

## **IN RE WEST SUBURBAN RECYCLING AND ENERGY CENTER, L.P**

PSD Appeal No. 97-12

### ***REMAND ORDER***

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Decided March 10, 1999

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#### Syllabus

West Suburban Recycling and Energy Center, L.P. ("WSREC") filed a petition for review of a prevention of significant deterioration ("PSD") permit decision issued by the Illinois Environmental Protection Agency ("IEPA") for a proposed resource recovery facility to be constructed by WSREC.

During the course of the permit appeal, the Board received information indicating that WSREC had sold several properties comprising the proposed project site. The Board subsequently issued a Show Cause Order, ordering WSREC to defend against dismissal of its appeal on the ground that WSREC does not intend, or is unable to construct the facility identified in its permit application.

WSREC failed to provide an adequate response to the Show Cause Order. It neither provided an assurance that this project will be completed as described in its permit application, nor has it provided any reason why this permit appeal should not be treated as moot.

Held: The PSD regulation that requires a permittee to commence construction within 18 months of receipt of final approval to construct serves to ensure that BACT determinations are reasonably current and that PSD increment is allocated to projects that have a realistic prospect of completion.

There is no realistic prospect that the project described in WSREC's permit application will be completed. Thus, there is no basis for WSREC to continue to hold a PSD permit for this project. WSREC's appeal of IEPA's permit decision is therefore dismissed as moot and this matter is remanded to IEPA to issue a final permit decision denying the permit.

***Before Environmental Appeals Judges Ronald L. McCallum  
and Edward E. Reich.***

#### ***Opinion of the Board by Judge McCallum:***

On November 4, 1998, the Environmental Appeals Board issued an Order to Show Cause Why Appeal Should Not Be Dismissed as Moot ("Show Cause Order") in this case. The Show Cause Order directed the

permittee/petitioner, West Suburban Recycling and Energy Center, L.P. (“WSREC”), “to affirm that it is presently committed to construct the resource recovery facility” that is the subject of this appeal. Show Cause Order at 7. In particular, WSREC was to “demonstrate that it has the means to obtain control over the properties identified in its site plan for purposes of construction.” *Id.* at 8. The purpose of the Show Cause Order was to give WSREC an opportunity to defend against the dismissal of this appeal on the ground that “WSREC does not intend, or is unable, to construct the facility identified in its permit application.” *Id.*

WSREC has failed to establish that the project described in its application for a federal prevention of significant deterioration (“PSD”) permit is still viable. We conclude that no permit should issue to WSREC under these circumstances. This matter is remanded to the permitting authority, the Illinois Environmental Protection Agency (“IEPA”), for the purpose of issuing a final permit decision denying a federal PSD permit for this project.

## I. BACKGROUND

This is the third PSD permit appeal filed by WSREC over the course of WSREC’s long and somewhat tortuous history of efforts to obtain a permit to construct a resource recovery facility, including a municipal solid waste combustion facility, in the Villages of Summit and McCook, Illinois. The early background of the permitting process and the Board’s rulings on WSREC’s first two permit appeals can be found in *In re West Suburban Recycling and Energy Ctr., L.P.*, 6 E.A.D. 692 (EAB 1996) (“WSREC I”).

The present appeal was filed by WSREC in August 1997, after IEPA issued a permit to WSREC in July 1997, providing preconstruction authorization under the federal PSD program. WSREC’s appeal sought review of twelve permit provisions. WSREC’s principal argument was that the challenged permit provisions had no basis in the federal PSD rules and therefore should not be included in the permit. The Board granted review of WSREC’s appeal in April 1998, and requested supplemental briefing on three issues pertinent to the grant of review. Order Denying Motion to Dismiss and Granting Review (EAB, Apr. 21, 1998) (“Order Granting Review”). The Order Granting Review also provided for the filing of amicus briefs by interested parties.

During the course of the supplemental briefing, and primarily due to an amicus brief filed by the Chicago Legal Clinic on behalf of several community organizations, the Board learned that WSREC had transferred title to a substantial portion of the proposed project site. In light of the

property transfers, the Board questioned whether the proposed resource recovery facility was still a viable project. The Board issued the Show Cause Order to provide WSREC an opportunity to counter the inference suggested by the property transfers that WSREC had abandoned its plans to construct the facility as described in its permit application. The Board wanted to be assured that a commitment of the Board's time and resources on the merits of this case would not be rendered moot by WSREC's subsequent failure to construct. The Board noted that "if there is no realistic prospect that the proposed project will actually be completed and put into operation," this appeal may be moot. Show Cause Order at 4-5; see *In re New York Power Auth.*, 1 E.A.D. 825, 826 (Adm'r 1983).

