IN RE ZION ENERGY, L.L.C.

PSD Appeal No. 01-01

ORDER DENYING PETITION FOR REVIEW

Decided March 27, 2001

Syllabus

Susan Zingle, on her own behalf and as executive director of the Lake County Conservation Alliance ("LCCA"), and the LCCA (hereinafter referred to collectively as LCCA) filed a petition for review of a prevention of significant deterioration ("PSD") permit issued to Zion Energy, L.L.C. ("Zion") by the State of Illinois' Environmental Protection Agency ("IEPA") for the construction of an electrical generating facility in Lake County, Illinois. *See* Clean Air Act §§ 160-169B, 42 U.S.C. §§ 7470-7492. LCCA raises numerous issues which it contends justifies review by the Board.

Held: The Petition for review is denied because LCCA has failed to satisfy the requirements for obtaining review under 40 C.F.R. § 124.19. In particular, the Petition merely reiterates comments previously submitted to IEPA during the comment period without indicating why IEPA's responses to these comments were erroneous. Petitioner is also denied permission to supplement its appeal with comments allegedly explaining why Petitioner believes the IEPA's responses to Petitioner's original comments were erroneous. Allowing Petitioner to do so would constitute an unwarranted expansion of a party's appeal rights and would prejudice the permittee's interest in a timely resolution of the permitting process.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge McCallum:

Before the Board is a Petition, filed January 5, 2001, seeking review of a prevention of significant deterioration ("PSD") permit determination made by the State of Illinois' Environmental Protection Agency ("IEPA").[1] The permit determi-

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[1] IEPA administers the PSD program in Illinois pursuant to a delegation of authority from EPA. *See* 46 Fed. Reg. 9580 (Jan. 29, 1981). Because IEPA acts as EPA's delegate in implementing the federal PSD program within the State of Illinois, the permit is considered an EPA-issued permit for purposes of federal law, and is subject to review by the Board pursuant to 40 C.F.R. § 124.19. *See In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121,123 (EAB 1999); *In re West Suburban Recycling and*
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nation approved the issuance of a PSD permit to the Zion Energy, L.L.C. ("Zion") for the construction of an electrical generating facility in Lake County, Illinois.[2] The Petitioners are Susan Zingle, on her own behalf and as executive director of the Lake County Conservation Alliance ("LCCA"), and the LCCA (hereinafter referred to collectively as LCCA). LCCA raises numerous issues which it contends justifies review by the Board. For the reasons stated below, the Petition for review is denied.

I. *BACKGROUND*

The permit was issued on December 8, 2000,[3] and would authorize Zion to construct an electric power generating facility with a generating capacity of 800 megawatts. The proposed facility consists of five simple-cycle combustion turbines which would operate on natural gas as a primary fuel and distillate oil as a back-up fuel. Other emission sources at the facility include five auxiliary boilers, two fuel heaters, and a fuel storage tank.

The public was given an opportunity to submit written comments on the draft permit between June 30, 2000, and September 30, 2000. In addition, IEPA held a public hearing on August 14, 2000. LCCA, as well as other interested parties, submitted comments during the comment period and attended the hearing. When the permit was issued, IEPA prepared a Responsiveness Summary responding at length to public comments. *See* Responsiveness Summary for Public Questions and Comments on the Federal Prevention of Significant Deterioration Permit Application for Zion Energy, L.L.C. (Dec. 8, 2000) ("Responsiveness Summary") .

(continued)
Energy Ctr., L.P., 6 E.A.D. 692, 695 n.4 (EAB 1996) ("For purposes of part 124, a delegate State stands in the shoes of the Regional Administrator [and must] follow the procedural requirements of part 124. * * * A permit issued by a delegate is still an 'EPA-issued permit;' * * *.") (quoting 45 Fed. Reg. 33,413 (May 19, 1980)).

