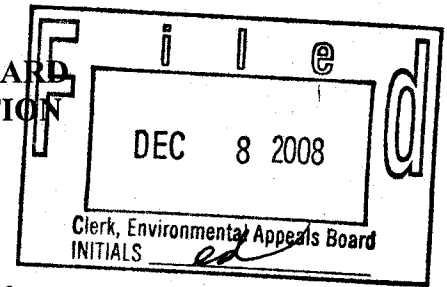


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION
WASHINGTON, D.C.



In re:)
Bango Oil, LLC)
)
Permit No. AP2992-1473)
)

PSD Appeal No. 08-10

ORDER DENYING PETITION FOR REVIEW

By letter dated October 8, 2008, Sherry Wideman petitioned the Environmental Appeals Board (“Board”) to review the Nevada Department of Environmental Protection’s (“NDEP”) proposed revision to Class II Air Quality Operating Permit No. AP2992-1473¹ (“Proposed Permit”) for the Bango Oil, LLC (“Bango Oil”) re-refining facility in Fallon, Nevada. Letter from Sherry Wideman to Clerk of the Board, Environmental Appeals Board, U.S. Environmental Protection Agency (Oct. 8, 2008) (“Petition”).² Ms. Wideman alleges that Bango’s permit application and NDEP’s Proposed Permit failed to meet certain statutory and regulatory

¹ The Board initially docketed this matter as a petition for review of permit number AO2992-1473, as identified in the Petition. However, NDEP-issued documents consistently refer to the draft permit as permit number AP2992-1473. As NDEP is the permitting authority, the Board defers to NDEP’s statement of the permit number, and the case caption has been revised accordingly.

² While a decision on the Petition was pending, the Board received correspondence from Stuart and Susan MacKie that references the above-captioned appeal and seeks consideration of a “complaint regarding odors and particulates we believe emanate from the Bango Oil refinery in Churchill County, Nevada.” Letter from Stuart and Susan MacKie to Clerk of the Board, Environmental Appeals Board, U.S. Environmental Protection Agency (Nov. 20, 2008) (“MacKie Letter”). To the extent that the MacKie Letter is an additional appeal of NDEP’s permitting decision for Class II Air Quality Operating Permit No. AP2992-1473, the Board denies review for lack of jurisdiction for the reasons explained herein.

requirements.³ For the reasons explained below, the Board concludes that it lacks jurisdiction to review the Proposed Permit because NDEP did not issue it as part of the federally delegated program, and even if the Proposed Permit were federally issued, the Petition is not timely filed.

Procedural History and Background

On July 30, 2008, Bango submitted to NDEP a permit application to revise Class II Air Quality Operating Permit⁴ Number AP2992-1473. NDEP Director's Review and Preliminary Determination of Permit Issuance (Sept. 12, 2008) ("Director's Review and Preliminary Determination"). Specifically, Bango sought a revised permit for the new construction and revised operation of a used oil and recycled fuel oil re-refining facility in Fallon, Nevada. NDEP's Notice of Proposed Action and Public Notice of Tentative Determinations Regarding Revisions to Class II Air Quality Permit No. AP2992-1473 (Nov. 12, 2008) ("Notice of Proposed

³ The Petition states:

This letter shall serve as a request for your help please in the withdrawal of the Class II Air Quality Permit AO2992-1473 from Bango Oil, LLC, and/or a hearing pursuant to NRS 445B Air Pollution and NAC 445B Air controls in regards to the application for a revision to Class Air Quality Operating Permit AO-2992-1473 from Bango Oil, LLC.

Petition at 1.

⁴ Under Nevada law and regulations, a Class II air quality operating permit governs emissions from a stationary source that emits fewer criteria pollutant emissions than facilities categorized as major stationary sources regulated by federal permitting requirements. Nev. Admin. Code § 445B.037. A "major stationary source" is a certain type of facility that "emits or has the potential to emit 100 tons per year or more of any regulated [new source review] pollutant." 40 C.F.R. § 52.21(b)(1)(i).