The Show Cause Order included a schedule for WSREC to file a response and provided an opportunity for other parties to file replies to WSREC's response. Upon a motion from IEPA, as agreed to by WSREC, the deadlines for filing the response and replies were extended. See Order Granting Extension of Time and Modifying Briefing Schedule (EAB, Nov. 25, 1998). On January 22, 1999, the revised deadline for receipt of WSREC's response to the Show Cause Order, WSREC filed a Motion to Voluntarily Withdraw Appeal. WSREC's motion to withdraw consists of one page and states, "WSREC desires at this time to voluntarily withdraw its petition for review and accept the PSD permit as issued by the IEPA." WSREC further requests that the Board enter an order dismissing its petition for review. The motion does not provide a response to the items identified in the Show Cause Order, and WSREC did not file a separate response to the Show Cause Order.

IEPA filed a response to WSREC's motion to withdraw in accordance with the revised deadline for receipt of replies pertaining to the Show Cause Order.<sup>1</sup> Response of the Illinois Environmental Protection Agency ("IEPA Response"). IEPA argues that WSREC's motion to withdraw is not responsive to the Board's Show Cause Order and requests that WSREC's motion be denied. IEPA Response at 2. IEPA also provides evidence that WSREC has completed additional property transfers such that all of the property comprising the proposed project site has now been sold. The final property transfer occurred after the date of the Show Cause Order. See *id.* at 5. All of the recent property transfers have been by warranty deed, and IEPA urges the Board to conclude that there is no realistic prospect that WSREC will commence construction of the proposed resource recovery facility within the 18-month period prescribed by 40

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<sup>1</sup> The Chicago Legal Clinic, whose amicus brief on the Order Granting Review largely precipitated the Show Cause Order, also filed a reply pursuant to the Board's Show Cause Order. However, the Clinic's reply was received after the deadline for receipt of replies and therefore was not considered.

C.F.R. section 52.21(r). *Id.* at 7. IEPA requests that the Board declare that the PSD permit issued to WSREC is void or, in the alternative, order a remand to IEPA to issue a permit denial. *Id.*

## II. DISCUSSION

The PSD regulations require a permittee to commence construction of a permitted project within 18 months of receipt of final approval to construct. 40 C.F.R. § 52.21(r)(2). If construction is not commenced within that time frame the approval to construct becomes invalid.<sup>2</sup> *Id.* This requirement provides an important assurance that major stationary sources “are constructed in accordance with reasonably current pollution control standards” and do not indefinitely tie up PSD increments in “a project which has no realistic prospect of completion.” *In re New York Power Auth.*, 1 E.A.D. 825, 826 (Adm’r 1983).

The 18-month time limit in 40 C.F.R. section 52.21(r) is one of the means of ensuring that the requirement for best available control technology (“BACT”) involves reasonably current pollution controls. Each time a BACT determination is made, it takes into account new pollution control equipment and processes. *See In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 160–61 (EAB 1999) (noting that “a benefit of conducting a permitting process for an expansion at a later date is that advances in air pollution control technology \* \* \* will be taken into account at that time.”). Therefore, it is important that decisions about pollution control methods and associated emission limitations are made based on the most current information possible. If a facility fails to commence construction within the time frame permitted by 40 C.F.R. section 52.21(r), it is possible that the BACT determination for the facility may be outdated by the time construction actually begins.

Section 52.21(r) also protects against long-term commitments of PSD increment to non-viable projects. A PSD increment is the maximum allowable increase in pollutant concentration that may occur in a particular area. *See* 40 C.F.R. § 52.21(c) (listing PSD increments for particulate matter, sulfur dioxide, and nitrogen dioxide). As PSD permits are issued, new emissions consume a portion of the PSD increment, thus shrinking the remaining amount available for new development. A facility with final permit approval, whether constructed or not, consumes PSD increment.

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<sup>2</sup> The regulation includes two exceptions to the 18-month time limit for commencement of construction. The permitting authority may provide an extension of the 18-month period “upon a satisfactory showing that an extension is justified.” 40 C.F.R. § 52.21(r)(2). In addition, the 18-month limit does not apply to projects that receive approval to be constructed in phases. *Id.* Neither of these exceptions appear to be applicable in this case.