[2] Congress enacted the PSD provisions of the Clean Air Act ("CAA") in 1977 for the purpose of, among other things, "insur[ing] that economic growth will occur in a manner consistent with the preservation of existing clean air resources." CAA § 160(3), 42 U.S.C. § 7470(3). To that end, parties must obtain preconstruction approval (i.e., PSD permits) to build new major stationary sources, or to make major modifications to existing sources, in areas of the country deemed to be in "attainment" or "unclassifiable" with respect to federal air quality standards called "national ambient air quality standards." *See* CAA §§ 107, 160-169B, 42 U.S.C. §§ 7407, 7470-7492.

[3] Pursuant to 40 C.F.R. § 124.15(b), the decision to issue the permit does not become final if, *inter alia*, review is requested under 40 C.F.R. § 124.19. Once review is requested, the finality of the permit decision is governed by 40 C.F.R. § 124.19(f)(1). In cases such as this, where review is denied by the Board, the permit decision becomes final when the Board gives notice of its decision and the permit issuer issues the final permit decision. *See* 40 C.F.R. § 124.19(f)(1)(i).

In its Petition, LCCA raises numerous objections to the permit. Although the Petition contains 45 numbered paragraphs, similar or related issues are interspersed in various paragraphs throughout the Petition. Accordingly, for the convenience of this discussion, we have consolidated, summarized, and arrayed the arguments in a manner that is different from the way they are enumerated in the Petition but preserves their gist. According to LCCA, the Petition warrants Board review for the following reasons:

> (1) Hazardous Air Pollutants: the facility is a major source of hazardous air pollutants ("HAPs") and is subject to Maximum Available Control Technology ("MACT") requirements (Petition ¶ 7), the potential to emit HAPs is higher than reflected in the permit (*id.* ¶ 11), the PSD permit does not effectively cap HAP emissions (*id.* ¶ 29), and the permit should require HAP testing (*id.* ¶ 36);
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> (2) the permit should contain a provision requiring compliance with State noise regulations, as well as other regulations (*id.* ¶ 42);
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> (3) Illinois' so-called "NO_x waiver" should be lifted and the facility treated as major for NO_x (*id.* ¶ 33);
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> (4) the permit incorrectly identifies the facility's proposed combustion turbines as "peaking units" (*id.* ¶¶ 15, 22);
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> (5) IEPA's best available control technology ("BACT") analysis was erroneous because: (a) IEPA failed to consider certain control technologies, including combined cycle operation with catalytic controls (*id.* ¶ 15); (b) catalytic controls were improperly rejected (*id.* ¶ 17); (c) IEPA should have considered alternative locations for the facility due to consideration of water availability (*id.* ¶ 15); (d) the analysis should have included an evaluation of need, energy conservation, demand side management and other alternatives to construction of the facility (*id.* ¶ 16); (e) IEPA should have considered the use of alternative turbine configurations (*id.* ¶ 17); (f) the use of low NO_x burners for the fuel heaters and auxiliary boilers does not constitute BACT (*id.* ¶¶ 24, 25); (g) the permit's provision for the operation of auxiliary boilers does not constitute BACT (*id.* ¶ 25); (h) good combustion practices were not sufficiently defined and are not BACT for carbon monoxide ("CO") and particulate matter ("PM") (*id.* ¶¶ 24, 26); (i) IEPA failed to require the development of operation and maintenance procedures as part of the BACT analysis (*id.* ¶ 18); and (j) the use of diesel fuel does not constitute BACT (*id.* ¶ 19);

(6) The permit fails to properly account for emissions during startup and shutdown of the facility, and fails to limit the number of startups (*id*. ¶¶ 9, 13);

(7) Emissions limits are based on unsubstantiated assumptions regarding facility operation (*id*. ¶ 10);

(8) The permit should be modified to specify what constitutes good air pollution control practices (*id.* ¶ 23);

(9) The permit fails to require compliance with requirements for a major source of volatile organic compounds ("VOCs") in a non-attainment area for ozone (*id*. ¶ 33);

