IN RE AMERADA HESS CORPORATION PORT READING REFINERY

PSD Appeal No. 04-03

REMAND ORDER

Decided February 1, 2005

Syllabus

Amerada Hess Corporation ("Hess" or "Petitioner") owns and operates an oil refinery in Port Reading, New Jersey, at which, among other things, it utilizes a fluid catalytic cracking unit ("FCCU") to produce gasoline, fuel oils, and liquified petroleum gas. On July 9, 2002, Hess applied to the New Jersey Department of Environmental Protection ("New Jersey DEP" or "the State") for a Clean Air Act ("CAA") prevention of significant deterioration ("PSD") permit for modifications Hess intended to make to its FCCU. Because New Jersey DEP issues federal PSD permits for sources within the State pursuant to a delegation agreement with the United States Environmental Protection Agency ("EPA"), such permits are considered to be EPA-issued permits and are subject to review before the Environmental Appeals Board ("Board"). On June 30, 2004, New Jersey DEP issued a draft PSD permit for public comment. On July 29, 2004, Hess submitted substantive comments on the draft permit, and on August 2, 2004, New Jersey DEP held a public hearing at which several members of the local community offered testimony.

On October 12, 2004, New Jersey DEP issued a final PSD permit decision ("Permit") pursuant to CAA § 165 and 40 C.F.R. § 52.21. Simultaneously, New Jersey DEP also issued a separate permit under State law, which was identical in content to the federal PSD permit except for the title page and effective/expiration dates. Hess filed its petition for review of the PSD Permit decision ("Petition") on November 3, 2004, in accordance with 40 C.F.R. § 124.19. Based on concerns that the Petitioner identified in its July 29 comments, the Petition raised issues regarding the appropriateness of (1) a stack test study program that New Jersey DEP had included in the Permit which was intended to correlate feed quality, feed rate, and certain operating conditions to emissions output; (2) stack testing for emissions of nickel compounds; (3) a study required by the Permit to determine the feasibility of controlling temperature and oxygen content as a means of demonstrating VOC emission performance; (4) pollution prevention studies to evaluate physical and/or process changes that might reduce NO_X and VOC emissions; (5) requirements limiting the opacity of FCCU emissions; and (6) periodic stack testing for NO_X, CO and SO_2.

On December 17, 2004, New Jersey DEP filed a Response Seeking Partial Summary Disposition in which it argued that certain requirements in the PSD Permit were governed by State law and not the federal PSD program and therefore were not PSD-related permit conditions subject to Board jurisdiction. On January 6, 2005, the Petitioner filed a reply to the State's request for summary disposition, in which the Petitioner essentially agreed that the Permit conditions identified in the request for summary disposition were not

PSD-related requirements, and argued that it was therefore inappropriate for New Jersey DEP to have included the requirements in the federal PSD Permit.

Held: Under 40 C.F.R. § 124.17(a) "[a]t the time any final permit decision is issued under § 124.15, the Director shall issue a response to comments" that shall, *inter alia*, "[b]riefly describe and respond to all significant comments on the draft permit." Because this requirement is intended to ensure that the decision maker has the benefit of the comments and the responses to those comments before making his or her final permit decision, it is not adequate for a permit issuer to address significant comments for the first time in response to a petition for review. Moreover, a failure to fulfill the obligation to adequately respond to significant comments in the administrative record itself constitutes grounds for remanding a permit. In this case, the response to comments document in the record clearly did not address the issues that the Petitioner raised in its July 29 comments on the draft PSD permit and which it reiterated in its Petition. Nor did the State offer any evidence that it had substantively responded to the issues raised in the Petitioner's July 29 comments anywhere else in the administrative record.

With respect to the non-PSD provisions that New Jersey DEP included in the PSD Permit, the State itself described these as State requirements that are not required under the federal PSD program. The inclusion of non-PSD permit conditions in a PSD permit may be appropriate where the State is consolidating multiple state and federal requirements into one integrated permit (obviating the need for separate federal, state, and local permits). Here, however, the Board concludes that because the State issued separate PSD (federal) and non-PSD (state) permits, and because the PSD Permit is, on its face, *exclusively* a PSD Permit, it was error for the state to incorporate into the federal PSD permit, without adequate explanation in the administrative record, permit conditions taken directly from the State non-PSD permit that bear no relationship to the federal PSD program.

Consequently, the Board remands the PSD permit that New Jersey DEP issued to the Amerada Hess Corporation for modifications to the FCCU at Hess' Port Reading facility, with instructions for New Jersey DEP to (1) issue a revised response to comments document that responds to all significant comments contemporaneously with re-issuance of the final PSD permit decision; and (2) either remove the non-PSD conditions from the PSD Permit, specifically justify adoption of the conditions under the federal PSD program, or otherwise restructure the Permit to address the concerns raised in the Board's opinion regarding the Permit's non-PSD requirements.

Before Environmental Appeals Judges Kathie A. Stein and Edward E. Reich.

Opinion of the Board by Judge Reich:

This case involves a petition for review ("Petition") filed by the Amerada Hess Corporation ("Hess" or "Petitioner") challenging certain conditions of a Clean Air Act ("CAA" or "Act") Prevention of Significant Deterioration ("PSD") permit issued by the New Jersey Department of Environmental Protection ("New Jersey DEP" or "the State") for various modifications at the Petitioner's petroleum refining facility in Port Reading, New Jersey. For the reasons discussed below, we find that the New Jersey DEP failed to respond adequately to the Petitioner's comments on the draft permit. We find also, that New Jersey DEP inappropriately

appears to have included non-PSD requirements in Hess' PSD Permit. Consequently, we remand the permit for further action consistent with this opinion.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

Congress enacted the CAA to "enhance the quality of the Nation's air resources so as to promote the public health and welfare and productive capacity of its populace." CAA § 101(b)(1), 42 U.S.C. § 7401(b)(1). As one means of achieving this objective, Congress enacted the CAA Amendments of 1970, which, among other things, directed the EPA to create a list of those pollutants that pose a danger to public health and welfare, result from numerous or diverse mobile or stationary sources, and for which EPA had not previously issued air quality criteria. CAA § 108(a)(1), 42 U.S.C. § 7408(a)(1).[1] Congress then directed EPA to issue air quality criteria for each pollutant on the list, and to promulgate regulations establishing national ambient air quality standards ("NAAQS") for all criteria pollutants.[2] *See* CAA §§ 108(a)(1), 109(a)(2), 42 U.S.C. §§ 7408(a)(1), 7409(a)(2). Currently, there are six criteria pollutants with corresponding NAAQS: sulfur oxides (measured as sulfur dioxide ("SO_2")), particulate matter ("PM"), carbon monoxide ("CO"), ozone (measured as "VOC"), nitrogen dioxide ("NO_2"),[3] and lead. *See In re Kendall New Century Dev.*, 11 E.A.D. 40, 43 (EAB 2003).