Thus, permitted projects that are not constructed can prevent other projects from receiving PSD approval.

From the beginning of the PSD program, EPA has acknowledged that decisions about how increment should be used or allocated are primarily within the province of the states. For example, in the preamble to the original PSD regulations, EPA noted that allocation of PSD increment could affect economic development and that EPA should endeavor to preserve the states' authority on issues of economic development and growth:

EPA should not make decisions which would have a significant impact upon future growth options of the States.

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While EPA is administering the PSD permit program, the Administrator will solicit and give careful consideration during the permit process to the views of State and local officials regarding the impact of proposed permit decisions on an area's potential for economic development. Additionally, where a source is expected to consume the entire remaining increment, the Administrator will notify the Governor of this proposed action.

43 Fed. Reg. 26,388, 26,401 (June 19, 1978).

Here, Illinois, through IEPA, decided to allocate increment for sulfur dioxide and nitrogen dioxide to the WSREC project when it issued a PSD permit to WSREC in July 1997. At that time, however, WSREC's plans to construct a resource recovery facility appeared more viable than they do today. In July 1997, WSREC owned all of the property comprising the project site. Beginning in October 1997, and continuing through November 1998, WSREC transferred title to individual lots in four separate transactions with different buyers. According to the information provided in IEPA's Response, which WSREC has not contested, all of the properties comprising the site in the Village of Summit have been sold.<sup>3</sup>

WSREC's motion to withdraw states that WSREC desires to "accept the PSD permit as issued by the IEPA." If we were to honor WSREC's request, our decision might require IEPA to reserve the PSD increment

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<sup>3</sup> As noted in the Show Cause Order, a substantial portion of the site located in the Village of McCook was leased to a third party for a period of 95 years beginning in September 1996. Show Cause Order at 2.

allotted to WSREC's project even though there appears to be no realistic prospect that the project will be completed. Such a result might limit Illinois's ability to implement its own plans for how the PSD increment should be used. *See New York Power*, 1 E.A.D. at 826–827 (“[i]ssuing a permit for a project which has no realistic prospect of completion would unreasonably tie up the available increments allotted to the proposed facility, thus possibly delaying or even preventing other permit applicants from obtaining permits \* \* \*”).

In light of the fact that WSREC has not provided an adequate response to the Show Cause Order, we cannot grant its motion to withdraw, thereby reinstating IEPA's July 1997 permit decision. WSREC has not provided an assurance that this project will be completed as described in its permit application. WSREC has not affirmed that it is committed to construct the resource recovery facility, nor has it demonstrated that it has the means to obtain control over the properties previously transferred. In addition, WSREC has not provided any argument as to why we should not treat this permit appeal as moot based on a reasonable inference that WSREC does not intend, or is unable, to construct the facility identified in its permit application. WSREC's motion to withdraw is denied.

We find that there is no realistic prospect that the resource recovery facility project described in WSREC's permit application will be completed. Therefore, WSREC's appeal of IEPA's permit decision is moot. Moreover, there is no basis for WSREC to continue to hold a PSD permit for this project. It is inappropriate for WSREC to bank a BACT determination that may well be outdated and to retain allotted PSD increment in the hopes that this facility might be constructed at some later date.<sup>4</sup> The permit should be denied.

### III. CONCLUSION

In light of WSREC's failure to affirm that it intends to construct the facility described in its PSD permit application and the evidence of property transfers covering the proposed project site, we conclude that there is no realistic prospect that construction will commence within the regulatory time frame specified in 40 C.F.R. § 52.21(r). Further, WSREC failed to show cause why this appeal should not be dismissed as moot. The appeal is hereby dismissed.

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<sup>4</sup> If WSREC finds a new site for its facility or reestablishes control over the presently proposed project site, it may reapply for a PSD permit. Any such application will be subject to the requirements in effect at that time.

In addition, this matter is remanded to IEPA for the purpose of issuing a final permit decision denying the permit. IEPA's final decision shall be considered final agency action for purposes of judicial review. *See* 40 C.F.R. § 124.19(f)(1)(iii). Region V and/or U.S. EPA headquarters shall coordinate with IEPA to see that notice of the decision is published in the Federal Register.

So ordered.