

LEXSEE 2 E.A.D. 838

In the Matter of Hibbing Taconite Company, Petitioner

PSD APPEAL NO. 87-3

United States Environmental Protection Agency
Environmental Appeals Board

1989 EPA App. LEXIS 24; 2 E.A.D. 838

July 19, 1989

PANEL:

[*1]

William K. Reilly, Administrator

OPINION:

ORDER ON PETITION FOR REVIEW

In a petition dated July 30, 1987, U.S. EPA Region V seeks review of a Prevention of Significant Deterioration (PSD) permit determination that authorizes the Hibbing Taconite Company (Hibbing) to modify its furnaces to burn petroleum coke as a fuel. A final decision to issue the permit was made on July 2, 1987, by the Minnesota Pollution Control Agency (MPCA), pursuant to a delegation of authority from Region V. n1 MPCA's action in issuing the permit is subject to the review provisions of 40 CFR § 124.19 because the permit is deemed to be an EPA-issued permit under EPA rules. 40 CFR § 124.41; *45 Fed. Reg. 33,413* (May 19, 1980).

n1 The PSD program was delegated to the State of Minnesota on October 15, 1980, under the authority of 40 CFR § 52.21(u). See Letter from John McGuire, Regional Administrator, EPA Region V, to Terry Hoffman, Executive Director, MPCA (October 15, 1980).

In its petition for review, Region V raises seven [*2] issues: (1) whether Hibbing's analysis of Best Available Control Technology (BACT) for sulfur dioxide (SO₂) is erroneous; (2) whether Hibbing failed to perform a collateral impacts analysis on unregulated pollutants as required by North County Resource Recovery Associates, PSD Appeal No. 85-2 (June 3, 1986); (3) whether the permit violates section 165 of the Clean Air Act (CAA or Act) by allowing Hibbing to modify its facility and operate for nine months without a prescribed emission limit for SO₂; (4) whether the permit limit of 0.024 grains per dry standard cubic foot (gr/dscf) represents BACT for particulate matter (PM); (5) whether Hibbing improperly excluded its property from the ambient air quality modeling; (6) whether analysis of alternative control technologies is required for carbon monoxide (CO) emissions and whether the permit must contain operating requirements for combustion of CO; and (7) whether Hibbing improperly relied on existing data from distant monitors to meet the preconstruction monitoring requirements under 40 CFR § 52.21(m)(1). n2

n2 Both Hibbing and MPCA have filed responses to the Region's Petition for Review. See Comments of Hibbing Taconite Company on the EPA Region V Petition for Review of Minnesota Permit No. 541-87-OT-1

(PSD Appeal No. 87-3) (December 30, 1987); Minnesota Pollution Control Agency, Division of Air Quality, Response to U.S. EPA Region V's Petition for Review of Permit No. 541-87-OT-1 Issued to Hibbing Taconite Co. (September 28, 1987). Hibbing's attorney sent a letter dated January 5, 1988, concerning a curtailment of natural gas to the Hibbing plant. For purposes of deciding the issues on appeal, there is no need to consider the matters raised in that letter.

[*3]

For the reasons set forth below and pursuant to 40 CFR § 124.19, review of issues (2), (6), and (7) is denied. Issues (1), (3), (4), and (5) are remanded to MPCA to conduct additional BACT analyses and to determine the portion of the Hibbing property (if any) that should be excluded from the ambient air determination, consistent with this opinion.

Background

Hibbing's plant crushes taconite ore, concentrates the iron in the resulting powder, and forms it into pellets for shipment to a primary steel plant. The taconite plant equipment includes ore crushers, concentrating process lines, and pelletizing furnaces. The plant currently uses venturi rod scrubbers as a pollution control technology. Until recently the furnaces burned only natural gas and fuel oil. Now Hibbing plans to switch to petroleum coke as a fuel, thus requiring a physical modification of the plant. The modification will bring Hibbing under the purview of the CAA's PSD requirements for the first time. n3

n3 The Hibbing facility was constructed between 1973 and 1977. The PSD requirements of the CAA apply only to facilities on which construction was commenced after August 7, 1977. 42 U.S.C. § 7475.

[*4]

Hibbing has submitted a PSD applicability analysis that shows the proposed modification is subject to PSD requirements for emissions of SO₂, CO, and PM. n4

n4 Before an existing major emitting facility located in an area that is meeting the National Ambient Air Quality Standards (NAAQS) can undertake a major modification, i.e., one which would result in a significant net emissions increase of a regulated pollutant, the owner must obtain a PSD permit. 40 CFR § 52.21(b)(2)(i). Hibbing is located in an area designated as being in attainment of the NAAQS for SO₂, CO, and TSP -- all regulated pollutants. 40 CFR § 81.324. Hibbing's analysis shows that there would be a significant net emissions increase for each of these pollutants.

Discussion

Administrative review of PSD permit decisions is not usually granted unless the permit decision is clearly erroneous or involves an exercise of discretion or policy that is important and therefore should be reviewed by the Administrator as a discretionary matter. 40 CFR § [*5] 124.19. "This power of review should be only sparingly exercised * * *." 45 Fed. Reg. 33,412 (May 19, 1980). The regulations envision that disputed permit conditions will be resolved for the most part at the regional level. Id. The burden of demonstrating that review should be granted is therefore on the petitioner.

Issue (1): BACT for SO₂

The CAA makes permit issuance contingent on a showing that the proposed facility will employ the Best Available

Control Technology (BACT) for each regulated pollutant emitted from it in significant amounts. 42 U.S.C. § 7475. Section 169(3) of the CAA defines BACT as an "emission limitation" reflecting the "maximum degree of reduction" that is "achievable" on a "case-by-case basis, taking into account energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3). This case-by-case approach provides a mechanism for determining and applying the appropriate technology in each situation.

The Region argues that the BACT analysis for SO₂ is erroneous because Hibbing failed to use the burning of natural gas as its "base" [*6] case; n5 it did not factor in the cost savings from the fuel switch; it did not justify rejecting the burning of natural gas as a viable control strategy; and it did not present an engineering analysis demonstrating how the proposed 1.2 lbs/MMBTU limitation for SO₂ emissions would be achieved or explaining why this limitation represents BACT. n6 According to the Region, the first two arguments present the following question: "When economic problems face a facility, to what degree must that facility use cost savings to minimize environmental degradation if the facility switches to a more polluting fuel that reduces operating costs?" n7 Because PSD guidance for BACT does not directly address this issue, the Region asserts that it is appropriate for review by the Administrator.

n5 Use of the base case in performing a BACT analysis is described in the EPA Prevention of Significant Deterioration Workshop Manual at I-B-7 (October 1980). For a definition of the base case, see text *infra* at 6-7. Cf. note 10 *infra*.

n6 The Region also argues that Hibbing failed to consider other technologies commonly used to control SO₂ gas streams. Although this argument may have been true with regard to the original BACT analysis, Hibbing remedied this deficiency with its supplemental BACT analysis and its 9/24/87 BACT support study, conducted by Black and Veatch. See Letter from Charles B. Hoffman to David Beil, MPCA Staff Engineer (June 17, 1987); MPCA Response at 9-11 and Attachment 1.

n7 See Response of U.S. EPA, Region V, to Comments of Hibbing Taconite Company at 4 (March 14, 1988).

[*7]

Neither the PSD regulations nor the PSD guidance differentiate between BACT analyses for plant modifications and BACT analyses for the construction of new plants. Nevertheless, the Region contends that, because Hibbing has been able to continue to operate burning natural gas, it must use natural gas as the base case. I disagree. Hibbing's use of the coke burning plant with existing pollution controls as the base case clearly complied with the criteria for choosing a base case in EPA's guidance document. EPA's Prevention of Significant Deterioration Workshop Manual (October 1980) defines the base case as:

[T]he control strategy that, in the absence of BACT decisionmaking, would normally have been applied. The choice of the base case may be dictated by other existing regulations and/or by company practice standards or choices, if they provide a greater degree of emission reduction than that required by existing regulations (such as new source performance standards, national emission standards for hazardous air pollutants, etc.).

Id. at p. I-B-7. The base case chosen here meets the requirements of Minnesota's state permitting regulations, n8 and thus is consistent with this [*8] definition. Moreover, Hibbing's choice of the base case is consistent with the practices of other taconite plants in Minnesota. n9 Nothing in the definition requires the base case to be the unmodified plant. n10 The Region has not shown any compelling reason why a permit applicant seeking to modify an existing plant should be subject to a different set of criteria for choosing a base case than a new permit applicant.

n8 Minnesota taconite plants operate under permits specifying the SO₂ emission limits based on

Minnesota Rules part 7005.2770. These limits are 2.0 lbs/MMBTU when burning a liquid fuel and 4.0 lbs/MMBTU when burning a solid fuel. See MPCA Response at 7. The limit in the base case chosen by Hibbing is 4.0 lbs/MMBTU when burning petroleum coke. But see note 15 infra.

n9 Of the three taconite plants in Minnesota that are equipped and permitted to burn a combination of solid fuel, fuel oil and natural gas in the pellet production process, two plants produce a substantial portion of their production using a solid fuel. See MPCA Response at 6. Hibbing is the first taconite plant in the United States to become subject to PSD review either for original construction or for modification. *Id.* at 7.

n10 Recognizing the need for a more consistent BACT process, EPA recently began developing specific guidelines on the use of the "top-down" approach, which requires an applicant to justify why it cannot use the most effective pollutant control available. See Memorandum from J. Craig Potter, Assistant Administrator for Air and Radiation, to EPA Regional Administrator's (December 1, 1987). The top-down approach, however, was not applicable here because the permit determination was made prior to the issuance of this memorandum. See *In the Matter of Pennsauken County, New Jersey Resource Recovery Facility, PSD Appeal No. 88-8 at 6-7* (November 10, 1988).

[*9]

Furthermore, I disagree with the Region's argument that Hibbing failed to take into account the cost savings from the fuel switch. An important purpose of any BACT analysis is to provide a comparison of the costs associated with each alternative control technology. This comparison necessarily takes into account the cost-savings associated with less expensive control technologies, as well as the increased costs associated with the more expensive alternatives. Once a proper base case is chosen and alternatives are compared, no additional cost savings analysis is necessary. The Region has not met its burden of showing that the BACT analysis was clearly erroneous or otherwise warrants review with respect to the first two issues. Thus, review is denied on this aspect of the SO₂ BACT issue.

The Region's third argument is that Hibbing failed to justify its rejection of burning natural gas as a viable control strategy. I agree. Hibbing contends that although natural gas was once a financially viable alternative, due to the depressed economic situation in the steel industry, natural gas is now too costly. Nevertheless, Hibbing has been able to continue to operate using natural [*10] gas. In my view, Hibbing's ability to continue to operate using natural gas creates a presumption that natural gas is a financially achievable alternative. Of course this presumption can be rebutted, but to do so, Hibbing must provide a detailed consideration of objective economic data. Mere generalizations about the economic woes of the steel industry are not enough. Hibbing's BACT analysis does not contain the level of detail and analysis necessary to overcome the presumption that the natural gas alternative is economically achievable. The BACT analysis shows the cost of burning natural gas is \$ 1310/ton of SO₂ removed, however, there is no serious discussion of cost effectiveness. Greater efforts must be made by the applicant to show that the natural gas alternative is not economically feasible. This might be done, for example, by comparing the costs of burning natural gas with the costs associated with SO₂ controls used in other similar types of facilities that have gone through PSD review. n11 Thus, on remand, MPCA must ensure that the BACT analysis contains a more detailed economic justification for rejecting the natural gas alternative.

n11 In its petition, the Region states that a control cost of \$ 1300 per ton is within the cost range found for BACT determinations, and therefore, is reasonable.

[*11]

Although the parties have not raised it, one argument that could be made is that the Region, by requiring the

burning of natural gas to be an alternative to be considered in the BACT analysis, is seeking to "redefine the source." Traditionally, EPA has not required a PSD applicant to redefine the fundamental scope of its project. n12 However, this argument has not been made, and in any event, the argument has no merit in this case.

n12 See *In the Matter of Pennsauken County, New Jersey Resource Recovery Facility*, PSD Appeal No. 88-8 at 11 (November 10, 1988) (BACT permit conditions "are not intended to redefine the source"). Several important distinctions, however, can be drawn between Pennsauken and the facts here. In Pennsauken, the petitioner was urging EPA to reject the proposed source (a municipal waste combustor) in favor of using existing power plants to co-fire a mixture of 20% refuse derived fuel and 80% coal. In other words, the petitioner was seeking to substitute power plants (having as a fundamental purpose the generation of electricity) for a municipal waste combustor (having as a fundamental purpose the disposal of municipal waste). Moreover, the petitioner was not merely seeking to "condition" the permit; instead, it was urging EPA, in effect, to deny the permit for construction of the proposed source in favor of using existing power plants. The Hibbing situation, however, is quite distinct. Here, the petitioner (the Region) is merely urging the continued burning of natural gas at the same source -- an alternative that will not require any fundamental change to Hibbing's product, purpose, or equipment.

[*12]

EPA regulations define major stationary sources by their product or purpose (e.g., "steel mill," "municipal incinerator," "taconite ore processing plant," etc.), not by fuel choice. n13 Here, Hibbing will continue to manufacture the same product (i.e., taconite pellets) regardless of whether it burns natural gas or petroleum coke. Likewise, the PSD guidelines state that in choosing alternatives to be considered in a BACT analysis, the applicant must look to what types of pollution controls other facilities in the industry are using. The record here indicates that there are other taconite plants that burn natural gas, or a combination of natural gas and other fuels. Thus, it is reasonable for Hibbing to consider natural gas as an alternative in its BACT analysis. Moreover, because Hibbing is already equipped to burn natural gas, this alternative would not require a fundamental change to the facility.

n13 See 40 CFR 52.21(b)(1).