The Act further directs EPA to designate geographic areas within states, on a pollutant-by-pollutant basis, as being either in attainment or in nonattainment with the NAAQS, or as being unclassifiable. CAA § 107(d), 42 U.S.C. § 7407(d). An area is designated as being in attainment with a given NAAQS if the concentration of the relevant pollutant in the ambient air within the area meets the limits prescribed by the applicable NAAQS. CAA § 107(d)(1)(A), 42 U.S.C. § 7407(d)(1)(A). A nonattainment area is one with ambient concentrations of a

---

[1] Pollutants for which EPA has established air quality criteria are commonly referred to as "criteria pollutants." 42 U.S.C. § 7408(a)(2).

[2] The NAAQS are air quality standards for particular pollutants "measured in terms of the total concentration of a pollutant in the atmosphere." Office of Air Quality Planning, U.S. EPA, New Source Review Workshop Manual ("NSR Manual") at C.3.

[3] Nitrogen dioxides are generally identified in terms of all oxides of nitrogen ("NO_x"). *See Ala. Dept. of Envtl. Conservation v. EPA*, 540 U.S. 461, 470 n.1 (2004) ("The term nitrogen oxides refers to a family of compounds of nitrogen and oxygen. The principal nitrogen oxides component present in the atmosphere at any time is nitrogen dioxides. Combustion sources emit mostly nitric oxide, with some nitrogen dioxide. Upon entering the atmosphere, the nitric oxide changes rapidly, mostly to nitrogen dioxide" (quoting EPA, Prevention of Significant Deterioration for Nitrogen Oxides, 53 Fed. Reg. 40,656 (Oct. 17, 1988))).

criteria pollutant that do not meet the requirements of the applicable NAAQS. *Id.* Unclassifiable areas are those areas "that cannot be classified on the basis of available information as meeting or not meeting the [NAAQS]." *Id.*

Congress enacted the PSD provisions as part of the CAA Amendments of 1977, in part, to "protect public health and welfare * * * notwithstanding attainment" of a NAAQS and "to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources."[4] CAA § 160, 42 U.S.C. § 7470. Among other things, the PSD provisions require any person planning the construction or modification of any major emitting facility in an attainment area, or in an unclassifiable area, first to apply for and receive a PSD permit.[5] Typically, state or local permitting authorities implement the PSD program, either according to a state PSD program that EPA has approved as a part of the state implementation plan ("SIP") required under CAA § 110(a), or pursuant to an agreement whereby EPA delegates federal PSD program authority to the state, as is the case in New Jersey. *See* 40 C.F. R. § 52.21(a)(1), (u); Delegation of PSD Authority to the State of New Jersey, 48 Fed. Reg. 16,738 (April 19, 1983).

A permitting authority may not issue a PSD permit unless the applicant demonstrates compliance with the substantive PSD requirements. Specifically, the applicant must perform a thorough analysis of the air quality impacts of the proposed construction or modification and demonstrate that the new or modified facility will not cause or contribute to an exceedance of any applicable NAAQS or air quality increment.[6] Additionally, with respect to PSD regulated pollutants that the new or modified facility will emit in significant quantities,[7] the applicant must demonstrate that the facility will comply with emissions limitations that reflect application of the best available control technology ("BACT").[8]

---

[4] Other objectives included protecting national parks, wilderness areas, monuments, seashores, and other special areas, and ensuring that permit decisions are made only after careful evaluation of the consequences of such decisions and with adequate opportunities for public participation. CAA § 160, 42 U.S.C. § 7470.

[5] A "major emitting facility" is any of certain listed stationary sources (including petroleum refineries) which emit or have the potential to emit 100 tons per year ("tpy") or more of any PSD pollutant, or any other stationary source with the potential to emit at least 250 tpy of any PSD pollutant. CAA § 169(1), 42 U.S.C. § 7479(1).

[6] EPA's PSD regulations identify the maximum allowable incremental increase in the ambient concentration of each pollutant that may occur in any attainment or unclassifiable area as a result of new or modified major emitting facilities. 40 C.F.R. § 52.21(c).

[7] EPA's PSD regulations identify applicable levels of significance. 40 C.F.R. § 52.21(b)(23).

[8] CAA § 169(3), 42 U.S.C. § 7479(3), defines BACT. *See also* 40 C.F.R. § 52.21(b)(12) (EPA's regulatory definition of BACT). The determination of BACT is one of the central features of the PSD program. *See In re Knauf Fiberglass, GmbH*, 8 E.A.D. 121, 123-24 (EAB 1999) ("*Knauf I*").

When PSD permits are issued by a state pursuant to a delegation of the federal PSD program, as is the case here, such permits are considered EPA-issued permits and, therefore, are subject to administrative appeal to the Environmental Appeals Board ("Board") in accordance with 40 C.F.R. § 124.19. *See, e.g., In re Hillman Power Co.,* 10 E.A.D. 673, 675 (EAB 2002). In general, the Board's jurisdiction to review state-issued permits is limited to those elements of the permit that find their origin in the federal PSD program — for example, the Board lacks authority to review conditions of a state-issued permit that are adopted solely pursuant to state law. *See In re Sutter Power Plant,* 8 E.A.D. 680, 688, 690 (EAB 1999) (explaining that "[t]he Board has jurisdiction to review issues directly related to permit conditions that implement the federal PSD program" (citing *Knauf I,* 8 E.A.D. at 161), and that "[t]he Board may not review, in a PSD appeal, the decisions of a state agency made pursuant to non-PSD portions of the CAA or to state or local initiatives and not otherwise relating to the permit conditions implementing the PSD program" (citing *Knauf I,* 8 E.A.D. at 167-68)).

B. *Factual and Procedural Background*

Hess, Petitioner in this case, owns a petroleum refining facility in Port Reading, New Jersey, at which it operates a fluid catalytic cracking unit ("FCCU"). The Petitioner uses the FCCU to process low sulfur vacuum gas oil and residual feedstock to produce gasoline, fuel oils, and liquified petroleum gas. *See* Respondent's Exhibit ("R Ex.") A, Air Pollution Control Summary of the Proposed Modification of the Petroleum Refining Facility by Amerada Hess Corporation at Point Reading, NJ ("Permit Proposal") at 2. Emissions from the FCCU include NO_X, CO, SO_2, sulfuric acid mist, PM,[9] VOC, and hazardous air pollutants.[10] Petitioner controls emissions from the FCCU primarily by employing a high energy venturi wet gas scrubber ("wet gas scrubber"), which reduces emissions of SO_2, PM, and sulfuric acid mist. *See* Permit Proposal at 4-5. Emissions of NO_X and CO are controlled during the combustion process in the fluidized bed regenerator by "carefully controlling the combustion process."[11] Permit Proposal at 5.