(10) The permit's monitoring requirements are inadequate in that: (a) the 180-day period of operation prior to shakedown and emission testing should be shortened (*id*. ¶ 35), (b) testing for particulate matter should include testing using method 202 (*id.* ¶ 36), (c) testing for VOCs should utilize method 18 rather than 25a (*id.* ¶ 37), (d) procedures for NO_x testing should be modified and specified in the permit (*id*. ¶ 38), (e) the permit should specify that continuous emissions monitoring is required applying part 75 criteria (*id.*), (f) all operations should be suspended until additional modeling can be conducted because stack testing shows emissions for all pollutants are higher than levels previously modeled using receptor modeling (*id*. ¶ 39), (g) permit condition 14 should be modified to provide for continuous emission monitoring for CO and total hydrocarbons (*id*. ¶ 40), and (h) flow should be monitored and Zion should not be permitted to calculate total flow using "F factors" (*id*. ¶ 41), and (i) all monitoring should be on an hourly basis (*id*.);

(11) emissions from facilities under common control should have been included in calculating the potential to emit (*id*. ¶ 43); and

(12) a complete copy of the draft permit was not made available at the Waukegan Public Library or on the internet (*id*. ¶ 44).

On January 29, 2001, IEPA filed a Motion for Summary Disposition ("IEPA Motion") with the Board. IEPA asserts, among other things, that LCCA has failed to satisfy the requirements for review under 40 C.F.R. § 124.19, and that the Petition should therefore be dismissed. With the Board's permission,[4] Zion has filed a response to the Petition, also alleging that LCCA has failed to satisfy the re-

[4] *See* Order Granting Motion for Leave to Respond (Mar. 6, 2001).

quirements for review under 40 C.F.R. § 124.19. *See* Response of Permittee Zion Energy, L.L.C. in Opposition to Petition for Review of Lake County Conservation Alliance (Feb. 5, 2001). On March 2, 2001, more than one month after IEPA filed its Motion for Summary Disposition, LCCA filed a motion seeking leave to respond to IEPA's Motion and to supplement the Petition with comments on IEPA's Responsiveness Summary. *See* Motion for Leave to Respond to Motion for Summary Disposition and to Supplement Petition (Mar. 2, 2001).

II. *DISCUSSION*

A. *Scope of Board Review*

The Board's review of PSD permit decisions, such as the one at issue in this case, is discretionary. *See* 40 C.F.R. § 124.19. Under the governing regulations, a permit decision will ordinarily not be reviewed unless the decision is based on either a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a); *In re RockGen Energy Ctr.*, 8 E.A.D. 536, 540 (EAB 1999); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126-27 (EAB 1999). In applying this regulation-based standard of review, the Board is guided by language in the preamble to section 124.19 that states the "power of review should be only sparingly exercised," and "most permit conditions should be finally determined at the Regional [State] level." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 328 (EAB 1999), *aff'd sub nom. Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000). The petitioner bears the burden of demonstrating that review is warranted. *AES Puerto Rico*, 8 E.A.D. at 328.

Further, in complying with the above requirements, a petitioner must include specific information supporting its allegations. *In re Sutter Power Plant*, 8 E.A.D. 680, 688 (EAB 1999). As the Board has stated on numerous occasions, it is not enough simply to repeat objections made during the comment period. Rather, in addition to stating its objections to the permit, a petitioner must explain why the permit issuing entity's response to those objections is clearly erroneous or otherwise warrants review. *Knauf Fiber Glass*, 8 E.A.D. 127 ("One way that the Board implements the standard of review in 40 C.F.R. § 124.19 is to require petitioners to state their objections to a permit and to explain why the permitting authority's response to those objections (for example, in a response to comments document) is clearly erroneous or otherwise warrants review."); *In re Hawaii Elec. Light Co., ("HELCO")*, 8 E.A.D. 66, 71-72 (EAB 1998); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 114 (EAB 1997); *In re Puerto Rico Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995); *In re LCP Chems.*, 4 E.A.D. 661, 664 (EAB 1993). Failure to do so, will result in a denial of review. *See, e.g.*, *HELCO*, 8 E.A.D. at 91; *In re Maui Elec. Co.*, 8 E.A.D. 1, 19-20 (EAB 1998).