The Region's last argument with respect to the BACT analysis for SO₂ is that Hibbing [*13] failed to present an engineering analysis demonstrating how the 1.2 lbs/MMBTU limitation for SO₂ emissions would be achieved or explaining why this level represents BACT. I agree. Although BACT is defined as an "emission limitation," it is also, as its name implies, keyed to a specific control technology. In a previous PSD permit decision involving the issue of whether EPA has the authority to prescribe technological process and production requirements, the Administrator stated:

PSD permits and BACT determinations are tailor-made for each pollutant emitting facility. Consequently, the "case-by-case" evaluation of economic costs and energy and environmental impacts that has to be performed as part of a BACT determination is inextricably tied to a specific set of assumptions regarding the type of pollution control technology that will be in place at each facility. Any change in the control technology would require a reevaluation of those impacts and costs, which, in turn, might necessitate a change in the emission level (lower or higher than the previous one). Therefore, unless the type of control technology that will be used to achieve a particular emission limitation is identified [*14] and adhered to by the Applicant, the BACT determination is meaningless. Accordingly, an emission limitation in a PSD permit cannot be established without also relating it to the specific type of control technology that will be used to achieve the limitation. n14

n14 In the Matter of CertainTeed Corp., PSD Appeal No. 81-2 at 5-6 (December 21, 1982) (footnote omitted).

Moreover, EPA regulations require PSD permit applicants to submit "a detailed description as to what system of continuous emission reduction is planned . . . , emission estimates, and any other information necessary to determine that best available control technology would be applied." 40 CFR § 52.21(n)(1)(iii)(emphasis added).

Here, the record before me fails to clearly identify the control technology that represents BACT and to explain how MPCA arrived at the 1.2 lbs/MMBTU n15 figure or whether Hibbing will be able to meet the limit using the existing control technology. n16 MPCA's failure to require Hibbing to provide a detailed description of the [*15] control technology that represents BACT, including data quantifying its removal efficiency, is clear legal error. Accordingly, on remand, MPCA must ensure that the record identifies the control technology that represents BACT and MPCA must propose an emission limit based on the BACT analysis. If MPCA determines that 1.2 lbs/MMBTU is BACT, the record must specify the control technology upon which the limitation is based and show that such technology will enable Hibbing to meet the 1.2 lbs/MMBTU limit.

n15 The entire process by which the emission limitation of 1.2 lbs/MMBTU was chosen is confusing. In its initial BACT analysis, Hibbing proposed burning petroleum coke as BACT, using its existing control technology (venturi rod scrubbers). See Letter from Charles B. Hoffman to David Beil, MPCA Staff Engineer (May 20, 1987). In a technical document based on Hibbing's BACT analysis, MPCA concurred with Hibbing. See Request for Authorization to Issue Air Emission Facility Permit No. 541-87-OT-1 for a Taconite Ore Processing Plant and Air Pollution Control Equipment to Hibbing Taconite Company, MPCA, Division of Air Quality, Regulatory Compliance Section at 4-5 (June 23, 1987). However, MPCA did not specify an emission limitation for SO₂ in that document. In the draft permit subject to public notice, MPCA set the BACT emission limit for SO₂ at 2.0 lbs/MMBTU. Subsequently, in response to EPA comments on the permit, MPCA issued the permit with an emission limitation of 1.2 lbs/MMBTU for SO₂. In its brief, MPCA summarily stated that the 1.2 lbs/MMBTU limit "is economically justified." The Black & Veatch support study, which was completed after MPCA issued the permit with the 1.2 limit, also found the existing technology and petroleum coke to be BACT. Based on this study MPCA determined that 1.8 lbs/MMBTU was BACT. The Black & Veatch study indicates that the only control technology that would lower emissions to 1.2 lbs/MMBTU is the addition of a wet limestone scrubber. However, MPCA never determined that wet limestone scrubbers represent BACT.

n16 Hibbing contends that it "cannot meet the 1.2 lb. limit in any financially viable way." See Hibbing's Comments (December 30, 1987).

[*16]

Issue (2): Unregulated Pollutants

Region V argues that MPCA's permit review is deficient because there was no consideration of unregulated pollutants as required by North County Resource Recovery Associates, PSD Appeal No. 85-2 (June 3, 1986). In response, MPCA incorrectly argues that North County only applies to PSD permit proceedings for municipal waste combustors. North County interprets an express statutory requirement applicable to all PSD permits, and thus requires the permitting authority to take into account the control technology's impact on unregulated pollutants in every permit proceeding. However, MPCA also responds that it did require Hibbing to analyze petroleum coke for unregulated trace elements of concern. n17 In its response, Region V did not dispute the adequacy of the trace element analysis. Thus,

the Region has not met its burden of showing that Hibbing's analysis of unregulated pollutants is clearly erroneous or otherwise warrants review.

n17 Hibbing analyzed a large number of trace elements in its Applicability Analysis. See MPCA Response at 18-19 and Attachment 6 (September 28, 1987).

[*17]

Issue (3): CAA's requirement for prescribed emission limits

Region V argues that MPCA erred in issuing a PSD permit that does not prescribe an emission limitation for SO₂ for the first nine months of operation under the permit. The permit must set forth emission limitations for each regulated pollutant that the facility will emit in significant amounts. Section 165(a)(1), 42 U.S.C. § 7475(a)(1). Although Hibbing's permit establishes a 1.2 lbs/MMBTU emission limitation for SO₂, Part V.D. of the permit allows Hibbing to operate its facility for nine months after modification while it designs a plan to achieve and comply with this limit. If after nine months Hibbing cannot achieve the 1.2 lbs/MMBTU limit, it must submit an application for a revised emission limit. As a result, the permit has no emission limit prescribed for SO₂ for at least the first nine months.

Last year in another PSD permit decision (involving the threshold question of whether the Administrator should review the permit), the Administrator stated:

[T]he permit contains a provision allowing a reopening of the BACT determination after construction of the facility has [*18] commenced. This provision appears to contravene § 165(a)(1) of the Clean Air Act (CAA), which forbids construction of a facility before the emission limitations in the permit have been established. (CAA § 169(3) defines BACT as an "emission limitation.") n18

n18 In the Matter of Virginia Power (Chesterfield Generating Station), PSD Appeal No. 88-2 at 2-3 (February 1, 1988) (footnote omitted).

Similarly, in the instant case, Part V.D. of the permit contravenes section 165(a)(1) of the CAA. Thus, Region V has made a showing of clear error and, on remand, MPCA must ensure that the permit contains an emission limitation for SO₂, based on BACT, for the entire life of the permit.

Issue (4): BACT for (PM)

Region V contends that MPCA erred in setting 0.024 gr/dscf as BACT for PM because the technical document supporting the permit states that the existing scrubbers used by Hibbing "have consistently shown an outlet dust loading of 0.01 gr/dscf when tested by EPA Methods 1-5." n19 Nowhere in this document is the 0.024 [*19] gr/dscf limit mentioned.

n19 See Request for Authorization to Issue Air Emission Facility Permit No. 541-87-OT-1 for a Taconite Ore Processing Plant and Air Pollution Control Equipment to Hibbing Taconite Company, Minnesota Pollution Control Agency, Division of Air Quality, Regulatory Compliance Section at 5 (June 23, 1987).

MPCA's response to the Region is that many BACT and Lowest Achievable Emission Rate (LAER) determinations have been made in the range of 0.02 to 0.05 gr/dscf. Since 0.024 is at the low end of this range, MPCA considered it acceptable. MPCA's argument is unresponsive to the information contained in the technical document and it ignores the site-specific nature of BACT determinations. The argument that many BACT and LAER determinations have been made in the range of 0.02 to 0.05 gr/dscf should not, by itself, be used to justify a less stringent PM limit than is otherwise achievable, taking into account the necessary energy, economic, and environmental impacts. n20 Therefore, on remand, MPCA must [*20] provide a detailed justification for not adopting the 0.01 gr/dscf limitation if another less stringent limitation is chosen.

n20 As MPCA pointed out in its response, EPA guidelines on BACT state that the analysis of alternative strategies is not required in a BACT analysis if the applicant demonstrates that the chosen base case provides the highest degree of emission reduction available. Thus, MPCA may use the 0.01 gr/dscf limit in the permit without considering alternatives if it can show, as it represented in its technical document, that 0.01 gr/dscf represents the highest degree of emission reduction available. See id. MPCA also cites EPA's BACT guidelines, which state that the analysis should only be as extensive as the quantity of pollutants emitted and the ambient air impact. MPCA is correct that, under this guideline, it need not necessarily expand the scope of control technology alternatives beyond those previously considered. Nevertheless, MPCA must still explain its reasons for rejecting the 0.01 gr/dscf limit.

[*21]

Issue 4: Ambient Air

The Region argues that Hibbing improperly excluded approximately 14,000 acres of its property from ambient air quality monitoring. An EPA screening analysis conducted with receptors located inside the excluded area indicates that the PM and SO₂ PSD increments and the SO₂ NAAQS will be exceeded. n21 To obtain a PSD permit, an applicant must demonstrate that emission increases from the proposed source or modification will not exceed primary or secondary NAAQS or PSD increments. n22

n21 Furthermore, the analysis suggests PM concentrations in this area may exceed the de minimis level of 10 $\mu\text{g}/\text{m}^3$, thus triggering the requirement for pre-construction monitoring data for TSP.

n22 See 40 CFR § 52.21(c) (increases in pollutant concentrations over baseline limited to specific PSD increments); id. § 52.21(d) (no pollutant concentration shall exceed the primary or secondary NAAQS); see also 40 CFR § 52.21(k)(2) (the applicant must demonstrate the proposed source or modification will not cause or contribute to air pollution in violation of any PSD increment or NAAQS).

[*22]

In ambient air quality monitoring, mathematical models are used to predict pollutant concentrations at specific locations. To obtain a permit, the models need show only that the NAAQS and PSD increments will not be exceeded in the "ambient air." n23 The rules define ambient air as "that portion of the atmosphere, external to buildings, to which the general public has access." 40 CFR § 50.1(e). Thus, emissions that exceed the NAAQS or PSD increments on company property to which the public does not have access are not an impediment to permit issuance. EPA policy has allowed exclusion if public access is barred by fence or other physical barrier. n24 A Memorandum of Law issued by the EPA Office of General Counsel interprets the definition of "ambient" in section 50.1(e) as follows:

That definition, in our view, limits the standards' applicability to the atmosphere outside the fence line, since

"access" is the ability to enter. In other words, areas of private property to which the owner or lessee has not restricted access by physical means such as a fence, wall, or other barrier can be trespassed upon by members of the community at large. Such persons, whether they are knowing [*23] or innocent trespassers, will be exposed to and breathe the air above the property. n25

n23 Both the PSD increments and the NAAQS only apply in areas meeting the definition of ambient air. See 42 U.S.C. §§ 7409 & 7470-7473.

n24 See, e.g., Letter from Douglas M. Costle, EPA Administrator, to Senator Jennings Randolph (December 19, 1980).

n25 Memorandum from Michael A. James, EPA Air Quality and Radiation Division, to Jack R. Farmer, EPA Plans Management Branch (September 28, 1972) (citation omitted) (emphasis added).

MPCA argues that it inspected the area and found that effective physical barriers preclude public access. n26 In support of this argument, MPCA has submitted photographs that show access roads blocked by gates and other physical barriers. Hibbing correctly argues that the test for ambient air exclusion does not require a continuous fence around the perimeter of the property. Other types of physical barriers can effectively preclude access. However, based on photographs [*24] submitted by EPA, there appears to be at least three, n27 possibly four, n28 locations where physical barriers, natural or otherwise, do not exist along the perimeter of the 14,000 acres. I am remanding this issue to MPCA to reconsider whether public access is effectively precluded at the four locations in question. If MPCA does not find effective barriers to public access at the four identified (or any other) locations, MPCA must impose requirements in the permit that would force Hibbing to erect appropriate barriers or to take other measures that would effectively preclude public access. Alternatively, MPCA may identify a different portion (presumably smaller) of Hibbing's property, from which access is effectively barred. n29 The factual issue of the exact area to which public access is precluded may be ripe for a negotiated settlement.

n26 MPCA cites a Federal Register notice in which EPA found the operator of the Kennecott smelter in Magma, Utah had effectively precluded public access from its property by a series of no trespassing signs, rugged terrain, and security patrols. See 50 Fed. Reg. 7057 (February 20, 1985). As Region V points out in its response, however, the two situations are not analogous. The Kennecott property was extremely rugged and mountainous. Thus, the physical terrain itself helped to create an effective barrier. Id. Hibbing's property, as described by Hibbing itself, consists of "flat lowland with occasional rolling hills." See Hibbing's Comments at 16. Furthermore, Kennecott apparently did not involve the same type of rights of way as does the Hibbing property.

n27 The three locations not having any apparent physical barriers are the main plant entrance, the rail line into the plant, and the power line into the plant.

n28 It is difficult to ascertain whether the berm around the tailings pond is an effective physical barrier from the photographs submitted.

n29 Region V has indicated that there may be a smaller area that would properly be excluded from the ambient air.

[*25]

Issue 6: BACT for CO

Region V argues that the BACT analysis for CO is erroneous because it did not contain an analysis of alternative controls and did not include any operational requirements for combustion of CO. I disagree. The Region acknowledges that alternative controls for CO are limited to combustion with excess air and temperature control. Nevertheless, the Region argues that the BACT analysis must include consideration of alternative combinations of these two variables. Both Hibbing and MPCA have provided reasons why the chosen combination of temperature and excess air was the only acceptable one. n30

n30 To produce a high strength abrasion resistant taconite pellet, the pellets must be heated to, and maintained at, a temperature of 2450 degrees F. The amount of excess air that can be used is limited by the need to achieve a high enough temperature in the combustion gases to raise the temperature of the pellet to the required level. Although increasing the temperature would result in a reduction of CO emissions, it would also result in pellets of unacceptable quality. Thus, the chosen combination of temperature and excess air appears to be the only acceptable combination. The Region has not shown that Hibbing's justification of this combination is clearly erroneous.

[*26]

The Region also asserts, without citation, that once the combination of temperature and excess air that represents BACT is established, it should be specified in the permit. Neither the CAA nor EPA regulations absolutely require the permit to specify operational requirements in addition to a numerical emission limitation. n31 Both the CAA and EPA regulations define BACT as an "emission limitation." n32 Hibbing's permit contains this required emission limitation and therefore omission of operational requirements was not clear error. n33 Nevertheless, Hibbing must adhere to the control technology identified as representing BACT in its BACT analysis. n34 Review is denied on this issue.

n31 Furthermore, MPCA represents that combustion control is automatic and not dependent on operator attention.

n32 *42 U.S.C. § 7479(3); 40 CFR § 52.21(b)(12).*

n33 Moreover, there is nothing in the record to indicate that specifying the combination of temperature and excess air is essential to monitor compliance with the emission limitation.

n34 See *In the Matter of Certain Teed Corp.*, PSD Appeal No. 81-2 at 5 (December 21, 1982).