Action”). NDEP issued a draft permit for public comment on September 16, 2008, and the public comment period closed on October 17, 2008. *Id.*; Director’s Review and Preliminary Determination. NDEP received comments from Ms. Wideman on October 14, 2008.⁵ Letter from Sherry Wideman to Randy Phillips, Bureau of Air Pollution Control, NDEP (Oct. 8, 2008) (“Wideman Comments”). As of November 12, 2008, NDEP had neither responded to comments received in connection with the draft permit nor issued a final permit decision. NDEP Response to Petition for Review Requesting Summary Disposition (“NDEP Resp.”) at 2 (citing Affidavit of Greg A. Remer (“Remer Affidavit”)).

Ms. Wideman asserted the following in the Petition: (1) Bango’s “present permissible emission levels * * * have made the surround[ing] area uninhabitable with their offensive odors, and have interfered with and prevented the comfortable enjoyment of life and property in the surrounding areas of the plant[,]” in violation of Nev. Admin. Code § 445B.22087(1);⁶ NDEP and Bango violated Nev. Admin. Code § 445B.22087(2)⁷ because neither NDEP nor Bango

⁵ We observe that the text of Ms. Wideman’s comments on the draft permit to NDEP and the text of the Petition are in large part identical. *Compare* Petition *with* Letter from Sherry Wideman to Randy Phillips, Bureau of Air Pollution Control, NDEP (Oct. 8, 2008) (“Wideman Comments”); *see also* Petition at 2 (“Petitioner submitted comments on the draft permit, in identical form and substance as the ‘Petition for Review,’ submitted to the Board.”).

⁶ Nev. Admin. Code § 445B.22087(1) provides:

No person may discharge or cause to be discharged, from any stationary source, any material or regulated air pollutant which is or tends to be offensive to the senses, injurious or detrimental to health and safety, or which in any way interferes with or prevents the comfortable enjoyment of life or property.

⁷ Nev. Admin. Code § 445B.22087(2) provides:

conducted a “sampling of the population surrounding the plant” with respect to allegedly offensive odors, and specifically, neither Ms. Wideman nor her neighbors were part of a sample group despite having reported instances of offensive odors; and (3) NDEP failed to address the “secondary (welfare-based) policy-relevant science and the [Clean Air Act’s (“CAA”)] National Ambient Air Quality Standards (NAAQS) for both oxides of nitrogen and sulfur oxides * * *.” Petition at 1-2. Finally, Ms. Wideman questioned whether NDEP “considered the federal Prevention of Significant Deterioration (PSD) regulations contained in 40 C.F.R. 52.21 * * * [.]” *Id.* at 2. Ms. Wideman did not allege that NDEP issued a final federal PSD permitting decision with respect to the requested revision.⁸

After the Board granted an extension, NDEP filed a response seeking summary disposition of the Petition on November 13, 2008. NDEP raised three grounds for summary disposition. First, NDEP argued that the Petition was filed before NDEP issued a final permit, which is a threshold requirement for Board review. NDEP Resp. at 2. Second, NDEP asserted that the Board lacks jurisdiction to review the Proposed Permit because it is a Nevada Class II permit for a minor source, rather than a federal Prevention of Significant Deterioration (“PSD”) permit issued under NDEP’s Class I Permit Program. *Id.* at 3; Letter from Francisco Vega,

The Director shall investigate an odor when 30 percent or more of a sample of the people exposed to it believe it to be objectionable in usual places of occupancy. The sample must be at least 20 people or 75 percent of those exposed if fewer than 20 people are exposed.

⁸ In fact, Ms. Wideman appears to concede this point. Reply to the Request for Summary Disposition at 1 (Nov. 20, 2008) (“[M]y petition is addressing * * * the revision which is not applicable because it is not final.”).