The Board will also assess whether the issues raised in petitions for review pertain to the PSD program and are thus subject to the Board's jurisdiction. *Sutter Power Plant*, at 688. As the Board has explained, "[t]he PSD review process is not an open forum for consideration of every environmental aspect of a proposed project, or even every issue that bears on air quality. In fact, certain issues are expressly excluded from the PSD permitting process. The Board will deny review of issues that are not governed by the PSD regulations because it lacks jurisdiction over them." *Knauf Fiber Glass*, 8 E.A.D. at 127.

B. *Petition*

As a preliminary matter, we note that a number of issues raised in the Petition clearly fall outside the purview of the PSD program. These include:

(1) Issues relating to emissions of HAPS (issue 1 above). As the Board has previously stated, the PSD statutory provisions and regulations do not apply to HAPS listed in CAA section 112(b). *Knauf Fiber Glass*, 162-63. The only exception to this general rule is that if a technology has "an incidental effect of increasing or decreasing emissions of unregulated pollutants," consideration of that effect may be taken into account in selecting BACT for a facility. *Id*. at 163 n.56 (quoting *In re Genesee Power Station*, 4 E.A.D. 832, 848 (EAB 1993); *see also In re North County Res. Recovery Assocs.*, 2 E.A.D. 229, 230 (Adm'r 1986). LCCA assertions regarding HAPS, however, do not claim error in the BACT determination on the basis of this exception;

(2) The permit's alleged lack of compliance with provisions of State law such as State noise regulations (issue 2 above). Because State noise requirements and other unspecified State regulations are not requirements of the federal PSD program, and because LCCA has not shown that their assertions in this regard otherwise fall within the purview of the program, the Board must deny review. *See Knauf Fiber Glass*, 8 E.A.D. at 172; and

(3) LCCA's assertion that "the NO_x waiver should be lifted and the source should be treated as major for NO_x, for purposes of ozone non-attainment." Petition ¶ 33 (issue 3 above). As far as we can tell from the record before us, LCCA appears to be referring to an exemption granted by EPA to the States of Illinois, Indiana, Michigan, and Wisconsin pursuant to CAA § 182(f)(3), 42 U.S.C.A. § 7511a(f)(3), "from the Reasonably Available Control Technology (RACT) and New Source Review requirements for major stationary sources of [NO_x] * * * and from general conformity requirements for NO_x for ozone nonattainment areas within the Lake Michigan Ozone Study (LMOS) modeling domain which includes portions of the States of Illinois, Indiana, Michigan, and Wisconsin. The EPA is also granting exemptions from the transportation conformity requirements for NO_x for ozone nonattainment areas classified as marginal or transitional

within the LMOS modeling domain." 61 Fed. Reg. 2,428 (Jan. 26, 1996). The Board is without jurisdiction to lift this exemption.

With regard to the remaining issues, we agree with IEPA and Zion that LCCA has failed to satisfy the requirements for obtaining review under 40 C.F.R. § 124.19. In particular, the Petition merely reiterates comments previously submitted to IEPA during the comment period without indicating why IEPA's responses to these comments were erroneous. Indeed, the Petition does not even mention IEPA's Responsiveness Summary.[5]

As previously stated, LCCA has filed a Motion for Leave to Respond to Motion for Summary Disposition and to Supplement Petition ("Petitioners' Motion"). By its motion, LCCA seeks permission to supplement the record with comments on IEPA's Responsiveness Summary. In support of this request, counsel for LCCA states that in spite of her best efforts she was "not cognizant" of Board decisions stating that a petition may not simply reiterate comments raised during the comment period but must explain why the permit issuer's response to those comments was erroneous. Petitioner's Motion at 1. Counsel's argument is unconvincing. As indicated above, the Board has repeatedly stated that in implementing the standard of review in 40 C.F.R. § 124.19, the Board requires, among other things, that a petition explain why a permit issuer's response to comments on the draft permit is clearly erroneous or otherwise warrants review. Importantly, in the one Board case cited in the Petition (*HELCO*), the Board articulated this requirement. *See* Petition at 1. Indeed, the Board in *HELCO* denied review of certain issues because the petitioner failed to show that the permit issuer's response to comments was erroneous. *HELCO*, 8 E.A.D. at 82 n.16, 106-09. We therefore deny LCCA's request to supplement the Petition.