[*27]

Issue 7: Preconstruction Monitoring

Region V argues that the data used by Hibbing do not meet the preconstruction monitoring requirements of 40 CFR § 52.21(m) and EPA's Guidelines on Ambient Monitoring. n35 Section 52.21(m)(1)(iii) of the rules requires applicants to submit continuous air quality monitoring data to determine if emissions of a pollutant would cause or contribute to a violation of a NAAQS or an increment. The data must be gathered over a period of at least a year and must represent at least the year preceding receipt of the application. EPA allows substitution of existing representative air quality data in lieu of having the source generate its own preconstruction monitoring data, provided these data meet the criteria in the "Ambient Monitoring Guidelines for Prevention of Significant Deterioration" (July, 1980). n36

n35 Based on Hibbing's modeling results, preconstruction monitoring data is required only for SO₂. However, in light of the remand on the ambient air issue, preconstruction monitoring may also be required for

PM. See supra note 17 & accompanying text.

n36 See 45 Fed. Reg. 52676 (August 7, 1980).

[*28]

The guidelines require existing monitoring data to be representative of areas of (1) maximum existing pollutant concentrations, (2) maximum concentration increases from the proposed source or modification, and (3) maximum combined impact from existing and proposed sources. If there are no existing monitors in such areas the guidelines allow monitors located elsewhere to be used on a case-by-case basis. The guidelines provide examples of cases in which it would be appropriate to use existing monitors that are located outside the three areas listed above. *Id.* at 6-8. In one example, the proposed source is in an area that is generally free from the impact of other point sources. *Id.* at 6. The guideline states that representative data may be obtained from a "regional" site, a site that is characteristic of air quality across a broad region. *Id.* The use of regional sites should be limited to relatively remote areas and should not be used in areas of multisource emissions or areas of complex terrain. *Id.*

Hibbing maintains that it properly used representative data from a monitoring site that fits the description in this example. Both Hibbing and the monitoring site are located [*29] in an area that is generally flat, sparsely populated, and contains one plant (the Clay Boswell plant) that accounts for 70% to 81% of the total SO₂ emissions. Hibbing contends that because this monitoring site is closer to the Clay Boswell plant than is the Hibbing property, it probably has higher pollutant concentrations than the Hibbing property. Nevertheless, the Region asserts that it is "not convinced that Hibbing qualifies for the use of regional monitoring data." The Region maintains that there are eleven SO sources within 65 kilometers of Hibbing, and thus it is a "multisource" area. The Region also contends that because the Clay Boswell plant has two very tall stacks, it is not expected to cause high ground-level concentrations, and thus the monitoring data may not reflect pollutant levels as high as those in the area closer to the Hibbing plant.

In my view, the Region has not met its burden of showing that MPCA committed clear legal error in interpreting or applying example number one of the guidelines. The guidelines are very broad and leave much to the discretion of the permitting authority. Moreover, the examples provided in the guidelines are not intended to [*30] be an exhaustive listing of every conceivable situation in which the use of representative data is appropriate. n37 The Region is not able to point to any specific misinterpretation or misapplication of the guidelines. The mere existence of some other sources in the area and the Clay Boswell plant's tall stacks, without more, is not sufficient to show that MPCA's characterization of the area as non-multisource was clearly erroneous.

n37 The guidelines state "some examples are included to demonstrate overall intent." Ambient Monitoring Guidelines for Prevention of Significant Deterioration at 6 (July, 1980). The Region also argues that the guidelines require existing representative data to be collected in the three year period preceding the permit application. Hibbing used data from 1980-1983, which clearly was not within three years of the 1987 permit application. The guidelines merely state, however, that "generally" preconstruction data must have been collected within three years prior to the date of permit application. Here, it appears that it would be impossible to do this because MPCA had already permitted Hibbing to do a test burn of petroleum coke during 1985 and 1986. See *Citizens Against the Refinery's Effects, Inc. v. United State Environmental Protection Agency*, 643 F.2d 178, 181 (4th Cir. 1981) (PSD permit applicant may properly use one year of weather data in its air dispersion model instead of the five years recommended by EPA guidelines because the guidelines were only recommendations and only one year of data was locally obtainable and compatible with the model used).

[*31]

Moreover, the Region has not shown that MPCA committed a factual error in evaluating the conditions in the vicinity of the Hibbing site and monitoring site. Region V has not contested Hibbing's factual assertions that the Clay Boswell plant accounts for the majority of SO₂ emissions in the area or that the other plants in the area account for very small percentages (no source accounting for more than 3.6%) of overall emissions. In sum, far from demonstrating that MPCA committed clear error by allowing Hibbing to use the regional data, Region V has shown nothing more than it is "not convinced" that Hibbing's use of the regional monitoring data was appropriate. n38 Review is denied on this issue.

n38 Moreover, MPCA has included in the permit a requirement that Hibbing design, install, and operate an ambient air monitoring system for SO₂.

Conclusion

The deficiencies in the BACT analysis leave two courses of action open at this juncture of the proceedings. One is to grant review of the permit and enter into the [*32] briefing phase contemplated by 40 CFR § 124.19(c). However, the deficiencies in the record cannot be rectified through the submission of briefs, and any ensuing decision would likely conclude that the permit should be denied (because of the deficiencies) or that it should be remanded to the permit-issuing authority to allow the applicant to supplement the BACT analysis. Considerations of time favor remanding the permit in the first instance. Therefore, rather than receiving additional briefs on appeal, I am remanding the case to MPCA to: include in the permit an emission limitation for SO₂ based on BACT, for the life of the permit; to provide a detailed economic analysis sufficient to justify rejection of the natural gas alternative; to identify the control technology that the SO₂ limitation is based on and demonstrate that such technology will enable Hibbing to meet the prescribed permit limitation; and to either set the BACT limitation for PM at 0.01 gr/dscf or explain why it rejected this limitation. On remand, MPCA must also determine whether public access is effectively precluded from the four locations identified in this order, and if not, MPCA must either impose conditions [*33] in the permit that would require Hibbing to erect appropriate barriers at these locations or identify a smaller area of its property from which public access is effectively precluded.

MPCA's determination on remand will be subject to review under 40 CFR § 124.19, n39 and appeal of its decision on remand will be required to exhaust administrative remedies under section 124.19(f)(1)(iii).

n39 The Region maintains that MPCA should be required to obtain the Region's concurrence on the permit before issuing the permit. I find no basis for this argument. Regarding the procedures for issuance of PSD permits, the delegation agreement between EPA and MPCA requires MPCA only to forward preliminary determinations to grant or deny a PSD permit to EPA for comment and to send copies of its final action on PSD permits to EPA. In contrast, In the Matter of Honolulu Resource Recovery Facility, PSD Appeal No. 86-8 (June 22, 1987), the delegation agreement required EPA Region IX and the Hawaii Department of Health (HDOH) concurrence on BACT determinations on the first five permits issued by HDOH.

Nevertheless, MPCA and the Region should communicate during the course of PSD permit proceedings and attempt to reach a consensus on matters of disagreement. Moreover, as previously noted, MPCA's action in issuing the permit is subject to review provisions of 40 CFR § 124.19 because the permit is deemed to be an EPA-issued permit under EPA rules. 40 CFR § 124.41; 45 Fed. Reg. 33,413 (May 19, 1980).

[*34]

So Ordered.

LEXSEE 2 EAD 229

In the Matter of: North County Resource Recovery Associates Applicant

PSD Appeal No. 85-2

United States Environmental Protection Agency
Environmental Appeals Board

1986 EPA App. LEXIS 14; 2 E.A.D. 229

June 3, 1986

PANEL:

[*1]

Lee M. Thomas, Administrator

OPINION:

REMAND

In petitions filed pursuant to 40 CFR § 124.19 (1985), Donald J. Wakefield and John R. Leach, Jr., jointly, and Stephen Isaac and Richard D. Sauerheber, individually, requested review of a Prevention of Significant Deterioration (PSD) permit determination that will authorize North County Resource Recovery Associates (NCRR) to construct a 33 megawatt, 1000 ton per day resource recovery facility in San Marcos, California. The determination to issue the permit was made on March 22, 1985, by the Director, Air Management Division, U.S. Environmental Protection Agency, Region IX, San Francisco, California.

Petitions for review of PSD permits are not usually granted unless the permit determination is clearly erroneous or involves an exercise of discretion or policy that is important and therefore should be reviewed as a discretionary matter, 40 CFR § 124.19(a)(1) and (2). The preamble to the regulations containing this standard states that "this power of review should be only sparingly exercised [and] . . . most permit conditions should be finally determined at the Regional level. . . ." *45 Fed. Reg. 33412* (May 19, 1980). [*2] The burden of demonstrating that the permit conditions should be reviewed is therefore on the petitioners.

Among the reasons the petitioners present for granting review is Region IX's alleged failure to establish emission limitations for all pollutants, including hazardous pollutants, that will or could possibly be emitted from the facility; the alleged inadequacy of Best Available Control Technology (BACT) determinations; the alleged use of unrepresentative meteorological data; the contention that the Complex I air dispersion model for predicting pollution levels is inappropriate; and miscellaneous matters such as the contention that the impact of emissions on vegetation was not properly evaluated. With one exception, Region IX has addressed each of petitioners' allegations and has provided rational explanations for not making any alterations in its permit determination. The exception concerns Region IX's assertion that EPA lacks the authority to "consider" pollutants not regulated by the Clean Air Act when making a PSD determination. This assertion is correct only if it is read narrowly to mean EPA lacks the authority to impose limitations or other restrictions directly on [*3] the emission of unregulated pollutants. EPA clearly has no such authority over emissions of unregulated pollutants. Region IX's assertion is overly broad, however, if it is meant as a limitation on EPA's authority to evaluate, for example, the environmental impact of unregulated pollutants in the course of making a BACT determination for the regulated pollutants. EPA's authority in that respect is clear.

Under § 165(a)(4) of the Clean Air Act and the relevant regulations a proposed facility is subject to the "best available control technology" (BACT) for each pollutant that is regulated by the Act that is emitted from, or which results from, such facility in significant amounts, 42 USC § 7475(a)(4); 40 CFR § 52.21(j)(1985). As defined in § 169(3) the term BACT refers to an "emission limitation" that is set on a case-by-case basis for regulated pollutants, "taking into account energy, environmental, and economic impacts and other costs" associated with the particular emission control system that is selected to achieve the BACT emission limitation. 42 USC § 7475(3) (emphasis added); 40 CFR § 52.21(b)(12). [*4] Hence, if application of a control system results directly in the release (or removal) of pollutants that are not currently regulated under the Act, the net environmental impact of such emissions is eligible for consideration in making the BACT determination. The analysis may take the form of comparing the incremental environmental impact of alternative emission control systems with the control system proposed as BACT; however, as in any BACT determination, the exact form of the analysis and the level of detail required will depend upon the facts of the individual case. Depending upon what weight is assigned to the environmental impact of a particular control system, the control system proposed as BACT may have to be modified or be rejected in favor of another system. In other words, EPA may ultimately choose more stringent emission limitations for a regulated pollutant than it would otherwise have chosen if setting such limitations would have the incidental benefit of restricting a hazardous but, as yet, unregulated pollutant. n1

n1 Industry engineers would remain free, of course, to exercise their own independent judgment in devising ways to meet any such more stringent emission limitations, provided the energy, environmental and economic impacts associated with the chosen control system are not inconsistent with the corresponding impacts associated with the more stringent emission limitations. See *In the Matter of Certain Teed Corporation* at 5-8, PSD Appeal No. 81-2 (Decision of the Administrator, December 21, 1982).

[*5]

After reviewing Region IX's responses to petitioners' comments and to their petitions for review, it is unclear to me whether Region IX has given appropriate consideration to the matters just described. Petitioners have expressed understandable frustration at being told, without more, that "EPA does not have the authority to consider dioxin or most other toxic air contaminants for the purpose of issuing a PSD permit." Accordingly, I am remanding the permit determination to Region IX for reconsideration and for action consistent with the foregoing interpretation of EPA's authority to consider unregulated pollutants when making PSD determinations. In the meantime a ruling on the pending petitions for review will be held in abeyance.

So ordered.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental Law Air Quality Preconstruction Permits Environmental Law Air Quality Prevention of Significant Deterioration Environmental Law Hazardous Wastes & Toxic Substances Toxic Mold

LEXSEE 3 E.A.D. 779

In the Matter of: Old Dominion Electric Cooperative Permit Applicant

PSD Appeal No. 91-39

United States Environmental Protection Agency
Environmental Appeals Board

1992 EPA App. LEXIS 37; 3 E.A.D. 779

January 29, 1992

PANEL:

[*1]

William K. Reilly, Administrator

OPINION:

ORDER DENYING REVIEW

In a petition dated June 3, 1991, the Southern Environmental Law Center, et al. (Petitioners) n1 requested review of a Prevention of Significant Deterioration (PSD) permit issued to Old Dominion Electric Cooperative (Old Dominion), for the construction of a 786 megawatt pulverized coal-fired steam electric generating station in Halifax County near Clover, Virginia. The proposed facility will be operated by Virginia Electric & Power Company (Virginia Power), a 50% co-owner of the facility, on behalf of both Old Dominion and Virginia Power. The permit determination was made by the Virginia Department of Air Pollution Control (Virginia or the State) on April 29, 1991, pursuant to a delegation of authority from the U.S. Environmental Protection Agency (EPA), Region III, Philadelphia, Pennsylvania. Because of the delegation, the Virginia permit is considered an EPA-issued permit for purposes of federal law (40 CFR § 124.41 (1990); *45 Fed. Reg. 33413* (May 19, 1980)), and is subject to the review provisions of the applicable EPA regulations [*2] before becoming final, 40 CFR § 124.19 (1990).

n1 The SELC filed its petition on behalf of itself and the Conservation Council of Virginia, Sierra Club, National Parks and Conservation Association, Trout Unlimited, Environmental Defense Fund, Natural Resources Defense Council, The Wilderness Society, Southside Concerned Citizens, and Virginia Wildlife Federation.

