

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

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.

PM
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 day of November, 2008:

Bob Fulford
231 Westridge Drive
Tallahassee, FL 32304

and via electronic mail to:

Angela Morrison Uhland
123 South Calhoun Street
Post Office Box 6526
Tallahassee, FL 32314
AUhland@hgslaw.com

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



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

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Bob Fulford
231 Westridge Dr.
Tallahassee, FL 32304

COMPLETE THIS SECTION ON DELIVERY

A. Signature: [Signature] Agent Addressee

B. Received by (Printed Name) BOB FULFORD C. Date of Delivery 10/29/06

D. Is delivery address different from item 1? Yes
If YES, enter delivery address below: No

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

2. Article Number (Transfer from service label) 7005 1160 0004 3034 5759

Moore, Ronni

From: Livingston, Sylvia
Sent: Tuesday, November 18, 2008 1:18 PM
To: Moore, Ronni
Subject: FW: BG & E OF TALLAHASSEE, LLC - TALLAHASSEE RENEWABLE ENERGY CENTER; 0730109-001-AC

Sylvia Livingston
Bureau of Air Regulation
Division of Air Resource Management (DARM)
850/921-9506
GIC 257
sylvia.livingston@dep.state.fl.us

From: Bob Fulford [<mailto:bobfulford@nettally.com>]
Sent: Monday, October 27, 2008 2:59 PM
To: Livingston, Sylvia
Subject: Re: BG & E OF TALLAHASSEE, LLC - TALLAHASSEE RENEWABLE ENERGY CENTER; 0730109-001-AC

Oops. Sorry.

231 Westridge Dr.
City
32304

PS I discovered why I could not download the recommended version of Acrobat. My system is too old. Windows 98

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

From: Livingston, Sylvia
To: Bob Fulford
Sent: Monday, October 27, 2008 1:44 PM
Subject: RE: BG & E OF TALLAHASSEE, LLC - TALLAHASSEE RENEWABLE ENERGY CENTER; 0730109-001-AC

Mr. Fulford,

Please send me your mailing address and I'll send it to you via certified mail.

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

From: Bob Fulford [<mailto:bobfulford@nettally.com>]
Sent: Monday, October 27, 2008 2:19 PM

To: Livingston, Sylvia

Subject: Re: BG & E OF TALLAHASSEE, LLC - TALLAHASSEE RENEWABLE ENERGY CENTER; 0730109-001-AC

I have, or thought I had, all versions of the various "acrobat"....one loaded just this morning in fact. I will attempt to load the one you have informed me of.

Meanwhile if you would be so kind as to send a copy by mail that would be very much appreciated.

Thank you.

Bob Fulford

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

From: Livingston, Sylvia

To: Bob Fulford

Sent: Monday, October 27, 2008 12:59 PM

Subject: RE: BG & E OF TALLAHASSEE, LLC - TALLAHASSEE RENEWABLE ENERGY CENTER; 0730109-001-AC

Mr. Fulford,

Do you have Adobe Acrobat installed on your computer? The documents are in Adobe Portable Document Format (pdf). Adobe Acrobat Reader can be downloaded for free at the following internet site:
<<http://www.adobe.com/products/acrobat/readstep.html>> . Otherwise, I can send this to you by certified mail.

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

From: Bob Fulford [<mailto:bobfulford@nettally.com>]

Sent: Monday, October 27, 2008 1:44 PM

To: Livingston, Sylvia

Subject: Re: BG & E OF TALLAHASSEE, LLC - TALLAHASSEE RENEWABLE ENERGY CENTER; 0730109-001-AC

I can open this stuff but it is unreadable. Can you send it in another format?

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

From: Livingston, Sylvia

To: glenn@biggreenenergy.com

Cc: [Fancher, Dick](mailto:Fancher,Dick) ; sosbourn@golder.com ; forney.kathleen@epamail.epa.gov ; Abrams.Heather@epa.gov ; saulsj@leoncountyfl.gov ; proctorb@leoncountyfl.gov ; john.marks@talgov.com ; anita.favors.thompson@talgov.com ; [Gibson, Victoria](mailto:Gibson,Victoria) ; 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@famu.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 ; [Lineró, Alvaro](mailto:Lineró,Alvaro) ; [Read, David](mailto:Read,David) ; [Vielhauer, Trina](mailto:Vielhauer,Trina) ; [Walker, Elizabeth \(AIR\)](mailto:Walker,Elizabeth)

Sent: Monday, October 27, 2008 11:52 AM

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

Additional project information can be found at 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

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.