To do otherwise, that is, to allow a petitioner to amend a facially inadequate Petition one month after both the permittee and the permit issuer have filed motions for dismissal and two months after the deadline for filing a petition with the Board, would not only constitute an unwarranted expansion of a party's appeal rights under the applicable regulations, but would result in significant prejudice to the permittee's interest in a timely resolution of the permitting process. We decline to do either.

Finally, we note that IEPA made numerous changes to the draft permit in response to public comments, including those of LCCA. In this regard, IEPA's Responsiveness Summary states:

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[5] In addition to the jurisdictional infirmity inherent in the the three issues discussed above, we note that, although in its Responsiveness Summary IEPA responds to LCCA's comments regarding these three issues, the Petition fails to indicate why these responses are erroneous or otherwise warrant review.

Condition 2(b): The condition was enhanced to more clearly limit use of fuel oil by the facility to use as a backup fuel.

Condition 3(c): The [BACT] requirement for [NO_x] emissions from the turbines while firing natural gas without power augmentation was made more stringent by lowering it to 9ppm.

Condition 12: The requirements for emission testing were enhanced for clarity and to include testing for [CO], [PM], and volatile organic material for intermediate and minimum turbine load, testing of emissions during startup of the turbines, and testing for [HAPs] if Method 18 is used to test for volatile organic material emissions.

Condition 13(b): The requirements for operational monitoring were enhanced to address injection of water into the combustors for control of NO_x as required when firing fuel oil in the turbines.

Condition 16: The requirements for record keeping were enhanced to include records for additional data and information and reorganized for clarity.

Condition 18(b): The requirements for notification were enhanced to include notification for use of backup fuel under certain circumstances.

Condition 19(b) & (d): The requirements for reporting were enhanced for clarity and to include routine reporting for the number of startups and reporting of preliminary emissions data if testing is not done within 45 days of gainful operation.

Condition 21: A condition was added setting forth the circumstances under which the permit would authorize construction of the proposed facility and individual emission units, consistent with the applicable provisions of PSD, 40 C.F.R. § 52.21.

Condition 22(b): A condition was added clarifying that the facility would be subject to any new requirements that would be applicable to construction or operation of the turbines based on the timing of their actual installation.

Table 1A and 1B: The hourly emission limit for NO_x was lowered to reflect the lower BACT limit.

Table 1C, Footnote 2: Footnote 2 was enhanced to include the startup emission multiplier factor for fuel oil firing and to increase the multi-

> plier factor for natural gas firing and to clarify that the Permittee must fully account for all emissions from the proposed facility.

IEPA Responsiveness Summary at 3-4. Although these changes appear to make the permit more stringent, and indeed address many of the concerns raised by LCCA during the comment period, the Petition makes no reference to them.[6]

III. *CONCLUSION*

For the foregoing reasons, LCCA's Petition is hereby denied.[7]

So ordered.

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[6] With regard to LCCA's assertion that a complete copy of the draft permit was not made available at the Waukegan Public Library (issue 12 above), our examination of the record before us indicates that LCCA had sufficient access to the draft permit. In particular, the record indicates that LCCA submitted written comments on the draft permit during the comment period (*see* attachment 4 to Petition) and hired an engineering firm to review the draft permit. *See* Letter from Scott Evans, Clean Air Engineering ("CAE"), to Susan Zingle, LCCA (Sept 13, 2000) (stating that CAE had reviewed the draft permit and was providing its comments). Thus, while certain information may have been absent (at least temporarily) from the Waukegan Public Library, LCCA was able to obtain access to, and submit comments on, the draft permit.

[7] We also note that even were we to grant LCCA's request to supplement the record with LCCA's comments on IEPA's Responsiveness Summary, LCCA's comments do not contain the degree of specificity necessary to support Board review. *See In re Puerto Rico Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995) (absent sufficient specificity as to why the permit issuer's decision was erroneous, the Board has no basis on which to grant review); *In re Inter-Power of New York*, 5 E.A.D. 130, 153 (EAB 1994) (mere allegation of error does not satisfy the requirements of § 124.19).