Under the regulations governing this proceeding, there is no review as of right from the permit decision. See generally 40 CFR § 124.19. Review is discretionary. Ordinarily, a petition for review of a PSD permit determination is not granted unless 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. The preamble to the regulations states that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional [State] level * * *." *45 Fed. Reg. 33,412* [*3] (May 19, 1980). The burden of demonstrating that the permit should be reviewed is therefore on the Petitioners. After examining the issues raised by Petitioners, I conclude that

Petitioners have not satisfied that burden in this instance.

Virginia and Old Dominion filed responses to the petition stating their opposition to any review of the permit determination; Petitioners, in turn, filed a reply to the responses. Petitioners' principal objections to the permit are addressed below, seriatim.

A.

Increment Analysis. n2 Section 165(a)(3) of the Clean Air Act provides that a permit applicant must demonstrate that emissions from the proposed facility "will not cause, or contribute to, air pollution in excess of," inter alia, certain statutorily allowable increases in pollutant levels, called "increments," in any area where PSD requirements apply, including specially designated mandatory "class I" areas -- certain national parks and wilderness areas -- where required measures to protect air quality are particularly stringent. See also 40 CFR § 52.21(k). A complementary demonstration requirement appears in Section 165(d)(2)(C)(i) of the Act, which provides that in any case where [*4] the Federal Land Manager for a mandatory class I area files a notice alleging that emissions from the proposed facility may cause or contribute to a change in air quality in the area and identifying the potential adverse impact of such change, a permit shall not be issued unless the permit applicant demonstrates that the facility's emissions of particulate matter and sulfur dioxide (SO₂) will not cause or contribute to a violation of an increment in the class I area.

n2 See Petition at paragraphs I.A. & B. and VI. ("Statement of Reasons for Southern Environmental Law Center, et al. Appeal of Old Dominion Electric Cooperative (Clover, VA) PSD Permit No. 30867," dated June 3, 1991) (hereafter the "Petition").

The Petitioners claim that Old Dominion did not perform the required demonstration for the Shenandoah National Park (Park), which is a class I area, notwithstanding notification from the Park's Federal Land Manager of the proposed facility's potential adverse impacts on air quality related values in the Park. [*5] n3 Petitioners contend that the State's failure to require this demonstration is particularly egregious because the State had received modeling results from another permit applicant which indicated that existing permits currently exceed the class I increment at the Park and that emissions from the Old Dominion facility and sources closer to the Park would result in a violation of the class I increment. According to Petitioners the failure of the State to require such a demonstration under the circumstances is reversible error. Specifically, because there is no dispute that Old Dominion did not submit a demonstration for the Park pursuant to either Section 165(a)(3) or Section 165(d)(2)(C)(i), Petitioners argue that Old Dominion's permit application was not complete, and therefore the State erred in issuing the permit.

n3 Petitioners assume that the Federal Land Manager's September 25, 1990 letter to Virginia constituted notice within the meaning of section 165(d)(2)(C)(i) of the Act. See petition at 9. This assumption appears to be erroneous. The September 25, 1990 letter in pertinent part constituted elaboration and transmittal of a September 18, 1990 Federal Register notice in which the Federal Land Manager for the Park announced preliminary findings of adverse impact under section 165(d)(2)(C)(ii) of the Act. For this reason the Petitioners' claim that Old Dominion did not perform the demonstration required by section 165(d)(2)(C)(i) is not properly before me. Nevertheless, to the extent the discussion addressing Petitioners' claim under section 165(a)(3) of the Act also applies to Petitioners' claims under section 165(d)(2)(C)(i), I have addressed the substance of these claims.

[*6]

The validity of Petitioners' argument rests entirely on their assertion that such a demonstration is required even

though the proposed facility will be located approximately 135 kilometers from the Park's nearest boundary.

EPA guidance has not specified that the demonstration requirement applies regardless of how distant a class I area may be from the source in question. Thus, EPA has implicitly countenanced the view that, as a practical matter, pollution sources may be too distant from a specific area to have anything except an imperceptible or insignificant effect on the area in question. In other words, the mere possibility of pollution molecules being transported from a source to a class I area is not, by itself, sufficient reason to trigger the demonstration requirements of the Clean Air Act.

In the case of the proposed Old Dominion facility, the State followed its policy of not requiring modeling of increment impacts for proposed facilities located more than 100 kilometers from the Park. n4 It also rejected the notion that the results from the other permit applicant were determinative of the pending applicant's impact on the class I area. n5 According to Virginia, the [*7] policy it follows reflects its concern that the models used for this analysis overpredict pollutant concentrations at long distances and that substantial questions exist about their accuracy when employed at distances greater than approximately 50 kilometers. In Virginia's view, therefore, when it requires analysis for distances up to 100 kilometers, it is providing an added measure of environmental protection beyond what is strictly justified by the limited accuracy of the models. Accordingly, it did not require modeling for the Park, which is more than 100 kilometers from the proposed facility. The State did, however, require analysis of potential increments impacts at the James River Face Wilderness (the Wilderness), which is located approximately 99 kilometers from the proposed facility. The analysis for the Wilderness demonstrated to the State's satisfaction that the class I increments would not be violated in this area. Considering these findings for the Wilderness, which is located closer to the facility than the Park (and therefore potentially subject to even greater adverse impacts than the Park), and considering that EPA has not issued any final guidance that would contravene [*8] the State's policy, n6 Virginia did not clearly err in deeming Old Dominion's application complete even though Old Dominion did not supply a demonstration for the Park under Section 165(a)(3) of the Clean Air Act. Therefore, review of the permit for the reasons stated by Petitioners is not justified. n7

n4 It is the policy of the State "to require a Class I increment analysis for PSD sources proposing to locate within 100 kilometers of any Class I area." Virginia's response to Petition, dated July 30, 1991, at 4.

n5 Virginia indicated that the findings of the other permit applicant do not provide evidence that it clearly erred in failing to require the demonstration. According to Virginia, at the time ODEC's application was deemed complete there were no demonstrated exceedances of the class I increment in the Park.

n6 Draft guidance released by EPA in October 1990 and distributed to the States recommends analysis beyond 100 kilometers when there are potential impacts on a class I area. While this guidance has not yet become final, it reflects EPA's concern that increments analysis include class I areas when there are reasonable questions about a proposed facility's impacts on such areas. As a draft policy, however, it does not have the same weight as a binding Agency position and does not prohibit the States from adopting their own policies that are consistent with the Clean Air Act and applicable regulations. Nevertheless, EPA's draft policy reflects the Agency's latest thinking on when it is appropriate to require increment analyses for class I areas, and is based upon the availability and feasibility of modeling tools for assessing such impacts. For this reason, Virginia should consider reexamining its current policy.

n7 Although a Federal Land Manager's assertion of an adverse impact under Section 165(d)(2)(C)(i) triggers a duty on the part of the applicant to perform an increment analysis, no error occurs when the State subsequently determines that the Federal Land Manager's assertion lacks sufficient hard scientific data to sustain the charge of an adverse impact. Assuming, arguendo (see note 3 supra), that the Federal Land Manager's demonstration for the Park under section 165(d)(2)(C)(ii) constituted notice under section 165(d)(2)(C)(i), such a determination was made in this instance. (See discussion in paragraph B. of the text.) Requiring the applicant to supply a separate demonstration under such circumstances, i.e., after the permit issuer has examined and

rejected the merits of the Federal Land Manager's findings would serve no legitimate purpose. Cf. *United States Postal Service, Board of Governors v. Aikens*, 460 U.S. 711 (1983) (once the merits of a case are heard, it is error to focus on the procedural question of whether the plaintiff succeeded in establishing a prima facie case, rather than on the ultimate question of the merits). At most, the failure of the applicant to submit a demonstration in such circumstances constitutes harmless error.

[*9]

B.

Findings of Adverse Impacts on Air Quality Related Values. n8 Section 165(d)(2)(C)(ii) of the Act provides that, notwithstanding that the emissions from a proposed facility do not cause or contribute to exceedances of the class I increment in an area, a permit shall not be issued in any case where the Federal Land Manager of a mandatory class I area demonstrates to the satisfaction of the State that the emissions from the facility will have an adverse impact on the air quality related values (including visibility) of the class I area. See also 40 CFR § 52.21(p)(4). Petitioners claim that the State clearly erred in rejecting the adverse impact determinations of the Federal Land Managers for the Park and the Wilderness that Old Dominion would have an adverse impact on the air quality related values of their respective class I areas. I disagree. While the permit issuer must give reasonable consideration to a Federal Land Manager's assertion of an adverse impact, the final decision rests with the permitting authority. n9 See generally *50 Fed. Reg. 28544, 28549* (July 12, 1985). Section 165(d)(2)(C)(ii) clearly states that a demonstration by a Federal [*10] Land Manager that a facility will have an adverse impact on the air quality related values of a class I area must be made to the "satisfaction of the State." n10 For the reasons discussed below, the State did not commit clear error in rejecting the Federal Land Managers' assertions regarding the proposed facility's adverse effects on the Park or the Wilderness.

n8 See generally Petition at paragraph II.

n9 This is not to suggest, however, that the permit issuer's discretion in rejecting a finding is unfettered. See generally *50 Fed. Reg. 28544, 28549* (July 12, 1985). It merely signifies that, so long as it is not exercised in an arbitrary or capricious manner, the permit issuer's discretion takes precedence under the statute.

n10 Similarly, EPA's implementing regulations provide that a permit shall not be issued when the permit issuer concurs with the Federal Land Manager's demonstration. See 40 CFR § 52.21(p)(4).

Adverse Impacts -- The Park. n11 The Federal Land Manager's adverse impact [*11] determination for the Park is contained in a letter dated September 25, 1990, and in a December 19, 1990 letter and supporting documents. The Federal Land Manager reasoned that since certain air quality related values, visibility primarily, are subject to deterioration in the Park, the addition of new sources of pollution (referring not just to the proposed Old Dominion facility, but also to that facility plus several other proposed sources scheduled for construction in Virginia over the next several years) will by necessity only exacerbate existing impaired conditions. Virginia concluded that the Federal Land Manager's determination was largely a qualitative analysis and did not reveal any significant link between the proposed source and air quality at the Park. Nevertheless, the State asked EPA for assistance in further evaluating the Federal Land Manager's claim.

n11 See Petition at paragraph II.A.

The Federal Land Manager's claim of an adverse impact from the proposed Old Dominion facility largely hinges on the [*12] assumption that there is a demonstrable causal connection between the facility and the predicted adverse impact on the Park. However, the facts to support such a claim are not contained in the Federal Land Manager's determination, nor was the claim verifiable insofar as EPA was able to determine. The facts do show that air quality in the Park is adversely impacted by existing sources. However, in response to the State's request for assistance, EPA conducted a preliminary modeling analysis ("RELMAP") in an effort to assess the Federal Land Manager's adverse impact finding for the Park. See note 23 and accompanying text, *infra*. This analysis did not confirm the Federal Land Manager's finding. Based on the RELMAP analysis, EPA found that it could not conclude that Old Dominion would have an adverse impact on the Park, or the Wilderness. Virginia did not clearly err, then, when it issued the permit after it and EPA were unable to confirm the Federal Land Manager's assertions. Virginia ultimately rejected the findings of the Federal Land Manager on several grounds, concluding generally, however, that the findings were unsubstantiated and speculative. n12

n12 The Federal Land Manager for the Park also used the MPTER model to predict SO₂ concentrations, which were then converted to sulfates and used to estimate short-term (24-hour) impacts on visibility in the Park. The State evaluated and responded to the modeling results, finding them "clearly inadequate" for this purpose, tending to overstate impacts. Modeling cited by Petitioners and performed by Dr. Michael Williams is also highly likely to overstate short-term impacts. These analyses are contradicted by the analyses submitted by Old Dominion and EPA Region III's RELMAP analysis. It is not error for the State to determine that, in light of contradictory evidence, the MPTER model and Dr. Williams' analysis were not sufficiently convincing.

[*13]

Finally, I note for the record that the Park's Federal Land Manager subsequently entered into an agreement with Old Dominion that provides for environmentally beneficial reductions in pollutant levels from the proposed facility and from levels of allowable pollutant emissions at an existing facility. n13 The latter reductions are termed "offsets." n14 As a result, the Federal Land Manager for the Park has noted in the agreement that based on the performance of the terms therein it withdraws its adverse impact determination. n15

n13 The highlights of the agreement are described in the State's response to the Petition. See Virginia Response, dated July 30, 1991 (Appendix, Document No. 40).

n14 The offsets consist of reductions in SO₂ and NO_x emissions from Virginia Power's Mt. Storm (West Virginia) facility in amounts greater than the actual emissions of these pollutants projected for the proposed Old Dominion facility. See Virginia Response, dated July 30, 1991 (Appendix, Document No. 40).

n15 The State argues that the Federal Land Manager's adverse impact determination for the Park was absolutely withdrawn in the agreement and that the issues raised by this determination have become moot by the withdrawal. Petitioners respond by pointing out that the agreement is executory and argue that the Federal Land Manager's withdrawal is conditioned upon complete execution of the terms of the agreement. Petitioners also question the legality of the withdrawal, alleging that if in entering into the agreement the Federal Land Manager withdrew its adverse impact finding then the form of such withdrawal contravenes applicable procedural requirements. For purposes of deciding whether to exercise my discretionary powers of review of the State's permit determination, I do not find it necessary to resolve the exact legal status of the adverse impact finding. For my purposes, the largely qualitative nature of the Federal Land Manager's adverse impact finding and the failure of the subsequent analysis conducted by EPA to corroborate that finding lead me to conclude that the State did not commit clear error in issuing the permit.