On July 9, 2002, Petitioner submitted a permit application to the Respondent, New Jersey DEP, for certain proposed modifications to the FCCU, pursuant

---

[9] The permit issued to the Petitioner establishes limits on PM with a diameter of 10 microns or less ("PM_{10}") including PM that condenses after emissions are released to the atmosphere ("condensable PM"), and total suspended particulate ("TSP"). *See, e.g.,* Permit at OS Summary Ref. Nos. 9, 10; Permit Proposal at Table 2.

[10] The FCCU emits hazardous air pollutants that include benzene, cyanide compounds, mercury compounds, lead compounds, and nickel compounds. *See* Permit Proposal at 7.

[11] According to the draft permit, during this process NO_x can be reduced to nitrogen in the presence of carbon monoxide, and CO is converted to CO_2. *See* Permit Proposal at 5.

to the CAA's PSD provisions and EPA's implementing regulations. *See* 42 U.S.C. § 7475; 40 C.F.R. § 52.21; *see also* New Jersey DEP's Response Not Seeking Summary Disposition ("Response on the Merits") at 3. Specifically, Petitioner proposed to undertake a variety of projects intended to improve efficiency and increase the capacity of the FCCU by approximately four percent, from 62,500 barrels per day ("bbl/day") to 65,000 bbl/day. *See* Permit Proposal at 3. The proposed modifications would result in increases in emissions from the FCCU of 446.1 tpy of CO, 151.4 tpy of SO_2, 75.2 tpy of PM, and 153.8 tpy of NO_X. *See* Permit Proposal at 4.

On June 30, 2004, New Jersey DEP issued a draft PSD permit for the Petitioner's proposed FCCU modifications and invited public comment on the proposed permit until August 9, 2004. *See* Permit Proposal; Response on the Merits at 4. The Petitioner submitted substantive comments on the proposed permit on July 29, 2004. R Ex. B (Letter from Paul C. Bucknam, Amerada Hess Corp., to Max Friedman, New Jersey DEP (July 29, 2004)) ("July 29 comments"). Additionally, New Jersey DEP held a public hearing on August 2, 2004, at the Woodbridge Community Center in Woodbridge, New Jersey, during which several members of the local community gave testimony. *See* R Ex. C (Transcript of Proceedings) ("Hearing Transcript").[12] In connection with the Permit, New Jersey DEP prepared a response to comments document addressing the comments raised during the public hearing and noting changes to the proposed permit made in response to the comments from the Petitioner. *See* R Ex. D (Letter from Max Friedman, New Jersey DEP, to Paul Bucknam, Amerada Hess Corp., with attached Written Response to Comments) ("RTC"); Response on the Merits at 4.

On October 12, 2004, New Jersey DEP issued a final PSD permit decision ("Permit") authorizing the proposed FCCU modifications and establishing certain permit conditions. *See* R Ex. E. Among other requirements, the Permit included the following conditions which the Petitioner challenges:

- a stack test study program intended to correlate feed quality, feed rate, and certain operating conditions to emissions output (Permit at OS Summary Ref No. 1, OS1 Ref. Nos. 1, 3-8.);

- stack testing for nickel compounds to monitor emissions and determine the rate of nickel emissions under different operating scenarios (Permit at OS Summary Ref. Nos. 1, 14, OS1 Ref. No. 18);

---

[12] While the Hearing Transcript indicates that there were "several people from the refinery [present] and available to answer questions," Hess does not appear to have raised any issues of its own at the hearing. Hearing Transcript at 4.

- a study to determine the appropriateness of controlling temperature and oxygen content as a means of demonstrating VOC emissions performance (OS Summary Ref. No. 23);

- pollution prevention studies to evaluate physical and/or process changes that might reduce NO_X and VOC emissions (OS Summary Ref. No. 24);

- opacity requirements, limiting opacity (except water vapor) to no more than 20% for not more than three minutes in any 30-minute period (OS Summary Ref. No. 26); and

- stack testing for NO_X, CO, and SO_2 — initial tests and periodic testing every five years (OS1 Ref. Nos. 10, 11, 13).

On November 3, 2004, the Petitioner filed its petition for review with the Board asserting "that the Permit is arbitrary, unreasonable and capricious, an abuse of discretion and contrary to law," seeking "deletion or modification of the contested conditions from the Permit," and requesting "a stay of the Permit due to the comprehensive nature of the contested conditions thereof." *See* Petition at 3. Subsequently, New Jersey DEP filed a Response Seeking Partial Summary Disposition ("Summary Disposition Motion") on December 17, 2004, arguing that certain conditions of the PSD Permit were governed by State law and not the federal PSD program, and that these Permit conditions, therefore, are not subject to review by the Board.[13] *See* Summary Disposition Motion at 4-8. The New Jersey DEP filed its Response on the Merits on December 28, 2004.[14] The Petitioner submitted a brief in reply to the State's request for summary disposition on January 6, 2005. Brief of Petitioner in Reply to Respondent's Response Seeking Summary Disposition ("Summary Disposition Reply"). Finally, on January 26, 2005, the Petitioner submitted a motion requesting leave to file a reply brief, accompanied by a reply brief addressing the merits of the State's arguments in response to the Petition.[15] *See* Letter Motion Requesting Leave to File a Reply Brief to Department's Response Not Seeking Summary Disposition; Brief of Petitioner,

---

[13] We address this issue in Part II.B.2, below.

[14] Pursuant to the Board's December 2, 2004 Corrected Order Granting Additional Time to File Response, the State's merits response was due no later than December 27, 2004. It is evident from the carrier's tracking information that the Petitioner delivered the document to the carrier on December 23, 2004, and that the carrier did not attempt delivery on December 27 because it incorrectly believed that day to be a federal government holiday (the tracking information states for December 27: "The receiver is on a holiday, delivery will be attempted when the receiver returns"). Given this unusual situation, we will not penalize the New Jersey DEP for the one-day delay in the filing of its response. Our exercise of discretion in this regard does not in any way prejudice the Petitioner.

[15] Because we do not believe that a reply on the merits adds materially to the issues that we find central to our decisionmaking in this case, the Petitioner's request for leave to file a reply is hereby denied.

Amerada Hess Corporation, in Reply to Response Not Seeking Summary Disposition of the New Jersey Department of Environmental Protection.