Supervisor, Permitting Branch, Bureau of Air Pollution Control, NDEP to Randall E. Soule, President, Bango Oil, LLC (Sept. 16, 2008) (“Vega Letter”). Finally, NDEP argued that the Board lacks jurisdiction because “[a]ll of [Ms. Wideman’s] concerns with the Bango Oil facility in [her] ‘Petition for Review’ address compliance with state odor regulations and other non-PSD issues * * *.” NDEP Resp. at 4. On November 24, Ms. Wideman filed a Reply to the Request for Summary Disposition, reiterating arguments made in the Petition. Reply to the Request for Summary Disposition (Nov. 20, 2008) (“Reply”). As detailed below, the Board denies review.

Discussion

The threshold question is whether the Bango Oil facility is a “major stationary source” that triggers the CAA’s PSD program requirements. Congress enacted the PSD provisions of the CAA to, among other things, “insure 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). A PSD permit is required before anyone may build a new major stationary source of air pollutants or make a major modification to an existing source if it is located in either an “attainment” or “unclassifiable” geographic area. CAA §§ 107, 160-169B, 42 U.S.C. § 7407, 7410-7492. The PSD permitting program regulates air pollution in “attainment” areas, where air quality meets or is cleaner than the national ambient air quality standards, as well as in areas that cannot be classified as either in “attainment” or “non-attainment” (i.e., “unclassifiable” areas). CAA §§ 107, 161, 42 U.S.C. §§ 7407, 7471; *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 59 (EAB 1997); *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 766 -67 (EAB 1997). The U.S.

Environmental Protection Agency (“EPA” or “Agency”) administers the federal PSD program and has delegated that program authority to certain states, including Nevada. *See* 40 C.F.R. §§ 52.21(a)(1), (u), 52.1470-.1489; *Delegation of Authority to State Agencies*, 46 Fed. Reg. 9580, 9582 (Jan. 29, 1981); Nev. Admin. Code §§ 445B.036, .287. PSD permits for major stationary sources issued by delegated states, such as Nevada, are considered EPA-issued permits and are governed by federal regulations. *In re Christian County Generation, LLC*, PSD Appeal No. 07-01, slip op. at 2 n.1 (EAB Jan. 28, 2008), 13 E.A.D. at ___ (citing *In re SEI Birchwood, Inc.*, 5 E.A.D. 25, 26 (EAB 1994); *In re Hadson Power 14-Buena Vista*, 4 E.A.D. 258, 259 (EAB 1992)).

The federal PSD permit decisionmaking process, including permit review, is governed by 40 C.F.R. part 124. The scope of the Board’s permit review is limited to issues relating to the federal PSD program. *See, e.g., In re DPL Energy Montpelier Elec. Generating Station*, 9 E.A.D. 695, 699 (EAB 2001); *In re W. Suburban Recycling & Energy Center, L.P.*, 6 E.A.D. 692, 704 (EAB 1996); *see also* 40 C.F.R. § 124.2(a) (authorizing the Board to issue final Agency decisions in PSD permit appeals filed pursuant to 40 C.F.R. part 124). State law matters are addressed through the state system of review. *In re Sutter Power Plant*, 8 E.A.D. 680, 690 (EAB 1990) (“The Board may not review, in a PSD appeal, the decisions of a state agency made pursuant to * * * state or local initiatives and not otherwise relating to permit conditions implementing the PSD program.”).

Here, NDEP asserts that the Bango Oil re-refining facility is not subject to the delegated

PSD program because the facility is a minor, rather than a major, source of criteria pollutant emissions, and therefore, is not subject to PSD requirements. NDEP states that Bango Oil's application for a revision to the existing permit and the draft permit NDEP issued for public comment pertain to a facility whose "total * * * emissions, including the requested revision, are less than 100 tons per year of each regulated pollutant." NDEP Resp. at 1. Nevada regulations refer to such a minor source as a "Class II source."⁹ Remer Affidavit at 1. As a result, NDEP reviewed Bango Oil's permit application "under legal authority from Nevada Revised Statutes [sic] 445B.100 through 445B.640 and pursuant to regulations in the Nevada Administrative Code 445B.001 through 445B.3791." Vega Letter. Ms. Wideman, in neither her Petition nor her Reply, disputes this fundamental premise that Bango Oil's facility is a "minor" source of criterion pollutant emissions, which governs the Board's jurisdiction.