[*14]

Adverse Impacts -- The Wilderness. n16 Petitioners claim the State erred in rejecting the Federal Land Manager's findings of adverse impact for the Wilderness. While the Federal Land Manager's analysis supporting its finding on the Wilderness presents a somewhat stronger technical case than was presented for the Park, the State's decision to issue the permit nevertheless did not constitute clear error. The determination that Old Dominion would have an adverse impact on air quality related values at the Wilderness was based on the Federal Land Manager's findings of increases in sulfur deposition and acidification. n17 See December 14, 1990 letter from Joy E. Berg, Forest Supervisor, to Wallace Davis of the State. The single source modeling method used by the Federal Land Manager, which projected a 2% to 4% increase in sulfur deposition, appears on its face to be reasonable, but the State noted several reasons why the method may have significantly overestimated impacts. n18 See Board Book Response at Section V.B. As discussed further below, EPA's regional RELMAP modeling supports the State's view regarding overestimation: it suggests an increase in deposition only 1/10th as large [*15] as the Federal Land Manager's estimate for the Wilderness. In addition, as also discussed below (paragraph C), the Federal Land Manager for the Lye Brook Wilderness used a similar analysis in estimating impacts of the proposed Halfmoon Cogeneration project and significant questions about its accuracy there have been raised. These questions about the accuracy of the Federal Land Managers' findings suggest that the State acted reasonably in exercising its discretion under the Act to reject the Federal Land Manager's findings. See CAA § 165(d)(2)(C)(ii) and 40 CFR § 52.21(p)(4). Moreover, Petitioners have not persuaded me that there is any other evidence in the record to support its contention. For these reasons, no reviewable error stems from the State's rejection of the adverse impact determination for the Wilderness.

n16 See Petition at II.A.

n17 The Federal Land Manager for the Wilderness did not claim that Old Dominion would have an adverse impact on visibility.

n18 The original letter from the Federal Land Manager indicates the analysis was based on the annual SO₂ impact predicted by Old Dominion's modeling, but does not provide details of the calculations. Those details are contained in a separate paper that was reviewed by the State. See generally Board Book Response at Section V.B. The State did not receive detailed analysis from the Federal Land Manager until after the close of the public comment period.

[*16]

Petitioners' "Rational Basis" Argument. n19 Petitioners argue that to have a rational basis for rejecting the Federal Land Managers' analyses of the impacts of the proposed facility on the Park and the Wilderness, the State must arrive at its determination after conducting its own analysis of the impacts alleged by the Federal Land Managers. Petitioners describe several facets of the State's legal and policy conclusions which lead them to conclude that the State never analyzed the adverse impacts alleged by the Federal Land Managers, thus signifying to Petitioners that the State's actions lack a rational basis.

n19 See Petition at paragraphs II.B. and II.C. (1), (2), (3), & (5).

While it is true, as Petitioners assert, that the State appears at various points to surrender responsibility for independently analyzing the Federal Land Managers' adverse impact findings, n20 a just reading of the State's response to the findings by the Federal Land Managers reveals that the State rejected the findings of adverse impact [*17]

because it either was unable to verify the assertions made by the Federal Land Managers or it believed that their analyses tended to overstate impacts. See, e.g., Board Book Response at Section V.B. (Virginia identifies several reasons why the Federal Land Manager's analysis of adverse impacts for the Wilderness may have overstated impacts). These realities overshadow the criticisms that might otherwise be directed at some of the State's specific arguments for rejecting the Federal Land Managers' findings. For example, as to the Park, the Federal Land Manager's reasoning, as noted previously, relies in substantial part on the fact that visibility and other air quality related values in the Park have deteriorated, and concludes therefrom that the addition of other sources of pollution will inevitably cause further damage to the Park. The problem with the Federal Land Manager's claim of an adverse impact on the Park from the proposed Old Dominion facility is that it hinges on an unproven assumption, i.e., that any emissions from the facility will have an adverse impact on the Park. The truth of this assertion is not self-evident. Moreover, the facts to support such a claim are [*18] not contained in the Federal Land Manager's determination, nor were any uncovered in the analysis conducted by EPA. Among other things, the Federal Land Manager did not provide any quantitative measures of the impact of these sources (other than the MPTER modeling properly rejected by the State (see supra note 12)), and did not attempt to isolate the Old Dominion facility from the collective impact that supposedly would result from the construction of the other facilities in Virginia over the next several years. Under the circumstances, since the logic behind the Federal Land Manager's conclusions is not especially compelling, and since there is no verification of the conclusions through quantitative analysis, it was not unreasonable for the State to reject those conclusions. Petitioners are unreasonable in arguing, as they do, that in the absence of quantifiable tools to measure and identify the source of an adverse impact on a class I area, it was incumbent upon the permit issuer to refute the Federal Land Manager's "qualitative analysis" -- as Petitioners refer to it -- or accept it as proven fact. n21 As the record stands, the Federal Land Manager's so-called "qualitative [*19] analysis" could just as easily be termed an "unverified supposition" insofar as it purports to attribute a causal connection between the proposed facility and adverse impacts on air quality related values. The record demonstrates that neither the State nor EPA Region III n22 has been able, despite reasonable efforts, to confirm the supposition with reliable, scientific studies or data. Likewise, the State declined to accept the supposition based upon the Federal Land Manager's "qualitative analysis." No error results from rejecting the findings of the Federal Land Manager under these circumstances.

n20 For example, the State relied in part on the absence of guidance on de minimis levels for class I area adverse impacts as a basis for its rejection of the Federal Land Manager's adverse impact determination for the Wilderness. See "Board Book Response" at Section V.B. National guidance on de minimis impacts for class I air quality related values is in no way a prerequisite to a reasonable determination by a permit-issuing authority that the Federal Land Manager has demonstrated a proposed source will have adverse impacts. However, in this instance any State error regarding de minimis levels may be viewed as harmless. As noted elsewhere, while the Federal Land Manager's method for determining adverse impacts at the Wilderness was reasonable, Virginia explained that it may have overstated the impacts. It was not clear error for the State to reject the Federal Land Manager's finding for this reason and the reasons noted previously.

n21 The course of Petitioners' argument runs as follows:

EPA has not approved models for assessing episodic impacts of proposed sources on the Class I areas. Given that the quantitative tools are not available, the FLM must properly present a qualitative analysis. Unless the State can provide a rational basis for refuting the qualitative analysis, it must accept the FLMs' findings. The State has provided no rational basis for a finding contrary to the FLMs' expert and well reasoned qualitative assessments.

Petition at 22.

n22 Petitioners acknowledge that the concerted actions of EPA and the State bear on the determination of whether or not to sustain a finding of an adverse impact. Specifically, Petitioners assert, citing the Federal Register, 50 Fed. Reg. 28549, that the Federal Land Manager and the reviewing authority (meaning the State

and the Environmental Protection Agency) "share responsibility" to determine whether an adverse impact will result from a proposed facility. As previously noted in the text, *supra*, the Environmental Protection Agency participated in that shared responsibility by, *inter alia*, responding to the State's request for assistance for technical guidance. In recognition of that responsibility, I have taken the results of the Agency's response to the State's request into account in evaluating whether or not to review the State's permit determination. (See discussion above regarding the RELMAP modeling analysis.)

[*20]

Cumulative Impacts. n23 Petitioners assert that the State erred when it contended that the Federal Land Manager for the Park must demonstrate that emissions from each new source must by itself have an adverse impact on air quality related values, including visibility. Although Petitioners recognize that Federal Land Managers must assess whether each source will contribute to an adverse impact, Petitioners take the position that the Federal Land Managers can meet their burden under Section 165(d)(2)(C)(ii) by merely showing that proposed sources collectively will adversely impact class I areas. n24 I disagree. PSD permit determinations are made individually under the Act on a case-by-case basis, and the State is not required to withhold or deny a permit application for a qualified source based upon the supposition that there might be an adverse impact on visibility in an area if other pending applications are subsequently approved.

n23 See Petition at paragraph II.C.(4).

n24 Petitioners note that EPA has previously concluded that "a source's impact on visibility must be considered in the context of background visibility impacts caused by both existing and previously permitted, but not yet built sources." See Petition at 24 (citing *50 Fed. Reg. at 28548* (July 12, 1985)). Petitioners are correct that under EPA rules, in determining whether a proposed source will cause an adverse impact on visibility, the cumulative visibility impacts of the pending PSD applicant and all PSD-permitted sources, including those not yet constructed, must be assessed against background visibility conditions. Petitioners evidently seek extension of this policy by suggesting that all proposed sources having applied for permits should be included in the analysis.

[*21]

While it may be prudent in such circumstances for a State to consider the collective potential impacts on visibility from all prospective sources that have not yet received final permits, nothing cited by Petitioners requires this type of planning. Under existing EPA policy, the State is not required to evaluate the collective impact of those prospective sources that have not yet received permits. While EPA's policy may result in situations where applicants at the end of a permitting queue face denial of their applications because an area's visibility "growth margin" has been depleted (by those at the front of the queue), that possibility is not dispositive of the issue raised by Petitioners. It is enough to note that the State's policy of not considering prospective but as yet unpermitted sources is consistent with EPA's present cumulative impact policy for visibility. EPA's policy contains an adequate safeguard against impermissible encroachments on visibility in class I areas. Specifically, by requiring every permitted but not yet constructed source to be taken into consideration, EPA's policy considers the potential adverse impacts of every new source capable of causing [*22] an adverse impact on the area in question. n25 It also obligates the State to refrain from issuing permits whenever the addition of one more source in conjunction with all previously permitted sources (including those not constructed) would have the effect of causing an adverse impact on visibility in the class I area. In any event, there is no compelling need to speculate further on the potential impact of the unpermitted sources that Petitioners have identified as cause for concern. It suffices to note that the RELMAP modeling analysis conducted by EPA Region III did account for visibility impacts of all prospective sources (permitted or not), and could not confirm the presence of an adverse impact from that cumulative growth.

n25 Whether the relevant Federal Land Manager or the source bears the burden of demonstrating the impact would depend upon whether the source causes or contributes to an exceedance of the class I increment. See 40 CFR § 52.21(p)(4)-(5).

RELMAP Modeling Analysis of Adverse Impacts. n26 The [*23] State asked EPA Region III for technical assistance in assessing the findings of the Federal Land Managers for the Park and the Wilderness. The Region responded by performing the RELMAP analysis, the results of which it formally reported to the State on January 25, 1991. n27 The Region noted, inter alia, that the Federal Land Manager for the Park did not provide a technical analysis for its findings in either the Federal Register notice announcing its preliminary findings or the accompanying Technical Support Document; and that the reasoning underlying the findings was basically that visibility is impaired already and therefore any additional emissions from new sources would cause an adverse impact. EPA attempted to quantify the impacts in order to provide a reasonable basis for evaluating the findings of the Federal Land Managers. The Region concluded that its technical assessment using the RELMAP model did not substantiate the contention that emissions from the proposed Old Dominion facility would cause adverse impacts on the visibility values and aquatic resources of the Park or the Wilderness. n28 EPA Region III readily acknowledged in its letter to Virginia that the assessment [*24] it performed had deficiencies. In recognition of the deficiencies, it concluded by noting that, although no adverse impact was found, "[w]e do reserve the opportunity to revisit these issues as additional analytical tools become available for use in the future." On appeal, the Petitioners argue that these deficiencies render the assessment flawed, for they "[do] not support a conclusion of no adverse impact * * *." n29

n26 See Petition at paragraph II.D.

n27 Letter from Thomas J. Maslany, Director, Air, Radiation & Toxics Division, EPA Region III, to Wallace Davis, Executive Director, Virginia Department of Air Pollution Control, dated January 25, 1991 (Administrative Record #53).

n28 Id. at 4.

n29 See Petition at 28.

This argument by Petitioners does not persuade me to review the State's permit determination. Under the circumstances presented here I do not read the Act as imposing a burden on the permit issuer to prove that the proposed facility will not have an adverse impact on the two class I areas. Neither [*25] EPA nor Virginia is contending that Region III's technical assessment proves or is capable of proving such an impact will not occur. Rather, the assessment EPA performed represents a measured, analytical response to the Federal Land Managers' findings, using available tools, and is by comparison more technically rigorous and probative than the analyses they used. It showed that the allegations of the Federal Land Managers could not be substantiated by the analysis EPA conducted. Therefore, until such time as more sophisticated tools are applied to measure the impact of sources under the circumstances presented, the assessment performed by EPA represents the best available evidence in the record of the facility's impact on the two areas. The fact that the assessment may be inconclusive does not make it clear error for Virginia to have granted the Old Dominion permit. As the delegated permit issuer, the State was authorized to reject the Federal Land Managers' findings after concluding on reasonable grounds, as it did here, that they could not be substantiated. n30

n30 Petitioners have criticized the RELMAP analysis as being significantly limited by its regional scale and its inability to capture episodic impacts. The RELMAP results were based on large grid sizes and were monthly averages. The monthly averages generally are not a problem for assessing sulfate deposition because the effects

of concern are usually not of an episodic nature. However, the grid size is a limitation for the Wilderness. Overall, however, the analysis constituted a reasonable assessment of the Federal Land Manager's findings regarding adverse impacts from sulfur deposition.

[*26]

C.

Consistency Between Regions. n31 The Petitioners argue that there are parallels between this proceeding and a PSD permit proceeding in EPA Region II, involving the Halfmoon Cogeneration Project, where the Region provisionally accepted findings of adverse impact on the Lye Brook Wilderness by the Federal Land Manager for that area. However, Region II is reconsidering its initial acceptance of the findings as a result of subsequent analyses performed by the Halfmoon applicant, which tend to show, inter alia, lower long-term SO₂ levels and correspondingly lower deposition than originally indicated. The initial estimates may have been significantly overstated and therefore the issue is being revisited. Accordingly, I am not persuaded that there is such a fundamental split in approach between the two permit issuers to warrant review for the purpose of achieving national uniformity.

n31 See Petition at paragraph II.E.

D.

Quantity of NO_x Emissions. n32 The Petitioners raise concerns about the adequacy of consideration [*27] given by the State to the annual amount of NO_x emissions from the proposed facility. The Petitioners' concerns manifest themselves in numerous arguments wherein the Petitioners basically contend that additional analyses should have, but were not, performed by the applicant (e.g., relating to ozone formation or nitrification impacts upon the Chesapeake Bay). The State has adequately responded to these arguments by demonstrating that the submissions it required of the applicant fully satisfy all of the requirements set forth in EPA regulations and guidelines. n33 It points out that modeling of NO_x emissions for impact on ozone formation was not required because there is currently no acceptable EPA-approved method for assessing ozone impacts attributable to individual point sources of NO_x emissions. n34 The State further points out that the proposed facility is located quite far from the Chesapeake Bay (approximately 220 km). Also, the Chesapeake Bay is not a class I area. For all of these reasons, the State did not require Old Dominion to perform any impact analysis for the Bay. The State also notes that the analyses of impacts of the proposed facility on forest and vegetation [*28] areas was also done in accordance with EPA requirements. The Petitioners have not persuaded me that the State has committed any reviewable error as alleged.

n32 Id. at paragraph III.

n33 EPA does not currently require NO_x emissions to be addressed under the existing PSD program when an ozone violation is identified. However, EPA is considering reassessing that policy in light of section 182(f) of the amended Act.

n34 Old Dominion did supply modeling showing to the State's satisfaction that NO_x emissions would comply with class I and class II increments and NAAQS limitations.