II. *DISCUSSION*

A. *Standard of Review*

When evaluating a petition for review of a PSD permit, the Board first considers whether the petitioner has met the threshold pleading requirements, including timeliness, standing, and the preservation of issues for review. *See* 40 C.F.R. § 124.19; *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000) (*Knauf II*). Among other things, in order to demonstrate that an issue has been preserved for appeal, a petitioner must show "that any issues being raised were raised during the public comment period." 40 C.F.R. §§ 124.13, 124.19(a); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 249 (EAB 1999).[16] Moreover, this burden rests squarely with the petitioner — "It is not incumbent upon the Board to scour the record to determine whether an issue was properly raised below." *Encogen*, 8 E.A.D. at 250 n.10. Assuming that a petitioner satisfies the pleading obligations, the Board then evaluates the petition on the merits.

In order to succeed on the merits, the Petitioner must demonstrate that the actions of the permitting authority were based on (1) a finding of fact or conclusion of law that is clearly erroneous; or (2) an exercise of discretion or an important policy consideration that the Environmental Appeals Board should, in its discretion, review. 40 C.F.R. § 124.19(a); *see also In re Sutter Power Plant*, 8 E.A.D. 680, 686-87 (EAB 1999); *In re Steel Dynamics, Inc.*, 9 E.A.D. 740, 743-44 (EAB 2001). We have repeatedly noted that the "power of review should be only sparingly exercised" and that "most permit conditions should be finally determined at the [permitting authority] level." *See, e.g., Knauf I*, 8 E.A.D. at 127 (quoting 45 Fed. Reg. 33,290, 33,412 (May 19, 1980) (preamble to the rulemaking that established 40 C.F.R. pt. 124)).

Accordingly, for each issue raised in a petition, the petitioner bears the burden of demonstrating that review is warranted. *See Steel Dynamics*, 9 E.A.D. at 744. Moreover, to obtain review, "petitioners must include specific information in support of their allegations. It is not sufficient simply to repeat objections made during the comment period; instead, a petitioner 'must demonstrate why the [permit issuer's] response to those objections (the [permit issuer's] basis for its decision) is clearly erroneous or otherwise warrants review.'" *Steel Dynamics*, 9 E.A.D. at 744 (quoting *In re LCP Chems.*, 4 E.A.D. 661, 664 (EAB 1993));

---

[16] Alternatively, a petitioner may demonstrate that an issue was not reasonably ascertainable during the public comment period. *See Encogen*, 8 E.A.D. at 250 n.8.

accord In re Tondu Energy Co., 9 E.A.D. 710, 714 (EAB 2001); *Encogen*, 8 E.A.D. at 252.

Conversely, however, a permitting authority's failure to respond to significant comments may itself constitute grounds for remanding a permit. *See In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 585 (EAB 2004)(remanding in part a national pollution discharge elimination system permit because the permitting authority "failed to respond to [the petitioner's] significant comments in an adequate fashion"); *In re Rockgen Energy Ctr.*, 8 E.A.D. 536, 556 (EAB 1999) (remanding a PSD permit because the Wisconsin Department of Natural Resources "failed to issue a complete response to comments at the time the permit was issued as required by the regulations").

We evaluate the Petition in this case below, and for the reasons described herein, we remand the permit for further consideration consistent with the Board's decision.

B. *Request for Summary Disposition*

On December 17, 2004, Respondent New Jersey DEP filed its Summary Disposition Motion, in which it argued that four of the contested permit conditions are "not appropriate for review by the Board" because they do not reflect "requirements of the federal PSD program." Summary Disposition Motion at 7, 9. Rather, the State argues, these conditions should be treated as if they were adopted solely under New Jersey State law (as "non-PSD" permit requirements) and therefore fall outside the Board's jurisdiction. Three of these conditions involved requirements related to the emission of nickel compounds, Permit at OS Summary Ref. Nos. 1, 14 and OS1 Ref. No. 18,[17] and the fourth condition in-

---

[17] In its Response on the Merits, New Jersey DEP indicates that it might be "willing" to "change the nickel compound emission rate to 'de minimis' as suggested by Hess," on the condition that the associated "stack testing be conducted at [the unit's] worst feed quality and feed rate condition to verify the appropriateness of this change." Response on the Merits at 16. EPA's regulations provide that:

> The [permitting authority], at any time prior to the rendering of a decision * * * to grant or deny review of a permit decision, may, upon notification to the Board and any interested parties, withdraw the permit and prepare a new draft permit under § 124.6 addressing the portions so withdrawn. The new draft permit shall proceed through the same process of public comment and opportunity for a public hearing as would apply to any other draft permit subject to this part.

40 C.F.R. § 124.19(d). While the Respondent's statements appear to demonstrate a theoretical willingness to compromise, given their ambiguity and conditionality, they fall short of invoking § 124.19(d). Therefore, the permit conditions have not been effectively withdrawn and remain before the Board in the context of this permit appeal.

volved limitations on opacity, Permit at OS Summary Ref. No. 26.

First, the State notes that, at the time it issued the PSD permit in this case, it also issued "a State of [New Jersey] Air Pollution Control Permit and Certificate to Operate pursuant to NJAC 7:27-8" ("State Permit"). Summary Disposition Motion at 2-3. Both the PSD Permit and the State Permit, New Jersey DEP explains, "are identical with the exception of the title page and effective/expiration dates." *Id*. at 3. New Jersey DEP claims, however, that certain of the conditions in the two permits, including the four conditions mentioned above, involve emissions which are not subject to regulation under the PSD program. Summary Disposition Motion at 7-8. Thus, the State argues that these conditions are not within the subject matter jurisdiction of the Board and that we therefore may not exercise review authority as to these conditions.[18]

Specifically, New Jersey DEP observes that the "PSD statutory provisions and regulations do not apply to hazardous air pollutants ("HAP") listed in CAA § 112(b) [42 U.S.C. § 7412(b)]." Summary Disposition Motion at 7. The State concludes, therefore, that the Permit conditions applicable to emissions of nickel (a HAP) are not subject to Board review.[19] *Id.* Similarly, New Jersey DEP argues that the permit condition limiting opacity from the FCCU, although related to PM (a PSD pollutant), "is a state requirement" growing from New Jersey's Title V program.[20] *Id.* at 8. The State argues further that "opacity requirements are not required by the federal PSD program." *Id.* As a result, the State concludes that any dispute regarding the appropriateness of the Permit's opacity requirement "should be left for review under the State administrative process." *Id*. In sum, New Jersey DEP believes that "[t]he requirements in the permit relating to Nickel and Opacity are not requirements of the federal PSD program and petitioners have not

---

[18] We note here that, while it implies as much, New Jersey DEP does not specifically argue in its Summary Disposition Motion that it did not intend to adopt these four conditions under the authority of the federal PSD program at the time it issued the final Permit.