We agree with Nevada that the record before the Board reflects that Bango Oil's facility is not a major stationary source within the meaning of 40 C.F.R. § 52.21(b)(1)(i), and therefore, the Proposed Permit is not subject to federal PSD regulatory requirements. In making this determination, we rely on the cited record evidence and upon the expertise of NDEP, the delegated state authority for implementation of the federal PSD program in Nevada.

⁹ Under the relevant Nevada regulations, a "Class II source" is:

[A]ny stationary source which is not subject to the [federal permitting] requirements of 42 U.S.C. §§ 7661 to 7661f, inclusive, but which is otherwise subject to the requirements of NAC 445B.001 to 445B.3791, inclusive. The term does not include a stationary source that is operating under a Class III operating permit issued pursuant to NAC 445B.001 to 445B.3791, inclusive.

Nev. Admin. Code § 445B.037.

Accordingly, the Board lacks jurisdiction over the proposed permit, which is subject to jurisdiction under Nevada law and regulation. *See* 40 C.F.R. § 124.19(a); Nev. Admin. Code §§ 445B.001-.3791. To the extent that the Petition requests review of the existing permit,¹⁰ it is denied for the same reasons.

Even if the facility was properly categorized as a major source of criteria pollutant emissions and subject to federal PSD regulation, the Board would lack jurisdiction in this case because the Petition was filed prior to the issuance of a final permit decision on the application for a permit revision. The procedural requirements that govern the federal PSD permit decisionmaking process make clear that Board review is not triggered until a final PSD permit decision has been issued. 40 C.F.R. § 124.19(a). These procedural requirements also reflect the importance of public participation, and “[t]he 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.” *In re Weber #4-8*, 11 E.A.D. 241, 245 (E.A.D. 2003) (emphasis omitted). Thus, “[a]t the time a final permit decision is issued,” the permitting authority must issue a “response to comments” document responding to all significant comments received during the public comment period, as well as make the public comments and the EPA’s response thereto part of the administrative record upon which the final permit decision is based. *See* 40 C.F.R. §§ 124.17, .18(a),(b)(1); *see, e.g., In re Rockgen Energy Center*, 8 E.A.D. 536, 557 (EAB 1999) (explaining that adherence to 40 C.F.R. § 124.17 was necessary to give “thoughtful and full

¹⁰ The Reply states that the Petition “is addressing Bango Oil’s current permit which has been issued, and/or the application for a revision.” Reply at 1.

consideration to all public comments before making the final permit determination”). Seeking review prior to the issuance of a final permit decision, as the petitioner here has done, forecloses this critical aspect of the decisionmaking process. Because the Petition was filed prior to the completion of the administrative record, and a final permit decision had not been issued, the Board lacks the authority to review the Proposed Permit under 40 C.F.R. § 124.19. Accordingly, review is denied.

So ordered.¹¹

Dated: December 8, 2008

ENVIRONMENTAL APPEALS BOARD

By: Kathie A. Stein for Anna L. Wolgast
Anna L. Wolgast
Environmental Appeals Judge

¹¹ The three-judge panel deciding this matter is comprised of Environmental Appeals Judges Edward E. Reich, Kathie A. Stein and Anna L. Wolgast.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Petition for Review in the matter of *Bango Oil, LLC*, PSD Appeal No. 08-10, were sent to the following persons in the manner indicated:

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Date: DEC - 8 2008



Annette Duncan
Secretary