E.

BACT Analysis -- Consideration of Environmental Impacts. n35 The Petitioners contend that Virginia did not give adequate attention to environmental impacts in its analysis of best available control technology (BACT) for the facility's NO_x emissions. The State responds by suggesting that the Petitioners' discussion appears to confuse the BACT determination with the separate issue of the facility's compliance with National Ambient Air [*29] Quality Standards (NAAQS) or increments. I am inclined to agree with the State. While collateral environmental impacts are relevant to the BACT determination, their relevance is generally couched in terms of discussing which available technology, among several, produces less adverse collateral effects, and, if it does, whether that justifies its utilization even if the technology is otherwise less stringent. See generally, *Columbia Gulf Transmission Company*, PSD Appeal No. 88-11, at 7 (June 21, 1989) ("For example, if the most effective technology would impose exceptional demands on local water resources, so that use of the technology would have adverse impacts on the environment, then, under those circumstances, the applicant would have a sound basis for foregoing use of the most effective technology in favor of some less water-intensive technology."); *North County Resource Recovery Associates*, PSD Appeal No. 85-2 (Remand, June 3, 1986) (environmental impact of pollutants not regulated under the Clean Air Act may necessitate a more stringent emission limit for regulated pollutants undergoing BACT review). The Petitioners' discussion of collateral environmental impacts is not [*30] framed in this manner and makes no specific comparison of alternative technologies. Therefore, consideration of this issue as presented by the Petitioners is rejected as lacking in specificity and clarity. n36 In any event, Virginia did not clearly err in deciding not to assess environmental impacts in conducting the BACT analysis in the manner put forth by Petitioners.

n35 See Petition at paragraph IV.

n36 "[A]n objection to a permit term or condition must be articulated with the requisite specificity, clarity and support to enable meaningful consideration." In re *Resource Technology Services, Inc.*, RCRA Appeal No. 83-1, at 2, n.2 (September 17, 1983), citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553-554 (1978).

Clean Fuel Alternative. n37 Petitioners allege that the State unlawfully failed to consider natural gas as an alternative fuel for the proposed facility, contrary to the dictates of Section 403(d) of the Clean Air Act Amendments of 1990, amending the definition [*31] of BACT in Section 169(3) of the Act. The State responds to this contention by pointing out that it can impose alternative fuel requirements on an applicant if the applicant cannot meet all federal and state air emission limitations. In this case, however, the applicant met all of those limits, and since the modeling within the relevant impact areas has demonstrated that the NAAQS will not be violated, the State did not require the use of natural gas. The State did not feel it was authorized to "redefine the source," n38 i.e., to alter the fundamental scope of the project, since Old Dominion had previously considered the alternative of using gas turbines to power the facility, but ultimately rejected that approach because of higher capital cost, low unit efficiency, and the unavailability of natural gas in the Clover area. No clear error is apparent in the State's handling of this matter, although EPA does not view the new statutory language as being limited to instances where an applicable NAAQS or increment is at risk. Rather, EPA construes the 1990 Amendments as conferring discretion on the permit issuer to consider clean fuels other than those proposed by the permit applicant. [*32] See Letter from William G. Rosenberg, Assistant Administrator for Air and Radiation, EPA, to Henry A. Waxman, Chairman, Subcommittee on Health and Environment, House Committee on Energy and Commerce (Oct. 17, 1990) (enclosure at 4). n39 The State exercised its discretion in accord with EPA's reading of the Amendments.

n37 See Petition at paragraph IV.B.

n38 Traditionally, EPA does not require a PSD applicant to change the fundamental scope of its project. See, e.g., *Spokane Regional Waste-to-Energy Facility*, PSD Appeal No. 88-12 (EPA June 9, 1989) (Order

Denying Review); Pennsauken Resource Recovery Facility, PSD Appeal No. 88-8 at 11 (EPA November 10, 1988) (Order Denying Review).

n39 However, the BACT analysis should include consideration of cleaner forms of the fuel proposed by the source.

Selective Catalytic Reduction (SCR). n40 Petitioners argue that the State failed to give adequate consideration to SCR as an alternative control technology for NO_x emissions from the proposed facility. It argues that the [*33] technology settled upon by the State is roughly one-half as effective as SCR. In support, the Petitioners point to comments in the record by EPA Region III that make reference to numerous instances of SCR use for coal-fired power plants in Japan and Germany and of one instance in the United States, in a proposed coal-fired cogeneration industrial boiler in New Jersey, where a permit has been issued requiring that it be employed. The State counters by asserting that it is not required to consider foreign applications of SCR, citing Mecklenburg Cogeneration Limited Partnership, PSD Appeal No. 90-7 (Order Denying Review, December 21, 1990) (noting that SCR had not been employed domestically with a facility and fuel source the same as the applicant's), and second, that the New Jersey permit may be disregarded because the project is not yet operational and, thus, the use of SCR has not been demonstrated.

n40 See Petition at paragraph IV.C.

The SCR issue Petitioners raise is altogether familiar by reason of the Mecklenburg [*34] decision. n41 On the one hand it is immediately clear that the addition of the New Jersey facility to the SCR rolls is a new and noteworthy event; on the other hand it is by no means immediately clear that the event renders Virginia's decision clearly erroneous. In the one year since Mecklenburg was decided, there have been instances of acceptance of SCR for large scale facilities of the type proposed by the permit applicant, but not so as to render clearly erroneous the rejection of SCR on technical grounds, at least at the time the State issued the Old Dominion permit. In this regard, it is relevant that the New Jersey plant had not yet employed SCR at the time of the State's permitting decision in this case. The actual use of SCR in coal-fired boilers was still limited to foreign, primarily European, facilities. Both Old Dominion and the State distinguished those facilities from Old Dominion's by pointing to potentially significant differences in coal type (particularly, trace element content) and boiler design that may adversely affect catalyst life and operating characteristics. Although these differences apparently were not closely scrutinized by the State, the record [*35] also does not conclusively demonstrate that the State should have required SCR in this instance. As noted at the beginning of this Order, the regulations governing appeals of permit determinations contemplate that the permit issuer -- in this case the State -- shall make the permit determination, and that review by the Administrator shall be only sparingly exercised. Even though EPA Region III, for example, might well have arrived at a different determination had it been the permit issuer of record, the Petitioners have not persuaded me that the State's choice represents clear error, because the evidence "for" and "against" SCR was (at the time of permit issuance) in such close balance. Differences of opinion in such circumstances do not necessarily translate into error by one and correctness by the other; rather, they can easily reflect genuine differences of opinion -- i.e., differences best left for resolution to the informed discretion of the permit issuer. Consequently, I decline to review the State's determination not to require SCR for the Old Dominion facility. However, as more information comes to light (for example, when the New Jersey facility comes on line or other [*36] similar facilities are permitted for SCR), any future claims of technological or economic infeasibility by permit applicants (or permit issuers) will inevitably be subject to greater scrutiny, and to be sustainable, the claims will have to be accompanied by a detailed, case-specific analysis of all relevant factors.

n41 As in Mecklenburg, it is undisputed that the State analyzed the permit application by employing a

systematic, rational method of analyzing BACT for the facility. See, e.g., Virginia Response at 22. Under the methodology, all of the "available" control technologies are ranked in order of stringency, and the most stringent control technology is evaluated first. If the permit applicant does not intend to use that technology, it demonstrates that the technology would be technically infeasible or justifies rejection based on consideration of energy, environmental or economic impacts, in which case the next most stringent control alternative is evaluated as BACT, and so forth. See, e.g., Mecklenburg at 3-4. Also as in Mecklenburg, a fair reading of the record demonstrates that the necessary steps to the analysis were adequately followed in this case. Specifically, the State addressed SCR as an available technology and considered it in detail before rejecting it on grounds of technical infeasibility. That analysis included consideration of the New Jersey facility, which was permitted just prior to the State's decision in this case.

[*37]

BACT Analysis -- Timing Considerations. n42 The Petitioners claim that "the BACT analysis for the [Old Dominion] plant is contrary to the law and regulations because the decision was effectively made prior to the public involvement process and was not made on a case-specific basis." Petition at 58. This allegation does not state any basis for concluding that the State erred. It is essentially irrelevant that, as Petitioners allege, the State may have held a fixed view of how the BACT determination should be made during the period preceding the public comment process. Error would only ensue if it were alleged and shown that the State thereafter refused to conduct a meaningful evaluation of the public's comments. The Petitioners make no such allegation and have not shown any instance in which there is substantial reason to believe that the State did not give full and fair consideration to public comment. Accordingly, review is not warranted; Petitioners have not shown or alleged any error.

n42 Id. at paragraph IV.D.

[*38]

F.

Petitioners assert that the permit should not issue until EPA has reviewed and revised the long-term visibility strategy for protecting the Park and the Wilderness. n43 Matters such as these, which relate to adoption of a long-term strategy to prevent visibility impairment under Section 169A of the Clean Air Act, are beyond the scope of this permit proceeding under Section 165 the Act. EPA has previously determined that the visibility provisions for new sources as implemented through the PSD program constitute a fully adequate long-term strategy to prevent future impairment of visibility from new sources. See *52 Fed. Reg. 45135, 7807-7808 (1987)*. By raising the long-term strategy as an issue, Petitioners are attempting to use this proceeding to mount an otherwise impermissible collateral attack on EPA's implementation of Section 169A. This is the wrong forum in which to maintain such an attack; accordingly, review of this issue will not be entertained.

n43 Id. at paragraph V.

G.

Additional [*39] Public Comment. n44 EPA Region III commented on the draft permit and criticized aspects of Old Dominion's modeling as it related to increment consumption for the Wilderness. As a result, certain assumptions in the modeling were changed and Old Dominion agreed to tighten its emission limits so that no increment violation would

be shown. The State revised the permit accordingly and issued it in final form without soliciting further comment from the public. Although the revised permit calls for reduced SO[2] emissions, Petitioners argue that the State or the Administrator should solicit further comment on the revised modeling. In my opinion no further comment is necessary. First, Petitioners do not allege in their Petition that the State's failure to solicit additional comment constituted clear error or otherwise met the criteria for reviewing a permit determination under 40 CFR § 124.19. See Petition at paragraph VII. Second, even if Petitioners had made such an allegation, I would decline the request because I do not find that Virginia clearly erred in deciding not to reopen the comment period in this case.

n44 Id. at paragraph VII.

[*40]

The decision by the permit issuer to reopen the public comment period is discretionary, as is clear from the plain terms of the regulation that authorizes a reopening of the comment period by the permit issuer. See 40 CFR § 124.14(b) (the permit issuer "may" reopen the comment period if it appears that substantial new questions were raised during the public comment period). There is no indication the State abused its discretion by not reopening the comment period in this case.

The record reveals that during the public comment period, EPA Region III objected to the input of certain assumed values in Old Dominion's increment modeling for the Wilderness. Although Old Dominion believed the assumed values to be conservative, it accepted Region III's request to substitute actual values instead. The resulting analysis indicated the potential, under certain conditions, for increment violations in the Wilderness unless the draft permit was modified somewhat. Old Dominion obliged by agreeing to a tightening of the permit's SO[2] emission limits so that there would be no increment violation. Petitioners believe the modified permit and revised modeling should be subjected to an additional [*41] period of public comment. Virginia disagrees, arguing that the initial modeling was adequate, that the commenter -- EPA Region III -- is satisfied with the response by Old Dominion and the State, and that in any event no further public comment is required by the regulations.

While there may be times when a revised permit differs so greatly from the draft version that additional public comment is required (the discretionary wording of 40 CFR § 124.14(b) notwithstanding), this is not one of those instances. The increment modeling underlying the SO[2] emissions in the draft permit was properly subjected to public comment. Region III's concerns with the modeling were addressed by the permit applicant in a manner that satisfies Region III, and it is self-evident that Petitioners are in no position to oppose the decision to tighten the permit's SO[2] emissions. Petitioners are not worse off with the revision than without it. Moreover, there is no reason to believe that tightening the emissions limitation is likely to result in unanticipated adverse environmental consequences in comparison with retention of the previous, less stringent SO[2] emissions limitation. The revised permit [*42] by all accounts is a logical outgrowth of the notice and comment process and all commenters have had a fair and reasonable opportunity to present their views on the permit. To require further comment in the face of Old Dominion and Virginia's responsible actions might discourage substantive responses to public comments in the future, as well as introduce additional delay to the permit proceeding.

Conclusion

For the reasons stated above, it is my conclusion that review of the State's permit determination is not warranted. It meets all necessary requirements of federal law. Therefore, the petition for review is denied. In accordance with 40 CFR § 124.19(f)(2), the Regional Administrator of EPA Region III or his delegatee shall "promptly" publish notice of this final action in the Federal Register.

So ordered. n45

n45 Matters raised by Petitioners but not specifically addressed in this Order were not deemed critical to deciding whether discretionary review of the permit determination should be exercised. Accordingly, such matters are also rejected as grounds for reviewing the permit determination.

[*43]

LEXSEE 2 E.A.D. 667

In the Matter of: Pennsauken County, New Jersey Resource Recovery Facility

PSD Appeal No. 88-8

United States Environmental Protection Agency
Environmental Appeals Board

1988 EPA App. LEXIS 27; 2 E.A.D. 667

November 10, 1988

PANEL:

[*1]

Lee M. Thomas, Administrator

OPINION:

REMAND ORDER

In separate petitions filed pursuant to 40 CFR § 124.19 (1987), n1 the Township of Cinnaminson et al. n2 and Robert Filipczak requested review of a Prevention of Significant Deterioration (PSD) permit issued to the Pennsauken Solid Waste Management Authority for construction of a municipal waste combustor. The permit determination was made by the New Jersey Department of Environmental Protection (NJDEP) pursuant to a delegation of authority from EPA Region II, New York, New York. Because of the delegation, NJDEP's permit determination is subject to the review provisions of 40 CFR § 124.19, and any permit it issues will be an EPA-issued permit for purposes of federal law. 40 CFR § 124.41; *45 Fed. Reg. 33,413* (May 19, 1980).

n1 All references to the Code of Federal Regulations are to the 1987 edition.

n2 The Township of Cinnaminson is joined in the petition by the Borough of Palmyra and the Borough of Riverton, which are municipalities located in Burlington County, New Jersey, and by Allied Citizens Opposing Pollution (ACOP), a civic association.