[19] While the PSD provisions do not authorize the regulation of HAPs *per se*, HAP emissions may be considered in the PSD permitting process (1) if the HAPs are also VOCs and therefore covered collectively with other VOC emission by the PSD program's VOC emissions control requirements, or (2) in the context of considering collateral environmental impacts in the selection of BACT. *See Knauf I*, 8 E.A.D. 121,163 n.56 (EAB 1999) (addressing consideration of collateral environmental impacts); *see also In re Tondu Energy Co.*, 9 E.A.D. 710, 722 n.16 (EAB 2001) (same). Even in its arguments on the merits, however, New Jersey DEP does not suggest that its inclusion of nickel limits in Hess' Permit was justified under either of these scenarios. *See* Response on the Merits at 15-17.

[20] Title V of the CAA requires implementation of an operating permit program for major sources of air pollutants (as defined by CAA § 501(2)). States are given the primary responsibility for administering and enforcing the Title V program, although the Act directs EPA to promulgate regulations that set minimum standards for state Title V permit programs. *See* CAA § 502(b), 42 U.S.C. § 7661a(b); Final Operating Permit Rule, 57 Fed. Reg. 32,250 (July 21, 1992) (promulgating regulations governing state Title V programs).

shown that these issues otherwise come within the purview of the federal PSD program. Therefore, the EAB should grant partial summary disposition as to these issues." *Id.* at 9.

For its part, the Petitioner appears to agree that the four conditions of the Permit that the State identifies involve "non-PSD related, state-based operational conditions." Summary Disposition Reply at 4. In the Petitioner's view, however, the State "may not properly include [such requirements] in a federal PSD Permit where there is a state operational permit containing identical conditions." *Id*. at 4-5. Petitioner argues that New Jersey DEP's "dual permit" approach here is distinguishable from situations where a state has issued an integrated permit expressly containing both PSD and non-PSD requirements. *Id.* at 5-6.

We believe that there is some merit to the Petitioner's arguments in this regard. In *Knauf I*, we explained that:

> Often, permitting authorities that issue PSD permit decisions pursuant to a delegation agreement with EPA include requirements in a permit under both federal and state law. * * * Including such provisions in a PSD permit is legitimate, it consolidates all relevant requirements in one document and obviates the need for separate federal, state, and local permits. However, "the Board will not assume jurisdiction over permit issues unrelated to the federal PSD program."
>
> * * * In many cases, avenues of review are available for persons dissatisfied with a particular decision.

Knauf I, 8 E.A.D. at 162 (quoting *In re W. Suburban Recycling and Energy Ctr*., L.P., 6 E.A.D. 692, 704 (EAB 1996)) (citations omitted). In order for the Board to conclude that a particular permit condition is a non-PSD requirement, however, there must be some factual support for that conclusion in the record. In *Knauf I*, for example, it was evident that the state agency was undertaking an integrated state/federal permitting process, and that the permit in question included some conditions that the permitting authority clearly intended to adopt only pursuant to state law. *See* 8 E.A.D. at 168-69, 171. In such cases, the public is put on notice that it may need to challenge different components of the permit in different fora, and reviewing bodies are able readily to discern the boundaries of their respective jurisdictional authorities. *See, e.g., In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 110 nn.5 & 6 (EAB 1997).

In this case there were two separate permits issued — one identified as a federal PSD Permit and one identified as a New Jersey Air Pollution Control Permit and Certification to Operate issued under State law N.J.A.C. 7:27-8.

See R Ex. E; Response on the Merits at 4. The transmittal letter accompanying the PSD Permit provides no indication that any part of the PSD Permit contains non-PSD requirements — rather, the letter identifies the "Federal Prevention of Significant Deterioration of Air Quality Permit (PSD) issued pursuant to 40 C.F.R. 52.21" as separate and distinct from the permit issued under State law. *See generally* Permit; Letter from Lou Mikolajczyk, New Jersey DEP, to Paul Bucknam, Amerada Hess Corp. (Oct. 12, 2004) (transmitting the final PSD Permit and accompanying State Permit) ("Permit Transmittal Letter") at 1. While, the PSD Permit's introductory text states that "[t]his Prevention of Significant Deterioration Permit is issued under the authority of Chapter 106 P.L. 1967 (N.J.S.A. 26:2C-9.2),[21] *and* federal Prevention of Significant Deterioration regulations at 40 C.F.R. 52.21," Permit introduction at 1 (emphasis added), nothing in the record before us indicates that New Jersey DEP intended to adopt some of the Permit's conditions solely under State authority. In fact, as far as we can tell, nothing anywhere in the record identifies any condition of the PSD Permit as being a non-PSD provision. Moreover, the Permit introduction discusses only the federal PSD appeal process,[22] and none of the relevant conditions themselves indicate that

---

[21] N.J. Stat. Ann. § 26:2C-9.2 (2004) is entitled "Regulation of equipment, control apparatus" and establishes certain requirements for construction, reconstruction, installation, and modification of equipment or control apparatus, as well as operating permit requirements.

[22] The introduction states:

> The PSD regulations, specifically 40 C.F.R. 52.21(q), provide for administrative review of a final PSD permit decision within 30 days from the date of issuance of the permit. * * *
>
> Administrative review is available only to those persons who commented during the public comment period and is restricted to issues raised during the comment period with the exception that any person, including those who failed to file comments on the preliminary permit determination, may petition for administrative review of the changes from the draft PSD permit to the final PSD permit. Upon issuance by the Department of the final permit decision, or in the case of an administrative review upon completion of the administrative review process, the final PSD permit decision will be a final United State Environmental Protection Agency action and will be published in the Federal Register. This final action may be challenged only by filing a petition for review in the United States Court of Appeals for the appropriate circuit within 60 days of the date of the Federal Register notice. The Permit shall not be subject to later judicial review in enforcement proceedings. Opportunity for judicial review is only provided at the completion of the administrative appeals process and is only provided to those persons who were parties in an administrative appeal.

Permit, Introduction at 2. The introduction to the State Permit on the other hand describes only the State review process. State Permit, Introduction at 2.

they are non-PSD provisions.[23] *See* Permit at OS Summary Ref. Nos. 1, 14, 26; OS1 Ref. No. 18.