[*2]

Under the rules governing this proceeding, there is no appeal as of right from the permit decision. Ordinarily, a petition for review of a PSD permit determination is not granted unless 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. The preamble to the regulations states that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Region level * * *." *45 Fed. Reg. 33,412* (May 19, 1980). The burden of demonstrating that the permit conditions should be reviewed is therefore on the petitioners.

Discussion

Cinnaminson et al. object to issuance of the permit because they believe NJDEP's determination of best available

control technology (BACT) is deficient. n3 According to these petitioners, NJDEP did not give adequate consideration to thermal de-NO[x] technology in performing the BACT analysis. Petitioners argue that NJDEP's determination not to set an emission limitation based on thermal de-NO[x] technology was based on an inadequate record, resulting in part from [*3] NJDEP having made its BACT determination prior to the time of permit issuance. Petitioners also argue that the BACT analysis submitted by the permit applicant did not adequately justify use of combustion controls (the means chosen by the applicant for controlling NO[x] emissions from the proposed facility) instead of thermal de-NO[x] technology. NJDEP responded to these contentions by arguing that the record actually discloses that the BACT determination was made at the time of permit issuance; that the permit applicants' BACT evaluation fully evaluates alternative control technologies, including thermal de-NO[x] technology; and that thermal de-NO[x] technology is not yet "available" within the meaning of the statutory definition of BACT. Regarding the last point, NJDEP stated that there was just one facility in the United States (the Commerce facility in Whittier, California) employing thermal de-NO[x] technology, and that it had been in operation only one year; that there is just one facility currently under construction (in Modesto, California); and that a third (in Long Beach, California) began operations after the Pennsauken permit was issued and therefore could not have been [*4] considered at the time of permit issuance. With respect to these facilities, NJDEP says they were reviewed under legal standards n4 and NO[x] control strategies n5 not pertinent to the Pennsauken facility.

n3 To obtain a PSD permit, the applicant must demonstrate that the proposed facility will employ BACT for each regulated pollutant. Section 169 of the Clean Air Act defines BACT as an "emission limitation reflecting the maximum degree of reduction" that the "permitting authority," on a "case-by-case basis, taking into account energy, environmental, and economic impacts and other costs" determines is "achievable." 42 U.S.C. § 7479(3). Because BACT is determined on a case-by-case basis and takes into account energy, environmental, and economic impacts and other costs, which may vary from location to location, a BACT determination for a municipal waste combustor at one site may differ from one reached at another site, even though the technology employed may be identical. In other words, the emission limitations for the sites can differ.

n4 NJDEP points out that the South Coast Air Quality Management District in California (SCAQMD) treats NO[x] as a non-attainment pollutant requiring lowest achievable emission rate (LAER). In point of fact, however, one of the three facilities (Modesto) is located in an area that is attainment for NO[x], and EPA issued a PSD permit for it with a BACT limitation based on thermal de-NO[x]. EPA Region IX issued the permit on August 11 1986. Telephone conversations between Ronald L. McCallum, EPA Chief Judicial Officer, and Bob Baker, EPA Region IX (October 5 and November 11, 1988).

n5 According to NJDEP, the Commerce facility was permitted under California rules as innovative technology, and all of the facilities are in locations where NO[x] emissions fall under the South Coast Air Quality Management District's (SCAQMD's) control strategy for ozone. Conversely, New Jersey focuses on volatile organic compounds (VOC's) for its ozone control strategy.

[*5]

An examination of the materials identified by NJDEP as representing the NO[x] BACT analysis n6 generally bears out petitioners' contention that the BACT analysis on which NJDEP relied is inadequate. Specifically, the record fails to disclose that the applicant met its burden of showing that an emission limitation based on combustion controls alone represents BACT. The basic attributes of that burden are set out in Honolulu Resource Recovery Facility ("H-Power"), PSD Appeal No. 86-8 (June 22, 1987), where I interpreted the statutory definition of BACT as placing the burden on the applicant of "demonstrating that significant technical defects, or substantial local economic, energy, or environmental factors or other costs warrant a control technology less efficient than [the most stringent available technology]." Id. at 7, 6 n.9. This interpretation was disseminated in operational guidance for municipal waste combustors on June 26, 1987, n7 and was further refined in general guidance issued by EPA's Assistant Administrator

for Air and Radiation on December 1, 1987. The latter guidance refers to the applicant's burden as the "top-down" approach to BACT analysis:

The first step in [*6] this approach is to determine, for the emission source in question, the most stringent control available for a similar or identical source or source category. If it can be shown that this level of control is technically or economically infeasible for the source in question, then the next most stringent level of control is determined and similarly evaluated. This process continues until the BACT level under consideration cannot be eliminated by any substantial or unique technical, environmental or economic objections. Thus, the "top-down" approach shifts the burden of proof to the applicant to justify why the proposed source is unable to apply the best technology available. It also differs from other processes in that it requires the applicant to analyze a control technology only if the applicant opposes that level of control; the other processes required a full analysis of all possible types and levels of control above the baseline case.

n6 See Final Environmental and Health Impact Statement ("FEHIS"), Volume I, at 5-36 through 5-56 (Jan. 1987); FEHIS Response to Comments, Volume I at 211-213 (June 1987); Hearing Officer's Report at 226 (June 30, 1988).

n7 Memorandum from Gerald Emison, Director, EPA Office of Air Quality Planning and Standards (OAQPS) to EPA Regional Air Office Directors, enclosing "Operational Guidance on Control Technology for New and Modified Municipal Waste Combustors."

[*7]

The "top-down" approach is essentially required for municipal waste combustors pursuant to the June 22, 1987, Administrator's remand to Region IX of the H-Power BACT decision and the OAQPS June 26, 1987, "Operational Guidance on Control Technology for New and Modified Municipal Waste Combustors (MWC's)." It is also currently being successfully implemented by many permitting agencies and some of the Regional Offices for all sources. I have therefore determined it should be adopted across the board. n8

n8 Memorandum from J. Craig Potter, Assistant Administrator, to Regional Administrators (Regions I-X) at 4 (Dec. 1, 1987) (the Potter Memorandum)

The H-Power decision, the operational guidance for municipal waste combustors, n9 and the "top-down" guidance are all applicable to the Pennsauken permit determination. H-Power was my direct administrative interpretation of the statutory BACT requirement; the subsequent operational guidance and "top-down" guidance implement H-Power through statements of Agency policy. All [*8] three documents antedate issuance of the permit. n10 These interpretations and policy statements were therefore available to the applicant and NJDEP for the Pennsauken permit. n11

n9 The Operational Guidance expressly states that it applies to all PSD permits issued through State and local agencies pursuant to delegation agreements made under 40 CFR § 52.21(u), except where a final permit was issued and administrative appeals under 40 CFR Part 124 were exhausted prior to June 26, 1987. Operational Guidance at 7; see also *52 Fed. Reg. 25399, 25406* (July 7, 1987); *52 Fed. Reg. 47826* (December 16, 1987). The "top-down" guidance contains statements to the same effect. Potter Memorandum 4.

n10 The chronology of the Pennsauken permit is as follows: the permit application was filed in January 1987; it was supplemented with a BACT analysis for NO[x] in June 1987 (including an evaluation of thermal de-NO[x] technology); NJDEP completed its BACT assessment in December 1987; hearings were held and public comment was solicited in January-February 1988, in which commenters questioned the absence of an NO[x] emission limitation based on application of thermal de-NO[x] technology; and lastly, the permit was issued in July 1988, specifically rejecting thermal de-NO[x] as representing BACT for this facility.

n11 As a practical matter, BACT determinations will ordinarily be made at some time prior to actual issuance of the permit, for there is always a lag between closure of the administrative record (usually the close of the public comment period) and the time when the permit determination is announced. As noted in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), quoting *ICC v. Jersey City*, 332 U.S. 503 (1944):

Administrative consideration of evidence * * * always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is judicially reviewed] * * *. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.

435 U.S. at 554-55; see *Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981) (quoting *Vermont Yankee* supra).

Absent unusual delay between the close of the public comment period and the date of permit issuance, or the presence of other extraordinary circumstances, the close of the public comment period can be used as the reference by which the adequacy of the administrative record is judged.

[*9]

The permit applicant's burden of showing that a more stringent technology is not BACT obviously does not come into existence unless the so-called "more stringent" technology is available. If the technology is not available, the permit applicant is under no duty to consider it in the BACT analysis. Here, NJDEP contends that thermal de-NO[x] technology is not available; however, there is nothing of substance in the applicant's BACT analysis to bear out this contention. If anything, it is refuted by reference to the Commerce facility, which was in existence and operating during NJDEP's review of the permit application, and by reference to the evident willingness of the Modesto and Long Beach applicants to commence construction of their municipal waste combustors during the same period of consideration. The fact that these projects were undertaken to comply with allegedly different legal requirements (LAER or California rules) and different control strategies is not especially material to the issue of availability. n12 The question of availability for purposes of BACT is a practical, factual determination, using conventional notions of whether the technology can be put into use. [*10] n13 The record here raises a strong presumption in favor of concluding that thermal de-NO[x] technology is available in the sense just described. The operational guidance, issued June 26, 1987, also treats thermal de-NO[x] technology as an available technology that "should be considered by permitting authorities in making BACT determinations." Operational Guidance at 6. In short, the applicant's BACT analysis must evaluate thermal de-NO[s] as an available technology.

n12 See notes 4 and 5 supra.

n13 The dictionary defines the word "available" as that which can be "used," or is "usable," or can be "got, had, or reached; * * * accessible." Webster's New World Dictionary of the American Language 96 (2d College ed. 1972).

The applicant's BACT analysis, however, does not contain the level of detail and analysis necessary to satisfy the applicant's burden, as previously described, of showing that thermal de-NO[x] technology is technically or economically unachievable for this source. The applicant's assertions that [*11] the technology has not yet been demonstrated to be efficient, n14 reliable, and cost effective in controlling NO[x] are merely conclusory. n15 Moreover, they were made in a January 1987 submission and are undoubtedly out-of-date in view of the rapid developments in the application of this technology. Although the BACT analysis shows control costs in the range of \$ 1300-1500 per ton of NO[x] removed, n16 there is no serious discussion of cost effectiveness. For example, the applicant estimated annual costs of removing NO[x] at \$ 200,000 to \$ 250,000 using thermal de-NO[x] technology. FEHIS (Response to Comments) at 212 (Table 16.1-1). However, there is no discussion that even purports to show that these costs are unusually high. Greater efforts must be made by the applicant to show that thermal de-NO[x] is economically infeasible or otherwise not achievable in this case. This might be done, for example, by obtaining and analyzing operating data and other information from the Commerce facility -- and perhaps also from the Long Beach facility, which recently commenced operations. H-Power and EPA's guidance implementing that decision contemplate a much more thorough explanation, [*12] based on consideration of objective technical and economic data, to substantiate the contention that thermal de-NO[x] is an experimental, unproven technology. In sum, the BACT analysis does not contain sufficient justification, specific to the proposed facility, to justify the level of control proposed in the permit. More detail and analysis is required.

n14 The applicant's own submissions refute this contention. According to the applicant, NO[x] emissions for the proposed facility would be 88.9 lb/hr using combustion controls compared with 35.6 to 62.2 lb/hr using thermal de-NO[x] technology. FEHIS Response to comments 211-212 (Table 16.1-1 (June 1987)). Pollutant reductions of this magnitude are clearly significant.

n15 See FEHIS at 5-48.

n16 When operated at the peak fuel feed rate of 500 tons per day, for 365 days per year, the total annual emissions of NO[x] at the proposed facility are estimated at 389.3 tons. FEHIS at 5-37 (Table 5.3-3).

Petitioner Robert Filipczak's fundamental objections to the [*13] Pennsauken permit are not with the control technology, but rather, with the municipal waste combustor itself. He urges rejection of the combustor in favor of co-firing a mixture of 20% refuse derived fuel and 80% coal at existing power plants. These objections are beyond the scope of this proceeding and therefore are not reviewable under 40 CFR § 124.19, which restricts review to "conditions" in the permit. Permit conditions are imposed for the purpose of ensuring that the proposed source of pollutant emissions -- here, a municipal waste combustor -- uses emission control systems that represent BACT, thereby reducing the emissions to the maximum degree possible. These control systems, as stated in the definition of BACT, may require application of "production processes and available methods, systems, and techniques, including fuel cleaning as treatment or innovative fuel combustion techniques" to control the emissions. 42 U.S.C.A. § 7479(3). The permit conditions that define these systems are imposed on the source as the applicant has defined it. Although imposition of the conditions may, among other things, have a profound effect on the [*14] viability of the proposed facility as conceived by the applicant, the conditions themselves are not intended to redefine the source, as petitioner Filipczak would have them do. In other words, the source itself is not a condition of the permit. Therefore, petitioner's objections to the permit are not within the scope of this proceeding. Other matters raised by petitioner that are arguably within the scope of the proceeding, for example, the adequacy of the BACT analysis as it relates to mercury emissions and removal of metals as a fuel cleaning procedure, have not been presented in a manner to convince me that NJDEP committed clear error or that an important issue warranting review has been raised at this time. Therefore, the petition is denied.

Conclusion

The deficiencies in the BACT analysis leave two courses of action open at this juncture of the proceedings. One is to grant review of the permit and enter into the briefing phase contemplated by 40 CFR § 124.19(c). However, the deficiencies in the record can not be rectified through the submission of briefs, and any ensuing decision would likely conclude that the permit should be denied (because of the deficiencies) or that [*15] it should be remanded to the permit-issuing authority to allow the applicant to supplement the BACT analysis. Considerations of time favor remanding the permit in the first instance. Therefore, rather than receiving additional briefs on appeal, I am remanding the case to NJDEP for further consideration of the BACT analysis, solely as it relates to NO[x] emissions. This remand should not be viewed as prejudging the issue. NJDEP is simply directed to reopen the permit proceeding for the limited purpose of allowing the applicant to supplement its original BACT analysis in accordance with the guidance described in this decision. If, after a full review of the data NJDEP determines that NO[x] emission levels obtained from combustion controls alone represent BACT, it may reissue the permit as written. It may, of course, revise the limitations and other conditions of the permit as appropriate.

After making the determination, NJDEP should reopen the public comment period to receive any supplemental comments from petitioners Cinnaminson et al. on the issue of the NO[x] limitations in the permit. NJDEP's determination on remand will be subject to review under 40 CFR § 124.19, and [*16] appeal of its decision on remand will be required to exhaust administrative remedies under section 124.19(f)(1)(iii).

So ordered.

LEXSEE 5 E.A.D 25

In the Matter of: SEI Birchwood, Inc.

PSD Appeal Nos. 93-11 & 93-12

United States Environmental Protection Agency
Environmental Appeals Board

1994 EPA App. LEXIS 31; 5 E.A.D. 25

January 27, 1994

HEADNOTE:

[*1]

Resource Conservation and Recovery Act ("RCA")

1. This action involves two petitions for review of a Prevention of Significant Deterioration (PSD) permit issued by the State of Virginia under a delegation from the U.S. EPA. The petitions relate to a permit issued to SEI Birchwood (SEI) for the construction of a 220-megawatt coal-fired electric generating facility in King George County, Virginia. The first petition was filed by Sarah Nasta. Ms. Nasta expresses concern over the impact of the facility on historical structures, the need for a study of the cumulative impact of the proposed facility, and the impact of the facility on the Chesapeake Bay and the Rappahannock River.

Resource Conservation and Recovery Act ("RCA")

2. The second petition was filed by Citizens for Sensible Power (CSP). CSP raises a total of seven objections to the PSD permit. These can be summarized as follows: 1) the citizens of King George County were not given sufficient notice of the public hearing on the present permit; 2) the National Park Service determined that the plant would adversely impact Shenandoah National Park; 3) the State ignored obvious and calculable impacts on the Chesapeake Bay; 4) [*2] the proposed facility is unnecessary; 5) the State and Virginia Power are not doing enough to promote energy efficiency and conservation; 6) the proposed facility does not reflect Best Available Control Technology; and 7) the Agency should consider the cumulative impact of this and other power plants in Virginia.

Resource Conservation and Recovery Act ("RCA")

3. Held: Review of the petitions is denied. The petition filed by Sarah Nasta merely restates issues raised and addressed during the public comment period without explaining why the State's responses to these comments were clearly erroneous or otherwise warrant review. In addition, the concerns raised by Ms. Nasta are not stated with sufficient specificity to satisfy the requirements of 40 C.F.R. § 124.19, nor does the petition identify the specific permit conditions being challenged.

Resource Conservation and Recovery Act ("RCA")

4. The petition filed by CSP fails to identify any factual or legal errors or any policy considerations or exercises of discretion that warrant review. Moreover, several of CSP's objections either restate issues raised during the comment period without indicating why the State's response were [*3] clearly erroneous, raise issues outside the scope of the Board's jurisdiction, or raise issues that were not raised during the comment period.

Resource Conservation and Recovery Act ("RCA")

5. NOTICE: This opinion is subject to formal revision before publication. Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, of any typographical or other formal errors, in order that corrections may be made before publication.

PANEL:

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich;

Opinion of the Board by Judge McCallum:

OPINION:

ORDER DENYING REVIEW

I. BACKGROUND

The Environmental Appeals Board has received two petitions for review of a Prevention of Significant Deterioration (PSD) permit issued to SEI Birchwood, Inc. (SEI) for construction of a 220-megawatt coal-fired electric generating facility in King George County, Virginia. PSD Appeal No. 93-11 was filed by Sarah Nasta, a member of "Citizens opposed to the SEI Birchwood power plant." PSD Appeal No. 93-12 was filed by Citizens for Sensible Power (CSP) representing concerned citizens in King George, Spotsylvania, Caroline, [*4] and Stafford Counties, as well as Fredericksburg, Virginia. Both petitioners filed comments on the draft permit during the public comment period.

The permit was issued by the Virginia Department of Environmental Quality (VDEQ) pursuant to a delegation of authority from U.S. EPA, Region III, under 40 C.F.R. § 52.21(u). Because of this delegation, the Virginia permit is considered an EPA-issued permit for purposes of federal law (40 C.F.R. § 124.41; *45 Fed. Reg. 33,413* (May 19, 1980)), and is subject to review by the Agency under 40 C.F.R. § 124.19 before becoming final. As requested by the Board, the VDEQ filed a response to the petitions. Although not requested to do so, SEI has also filed a brief responding to the two petitions for review.

II. DISCUSSION

Under the rules governing this proceeding, a petition for review will not ordinarily be granted unless the permit determination is clearly erroneous or involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19. As the preamble to the Part 124 regulations states: "[the] power of review should be only sparingly exercised" and "most permit conditions should [*5] be finally determined at the Regional [or State] level." *45 Fed. Reg. 33,412* (May 19, 1980). The burden of demonstrating that review is warranted rests on the petitioner. In re Crown/Vista Energy Project (CVEP) West Deptford, New Jersey, PSD Appeal Nos. 93-15, et al., at 3 (EAB, January 5, 1994); In re Genesee Power Station, PSD Appeal Nos. 93-1 through 93-7, at 5-6 (EAB, October 22, 1993). In the present case, the petitioners have failed to satisfy their burden with regard to any of the issues raised.

A. Petition of Sarah Nasta

In a two-page letter addressed to the Environmental Appeals Board, Ms. Nasta states that she is appealing VDEQ's decision to grant a PSD permit to SEI Birchwood. Ms. Nasta expresses concern over the impact of the facility on historical structures, the need for a study of the cumulative impact of the proposed facility, and the impact of the facility on the Chesapeake Bay and the Rappahannock River.

The petition, however, merely restates comments previously submitted to the State during the comment period

without indicating why the State's responses to these comments were clearly erroneous or otherwise warrant review. The petition [*6] therefore fails to convince us that review is warranted. n1 Crown/Vista, supra, at 4; In re Hadson Power 14 - Buena Vista, PSD Appeal Nos. 93-2, et al., at 36-37 (EAB, Oct. 5, 1992) (mere reference to comments on a draft permit is insufficient to justify review). In addition, the issues raised by Ms. Nasta are not stated with sufficient specificity to satisfy the requirements of § 124.19, nor does the petition identify the specific permit conditions being challenged. Accordingly, review is denied. Genesee, supra, at 41 & 42; see also In re Beckman Production Services, UIC Appeal Nos. 92-9, et al., at 11 (EAB, January 24, 1994) (although the Board does not expect that petitions filed by persons unrepresented by counsel will necessarily conform to "exacting and technical pleading requirements, a petitioner must nevertheless comply with the minimal pleading standards and articulate some supportable reason why the [permitting authority] erred in its permit decision in order for the petitioner's concerns to be meaningfully addressed by the Board.") (emphasis in original).

----- Footnotes -----

n1 Ms. Nasta also states that the [*7] power from the proposed facility is not needed. This issue, however, is outside the scope of the Board's jurisdiction and does not, therefore, warrant review. See In re Kentucky Utilities Company, PSD Appeal No. 82-5, at 2 (Adm'r, Dec. 21, 1982) (holding that the need for a power plant is "more appropriately addressed by the state agency charged with making that determination.").

----- End Footnotes -----

B. Petition of Citizens for Sensible Power

The Petition filed on behalf of Citizens for Sensible Power (CSP) n2 raises a total of 7 objections to the SEI permit. These will be discussed below, seriatim.

----- Footnotes -----

n2 The petition was submitted by Conway C. Moy and Joyce C. Childress.

----- End Footnotes -----

First, CSP contends that the citizens of King George County were not given sufficient notice of the public hearing on the present permit because such notice was not provided at least 30-days prior to the hearing. See 40 C.F.R. § 124.10(b)(2) (public notice of a public hearing shall be given [*8] at least 30 days before the hearing). We disagree. Contrary to CSP's assertion, the record on appeal indicates that the public was indeed provided with 30-days notice of the public hearing. Such notice was published in the Free Lance Star, a daily newspaper with general circulation in the Fredericksburg area, including King George County, on December 5, 1992, 30-days prior to the January 5, 1993 public hearing. n3 See Attachment 1a to VDEQ's Response to CSP's Petition for Review. Review is therefore denied on this basis.

----- Footnotes -----

n3 This notice satisfied the requirements of 40 C.F.R. § 124.10(c)(2)(i) (notice must be published in a daily or weekly newspaper within the area affected by the facility).

----- End Footnotes -----

Second, CSP states that the National Park Service has determined that the plant would adversely impact Shenandoah National Park. While it is true that the Federal Land Manager for Shenandoah National Park initially indicated that the proposed facility would have an adverse impact on visibility and other air quality related values at [*9] the Park, n4 this finding was later withdrawn. By letter dated August 13, 1993, the Department of the Interior indicated that, after receiving and reviewing the results of additional modelling conducted by SEI, it was withdrawing its adverse impact finding for the SEI Birchwood project. n5 We therefore see no reason to grant review on this basis.

----- Footnotes -----

n4 Letter from Jennifer Salisbury, Assistant Secretary for Fish and Wildlife and Parks, United States Department of the Interior, to Wallace Davis, Executive Director, Virginia Department of Air Pollution Control (January 8, 1993) (Attachment 1d to VDEQ's Response).

n5 Letter from Don Barry, Acting Assistant Secretary for Fish and Wildlife and Parks, United States Department of Interior, to Pam Faggert, Executive Director, VDEQ (August 13, 1993) (Attachment 1e to VDEQ's Response).

----- End Footnotes -----

Third, CSP states that SEI and VDEQ ignored impacts on the Chesapeake Bay. CSP does not specify exactly what impacts were ignored, or why the modelling conducted for the proposed facility was incomplete. [*10] The objection is therefore not stated with sufficient specificity to justify review. n6 See Genesee, supra, at 41-42.

----- Footnotes -----

n6 In its response to comments on the draft permit, VDEQ addresses concerns regarding the impact of the proposed facility on the Chesapeake Bay. See Response to Comments, at 21-23. CSP fails to indicate why the State's responses in this regard were clearly erroneous or otherwise warrant review. See Crown/Vista, supra, at 4.

----- End Footnotes -----

CSP's fourth and fifth objections -- that the energy provided by the proposed facility is unneeded and that the State and Virginia Power are not doing enough to promote energy conservation -- are outside the scope of the Board's jurisdiction and do not warrant review. See supra note 1.

Next, CSP contends that emissions limitations from the proposed facility will not meet the definition of Best Available Control Technology or BACT. n7 CSP's sole support for this assertion is the following statement: "At long last, Virginia regulators continue to demonstrate that only the U.S. EPA can [*11] lead Virginia to require basic energy efficiency and natural gas as economic alternatives for [BACT]." Petition for Review at 3. However, because the issue as framed by CSP was reasonably ascertainable but was not raised during the public comment period, review is denied. 40 C.F.R. § 124.13 (all persons have an obligation to raise "all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period."). Moreover, the above-quoted objection, which evidently is intended to express petitioner's preference for a different type of electric generating facility than proposed by the permit applicant, fails to satisfy petitioner's burden of demonstrating clear error on the part of the permitting authority. n8

----- Footnotes -----

n7 "Best Available Control Technology" is defined in pertinent part in the Clean Air Act as:

an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under [the Act] emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case [*12] basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.

42 U.S.C. § 7479(3); see also, 40 C.F.R. § 52.21(b)(12) (definition of BACT).

n8 It is clear that permits issued by delegated States under federal PSD permitting regulations are not subject to challenge because the permit-issuer refused to redefine the source. Thus, in *In re Pennsauken County, New Jersey Resource Recovery Facility*, PSD Appeal No. 88-8, at 11 (Adm'r, Nov. 10, 1988), involving a permit issued under federal PSD permitting regulations by the State of New Jersey (pursuant to a delegation of authority from EPA Region II), the Administrator of EPA held that "the conditions themselves [of such a PSD permit] are not intended to redefine the source * * *." He therefore rejected a challenge to the permit that would have required a fundamental redesign of the proposed facility. Similarly, in [*13] *In re Old Dominion Electric Cooperative*, PSD Appeal No. 91-39 (Adm'r, Jan. 29, 1992), involving a permit issued under federal PSD permitting regulations by the Commonwealth of Virginia (pursuant to a delegation of authority from EPA Region III), the Administrator found no clear error in the State's rejection of a challenger's proposal to substitute one type of electric generating facility (fired by natural gas) for another (coal-fired) on the grounds that such an alternative would redefine the source. More recently, this Board has held that "EPA's PSD permit conditions regulations do not mandate that the permitting authority redefine the source in order to reduce emissions." *In re Hawaiian Commercial & Sugar Company*, PSD Appeal No. 92-1, at 6 (EAB, July 20, 1992) (involving a permit issued under federal PSD permitting regulations by the State of Hawaii pursuant to a delegation of authority from EPA Region IX).

----- End Footnotes -----

Finally, CSP argues that the Agency should require the preparation of a cumulative environmental impact statement for this and other previously permitted sources in Virginia. This argument, however, [*14] merely restates objections previously raised during the public comment period and addressed in various sections of the State's responses to comments. n9 The petition does not, however, indicate why these responses are clearly erroneous or otherwise warrant review. Moreover, the record on appeal indicates that SEI conducted all required analyses and demonstrated that the proposed facility would not cause or contribute to violations of any national ambient air quality standard or allowable PSD increments. Review is therefore denied on this basis.

----- Footnotes -----

n9 See, e.g., Response to Comments, at 2, 3 ("It has been the consistent policy of the VDEQ to require analysis of the cumulative impact due to appropriate Class I increment-consuming sources within 100 km of either of the two Class I areas in Virginia."); ("The permit applicant was required by the VDEQ to perform an analysis of cumulative impacts upon the [Shenandoah National Park].").

----- End Footnotes -----

III. CONCLUSION

For all the foregoing reasons, review of each of the petitions for review is [*15] denied.

So ordered.