In sum, while the language in the introduction to the final Permit could be read as indicating that the State intended to adopt the provisions of the Permit under both federal and State law, the record before the Board does not suggest that New Jersey DEP intended to adopt any of the conditions of the PSD Permit *exclusively* under State law.[24] Nor do the State's arguments in its Summary Disposition Motion provide a clear picture of how the contested provisions might be construed as having been adopted under State law alone.[25]

Moreover, we are particularly concerned about the consequences of leaving the non-PSD provisions in the PSD permit because, while New Jersey law provides a mechanism for contesting non-PSD conditions in the State Permit, this mechanism does not extend to non-PSD requirements adopted in the PSD Permit, which is essentially a federal permit. Therefore, the Petitioner contends that "[t]he only review of the PSD Permit available to Hess is before the Board," and if the Board allows the non-PSD conditions to remain in the Permit they "will escape review entirely." Summary Disposition Reply at 7. Such an outcome is not necessarily inconsequential — the non-PSD provisions of a PSD permit may "become federally enforceable permit terms upon final approval of the permit."[26] *See Knauf I*, 8 E.A.D. at 162 n.54; *see also* 40 C.F.R. § 52.23 (addressing violation and enforcement of requirements including PSD permit conditions).

---

[23] Interestingly, the Summary Disposition Motion, rather than citing any materials in the administrative record for the permitting decision, relies entirely on the Certification of Lou Mikolajczyk In Support of Respondent's Response Seeking Partial Summary Disposition, which New Jersey DEP filed as an attachment to its Summary Disposition Motion. This document, however, was created well after the Permit in this case was issued, and is not a part of the administrative record for the Permit.

[24] We note that none of the documents filed in this proceeding (including the PSD Permit itself, the parties' exhibits, and the briefs) explain how the federal and State permits interact in this case — New Jersey DEP merely observes that "[b]oth permits are identical with the exception of the title pages and the effective/expiration dates." Summary Disposition Motion at 3; *see also* Permit transmittal letter at 1.

[25] Indeed, the Summary Disposition Motion does little more than point out that the State here issued two identical permits and that certain conditions of those permits related to types of emissions not typically subject to regulation under the PSD program.

[26] For example, this creates the possibility that Hess could become vulnerable to citizen suits to enforce the non-PSD requirements of the PSD Permit, even where the same conditions in the State Permit have been successfully challenged in the appropriate State forum. *See* CAA § 304, 42 U.S.C. § 7604 (stating that "any person may commence a civil action on his own behalf * * * against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of title I (relating to the significant deterioration of air quality) * * * or who is alleged to have violated * * * or to be in violation of any condition of such permit").

Ultimately, in light of the wording of the Permit as a whole, the administrative record, and the briefs on appeal, it is not at all clear to us that the State adopted these four Permit conditions exclusively under authority of State law, notwithstanding the reference to both federal and State statutes. Accordingly, the State's request for summary disposition is denied. Moreover, given that the State itself asserts that these conditions do not relate to the federal PSD program, and makes no serious effort to justify its adoption of these requirements under the federal PSD program, we find that their inclusion as what appear to be PSD permit conditions in the final PSD Permit constitutes clear error.[27]

Consequently, we remand this element of the Permit with instructions for New Jersey DEP to either remove these four conditions from the PSD Permit, specifically justify adoption of these conditions under the federal PSD program, or otherwise restructure the Permit to address the concerns raised in our discussion above.[28]

C. *Analysis on the Merits*

In Exhibit B accompanying the Petition, the Petitioner describes the basis for its challenge to the Permit. *See* Petition; Petitioner's Exhibit ("P Ex.") B.[29] During the course of the underlying permit action, the Petitioner submitted substantive comments raising the same issues in response to the June 30, 2004 draft permit. *See generally* Petitioner's July 29 comments; Permit Proposal. In both the Petition and in its earlier comments, the Petitioner expressed the following substantive concerns:

---

[27] In *Knauf I* we explained that we would not "assume jurisdiction" over issues that were not "explicit requirements of the PSD provisions" or that had not been "otherwise linked to the federal PSD program in the context of [that] case." 8 E.A.D. at 162. Here, we find that the requirements in question have been linked to the federal PSD program by their inclusion, without explanation, in a permit that is expressly and distinctly a PSD permit. To be clear, however, we are not saying that a single permit may not appropriately contain both PSD and non-PSD conditions. We conclude only that in a case such as this, where a state issues separate PSD (federal) and non-PSD (state) permits, and where the PSD Permit is, on its face, *exclusively* a PSD Permit, it is error for the state to incorporate into the federal PSD permit, without adequate explanation in the administrative record, permit conditions taken directly from the state non-PSD permit that bear no relationship to the federal PSD program.

[28] Our remand of these conditions in the PSD Permit has no impact or effect on the four parallel conditions in the State Permit, to the extent that New Jersey DEP justifies those conditions based on State law and not the federal PSD program. Any claims the Petitioner may have with respect to the State's adoption of these conditions under State law must be pursued in the appropriate State forum.

[29] We note that this document is not a structured brief. Rather, it contains a series of substantive objections to certain conditions of the Permit, which appear to be reiterations of the Petitioner's comments on the draft permit. *See generally* P Ex. B; R Ex. B.

> A number of the draft permit conditions include a stack test study program consisting of four stack tests at varying feed conditions. The Stack test study program has been included as part of an effort to establish upstream process and feed parameters that reflect particulate matter emissions. * * * Hess is concerned that the proposed stack test study program will not provide useful information and may impose unreasonable permit conditions. * * *
>
> It is highly speculative that regenerator emissions can be reasonably predicted using feed sulfur content and the Conradson Carbon Residue (CCR) number. The FCCU process is a very complex operation and the low emission concentrations from the Wet Gas Scrubber (WGS) can not be precisely predicted based on feed stock qualities. The proposed stack test study program does not take into account numerous feed stock and operational variables that effect the emissions of the WGS. No manufacturer, testing contractor, engineer, vender or consultant will warranty emission limits based on the process and feed parameters targeted in this study.

July 29 comments at 1; *see also* P Ex. B. The comments then more specifically discussed the Petitioner's concerns regarding any attempt to establish a predictable correlation between PM emissions performance and feed sulfur content or Conradson Carbon Residue number. July 29 comments at 2. Petitioner's comments also suggested that wet gas scrubber performance is the best indicator of PM emissions control, and that SO_2 emissions performance is well correlated with scrubber efficiency. *Id.* Therefore, Petitioner recommended using the existing continuous emission monitors ("CEM") for SO_2 to confirm proper operation of the scrubber for purposes of ensuring appropriate reductions in PM emissions. *Id*. Petitioner also raised concerns about the feasibility of the proposed study based on cost and based on the Petitioner's inability to predict or control feed stock quality. *Id.* at 2-3. In light of these concerns, Petitioner requested specific changes to the proposed permit. *Id.* at 3-5.

The Petitioner's July 29 comments also raised several issues not specifically related to the stack test study requirements, such as emissions of nickel compounds being "below the reporting threshold," the redundancy of periodic stack tests for CO because "CO emissions from the [wet gas scrubber] are already continuously monitored," and a conflict between the opacity standards in the facility's Title V permit and the opacity standard proposed in the PSD Permit. *See* July 29 comments at 3-4. These issues are raised again in the Petition. P Ex. B.

Clearly, the Petitioner's comments on the draft permit were "significant," in that they purported to identify critical errors in the assumptions underlying the rationale for New Jersey DEP's proposed approach, raising the question at least of whether the approach was technically sound or otherwise appropriate. New Jersey DEP has an obligation to respond to these comments in connection with issuing its final permit decision. EPA's regulations provide, in pertinent part, that:

> At the time that any final permit decision is issued under § 124.15, the Director[30] shall issue a response to comments. * * * This response shall:
>
> (1) Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change, and
>
> (2) Briefly describe and respond to all significant comments on the draft permit * * * raised during the public comment period, or during any hearing.

40 C.F.R. § 124.17(a) (footnote added). Additionally, the regulations require that the permit issuer base its final permit decision on the complete administrative record, including "the response to comments required by § 124.17." 40 C.F.R. § 124.18. As we have explained in the past, a failure to fulfill the obligation to respond to comments "is neither harmless, inconsequential, nor trivial." *In re Weber # 4-8*, 11 E.A.D. 241, 245 (EAB 2003) (rejecting Region V's argument that omission of a response to comments from the record was harmless because staff had completed all technical reviews). Indeed, this requirement is "designed to ensure that the decision maker gives serious consideration to public comments at the time of making his or her final permit decision." *Id.* at 245 (citing *In re Rockgen Energy Ctr.*, 8 E.A.D. 536, 556 (EAB 1999); *In re Atochem N. Am., Inc.*, 3 E.A.D. 498, 499 (Adm'r 1991)). We elaborated on this point as follows:

> The idea behind the regulations is that the *decision maker* have the benefit of the comments and the response thereto to inform his or her permit decision. * * * These regulations focus on the actions of the *decision maker* and the record he or she has to consider, not on whether his or her staff have reviewed public comments and prepared a draft response thereto.

---

[30] According to EPA's regulations "Director means the Regional Administrator, the State director or the Tribal director as the context requires, or an authorized representative." 40 C.F.R. § 124.2.

Id. at 245 (emphasis in original). As we explained in *Rockgen*, "[i]f the [permit issuer] prepares a response to comments after it has already made its final permit decision, it runs the risk that the comments will not be considered with an open mind but instead with an eye toward defending the decision." *Rockgen*, 8 E.A.D. at 556 (quoting *Atochem*, 3 E.A.D. at 499).[31]

In this case, New Jersey DEP appears not to have substantively addressed the Petitioner's comments on the record at all. *See generally* RTC. The RTC was forwarded to the Petitioner with a cover letter explaining:

> The Department accepted public comments for the period from June 30, 2004 to August 9, 2004 on the proposed PSD air pollution control permit for this project. The Department conducted a public hearing on August 2, 2004. * * * At this public meeting representatives of the Department answered questions pertaining to air quality issues.
>
> After considering all the comments received, the Department approved the proposed air pollution control permit for the Amerada Hess Corporation. Enclosed is a copy of the PSD air pollution permit.
>
> Thank you for your concern for the environment. Enclosed for your information is a copy of the Department's response to the air quality issues raised by those who commented. * * *

R Ex. D (Letter from Max Friedman, New Jersey DEP, to Paul Bucknam, Amerada Hess Corp. (Oct. 12, 2004) (transmitting a copy of the RTC)).

The RTC itself is four pages long. It contains three pages of what appear to be responses to comments made during the public hearing by members of the community surrounding the Port Reading facility. RTC at 1-3; *see also* Hearing Transcript. It also contains one page with the heading "Revision of Permit Conditions Based on Written Comments From Amerada Hess Corporation." RTC at 4. While the heading suggests that New Jersey DEP received the Petitioner's July 29

---

[31] While the Board has held that in order to satisfy 40 C.F.R. § 124.17(a)(2) "a response to comments need not be of the same length or level of detail as the comments and that related comments may be grouped together and responded to as a unit," responses must, nonetheless, "address the issues raised in a meaningful fashion and * * * be clear and thorough enough to adequately encompass the issues raised by the commenter." *In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 585 (EAB 2004) (internal citations omitted); *see also In re Hillman Power Co.*, 10 E.A.D. 673, 696 n.20 (EAB 2002); *Rockgen*, 8 E.A.D. at 556-57.

comments, the RTC document does not respond to the substance of those comments. Rather, the RTC, in remarkable brevity, describes certain changes made to the final Permit based on comments from the Petitioner.[32] While this might satisfy New Jersey DEP's obligation under 40 C.F.R. § 124.17(a)(1) to explain revisions made in the final permit, it does not begin to address the State's obligation under 40 C.F.R. § 124.17(a)(2) to briefly describe and respond to the Petitioner's significant comments.

The Response on the Merits suggests that New Jersey DEP responded to the Petitioner's July 29 comments "in its October 12, 2004 Response to Comments document," and "in several e-mails, at meetings and during telephone discussions;" however, the State cites only to the RTC document (R Ex. D) without further explanation. Response on the Merits at 4. While the Certified Index does appear to contain numerous records of communications between New Jersey DEP and representatives of Amerada Hess during the course of the permit development process, the State does not specify any document in the record as containing its response to the Petitioner's substantive July 29 comments.

The Certified Index contains more than 140 items, most of which reflect communications between New Jersey DEP and Hess. *See generally* Cert. Index. Among these items are several undated entries (e.g., Cert. Index items 6 & 10), as well as nine items apparently reflecting communications between New Jersey DEP and Hess after submission of the Petitioner's July 29 comments and prior to

---

[32] In full, this discussion states:

> (1) In order to account for proper feed availability criteria, study related stack test schedule limit has been revised from 400 days to 600 days after changes to the unit are installed. The permit conditions affected by this revision are the followings [sic]: U1, OS Summary, Reference numbers 2, 3, 23; OS1, Reference numbers 4, 5, 6, 7, 8. In the applicable requirement of OS1 Reference # 6, 7, 8 this sentence was added — "Permittee shall endeavor to acquire feedstock with specified characteristics for stack testing study and schedule stack tests within 600 days limit accordingly."
>
> (2) Feed Rate to the FCCU: U1, OS1, Reference number 1. The applicable requirement is revised to include prorated feed rate and feed properties combination criteria based on stack test results instead of feed severity factor criteria proposed earlier. The purpose of this applicable requirement with stack test study is to control PM_{10}/TSP emissions within permit limits based on feed rate and feed properties combination because there [are] no continuous emission monitors for these particles.
>
> (3) H_2S in Fuel Monitoring Requirement: U19, OS Summary number 29. Under monitoring requirement added "or by an Alternative Monitoring Plan approved by the Department."

RTC at 4.

(or concurrent with) issuance of the final permit. *See* Cert. Index items 1, 5, 9, 25, 40, 41, 50-52. However, we note that the applicable regulations require that the "Director" issue a response to comments addressing all significant comments "[a]t the time that any final permit decision is issued." 40 C.F.R. § 124.17(a). As noted earlier, the purpose here is to ensure that the decision maker has the benefit of the comments and the responses thereto to inform his or her permit decision. *See In re Atochem N. Am., Inc.*, 3 E.A.D. 498, 499 (Adm'r 1991). Thus, even if some of these issues were discussed by staff during the comment period, their omission from the response to comment document required by 40 C.F.R. § 124.17 would be error.[33]

Ultimately, it appears that the State is formally articulating its response to the Petitioner's July 29 comments for the first time on review. The Certification of Iclal Atay In Support of Respondent's Response Not Seeking Summary Disposition ("Atay Certification"), which New Jersey DEP submitted as Exhibit F along with its Response on the Merits, is not a part of the record for the Permit since it was created well after the final Permit had been issued.[34] Indeed, nothing before the Board, including the Response on the Merits and its accompanying exhibits, references any substantive response in the record.

Given New Jersey DEP's failure to respond adequately to the Petitioner's comments, the Board cannot substantively evaluate the reasonableness of the State's permit decision.[35] Ultimately, the failure to reasonably respond to significant comments is itself sufficient grounds for remanding the Permit. *In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 586, 589-90 (EAB 2004) ("Region III c learly erred in this instance by failing to respond, adequately or in some cases

---

[33] Further, while it is the Petitioner's burden to demonstrate that the permit issuer has committed clear error, all parties, including the permit issuer, have an obligation to identify the materials in the record that form the backbone of their position on appeal. Accordingly, in the absence of at least some roadmap presented during briefing, the Board will not scour the administrative record in order to find the documents necessary to the permitting authority's case. *See, e.g., In re Rochester Pub. Util.*, 11 E.A.D. 593, 599 (EAB 2004) (per curium), *appeal docketed Minn. Ctr. for Envtl. Advocacy v. EPA*, No. 05-1113 (8th Cir. Jan. 12, 2005); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 507 n.39 (EAB 2002).

[34] It appears to have been signed on December 23, 2004, the same date New Jersey DEP's Response on the Merits was signed. *See* Atay Certification at 13; Response on the Merits at 22. As discussed in detail above, a response to comments must be issued no later than the date of issuance of the final permit. *See* 40 C.F.R. § 124.17(a); *In re Rockgen Energy Center*, 8 E.A.D. 536, 556-57 (EAB 1999).

[35] Indeed, we make no judgment here about the weight or legitimacy of the Petitioner's substantive arguments; we observe only that significant comments were made during the period allowed for public comment, and that the comments are sufficiently specific and sufficiently related to the underlying rationale of the respective permit conditions to require a response on the record.

at all, to significant comments. * * * We therefore remand the permit * * * .").[36] Nor does the articulation of a rationale in the context of responding to the Petition cure this failure. *Wash. Aqueduct*, 11 E.A.D. at 589 (explaining that a permitting authority "cannot through its arguments on appeal augment the record upon which the permit decision was based") (citing *In re Chem. Waste Mgmt. of Ind., Inc.*, 6 E.A.D. 144, 151-52 (EAB 1995)).

Because New Jersey DEP has not met its burden under 40 C.F.R. § 124.17(a)(2) to "respond to all significant comments" at the time the final permit decision is issued, we remand the permit to the permitting authority so that the State can give "thoughtful and full consideration to all public comments before making the final permit determination." *Rockgen*, 8 E.A.D. at 557. We recognize that New Jersey DEP may conclude that no substantive changes to the Permit are necessary, apart from those required to implement the Board's ruling on the non-PSD elements of the Permit (see supra Part II.B). Neither are we suggesting that the comment period necessarily need be reopened.[37] However, New Jersey DEP must issue a revised response to comments document that responds to all significant comments contemporaneously with re-issuance of the final PSD permit decision.[38]

---

[36] While Petitioners did not specifically raise this procedural defect, we believe it is necessarily a component of the Petition. That is, meaningful evaluation of the Petition on substantive grounds requires examination of not only the petitioner's arguments before the Board, but also the relevant comments on the draft permit and the permit issuer's response to those comments.

[37] Assuming that the State elects not to substantively change other Permit conditions, it need not issue another draft permit or solicit additional public comment.

[38] In its Petition, Hess requests that the Board issue "a stay of the Permit due to the comprehensive nature of the contested conditions thereof." Petition at 3. The Petitioner states further that it "is entitled to a stay of the Permit because the permitted facility does not pose any threat to public health or the environment during any stay of the Permit. On the other hand, if a stay were not granted, immediate and irreparable harm would be suffered by Hess." *Id.* at 4. We are somewhat perplexed by this request. EPA's regulations provide that a PSD permit, once issued, "shall become effective 30 days after the service of notice of the decision *unless* * * * [r]eview is requested on the permit under § 124.19." 40 C.F.R. § 124.15(b) (emphasis added). As relevant to this case, these regulations explain that a permit decision becomes a final agency action either when review is denied, or when the permitting authority has taken appropriate action on remand and any available subsequent review procedures have been exhausted. *See* 40 C.F.R. § 124.19(c), (f). The PSD regulations, in turn, provide that "[n]o new major source or major modification * * * shall begin actual construction without a permit." 40 C.F.R. § 52.21(a)(2)(iii). In this case the final action necessary to make the Petitioner's Permit effective has not yet occurred. Thus, in light of our decision to remand the Permit, the Permit will not become effective until such time as New Jersey DEP addresses the shortcomings identified in this decision, reissues the permit, and Agency review procedures have been exhausted. Accordingly, the Petitioner may not begin actual modification pursuant to the PSD permit until this process is complete and the permit has become effective. It is unclear to us what precisely the Petitioner is requesting that we "stay."

III. *CONCLUSION*

For the reasons discussed above, the PSD Permit issued by New Jersey DEP for modification of certain operations at Hess' Port Reading petroleum refinery is hereby REMANDED to the New Jersey DEP for further action consistent with this decision.[39]

So ordered.

[39] Although 40 C.F.R. § 124.19 contemplates that additional briefing typically will be submitted upon a grant of review, a direct remand without additional submissions is appropriate where, as here, it does not appear as though further briefs on appeal would shed light on the issues. *See, e.g.*, *In re Caribe Gen. Elec. Prods., Inc.*, 8 E.A.D. 696, 728 n.43 (EAB 2000). An administrative appeal of New Jersey DEP's decision on remand is required to exhaust administrative remedies under 40 C.F.R. § 124.19(f)(1). Any such appeal shall be limited to the issues within the scope of this remand.