

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

In the Matter of Hess Newark Energy Center
Prevention of Significant Deterioration and
New Source Review Preconstruction Permit

Permit Activity No. BOP110001
Program Interest ID: 08857

Issued by the New Jersey Department of
Environmental Protection

PETITION FOR REVIEW

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INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), the Ironbound Community Corporation (“ICC”) and the New Jersey Environmental Justice Alliance (“NJEJA”) (collectively “Petitioners”), petition for review the issuance of the Prevention of Significant Deterioration (“PSD”)/New Source Review (“NSR”) Permit Activity Number BOP110001, which the New Jersey Department of Environmental Protection (“NJDEP”) issued for the Hess Newark Energy Center (“Hess NEC”) on September 13, 2012. New Jersey elected to integrate its NSR preconstruction permits with the operating permit instead of issuing separate permits. A copy of the integrated proposed permit is attached hereto as Exhibit 1.

The State of New Jersey is authorized to administer the Clean Air Act’s (“CAA”) PSD and NSR permit program pursuant to the delegated authority by the United States Environmental Protection Agency (“EPA”). The Permit authorizes Hess to construct and operate a 655 megawatt natural gas fired combined cycle power plant. Because both the applicant and NJDEP failed to examine alternatives and make certain necessary findings based on this required examination, review is appropriate pursuant to 40 C.F.R. § 124.

THRESHOLD PROCEDURAL REQUIREMENTS

Petitioners satisfy the threshold requirements for filing a petition for review. NSR appeals are governed by 40 C.F.R. § 124.19. *See* USEPA Environmental Appeals Board, *Order Governing Petitions for Review of Clean Air Act New Source Review Permits* (April 19, 2011). Petitioners have standing to petition for review of the permit decision because each group participated in the public comment period on the draft permit. 40 C.F.R. § 124.19(a). *See* Comments of NJEJA, attached hereto as Exhibit 2; Comments of ICC, attached hereto as Exhibit 3. The issues raised here by Petitioners were raised with NJDEP during the public comment

period and are directly related to NJDEP's response to public comments. Consequently, the Environmental Appeals Board ("EAB" or the "Board") has jurisdiction to hear Petitioners' timely request for review.

STATEMENT OF FACTS

Hess applied for a PSD/NSR preconstruction permit to allow it to construct and operate the Hess Newark Energy Center in October of 2011. On July 27, 2012, NJDEP held public hearings at which twenty individuals spoke, including representatives from both ICC and NJEJA. *See* NJDEP Hearing Officer's Report, Response to Public Comments for Hess Newark Energy Center, attached hereto as Exhibit 4.

The proposed permit was issued on September 13, 2012 and would become effective on October 13, 2012 if no appeal were sought.

ARGUMENT

I. The EAB Must Remand the Permit Because NJDEP Failed to Require the Applicant to Submit an Analysis of Alternative Sites, Production Processes, and Environmental Control Techniques that Demonstrates that the Benefits of the Proposed Project Outweigh its Environmental and Social Costs.

As explained above, Hess proposes to build the Newark Energy Center, a 655 megawatt (MW) combined cycle electric generating facility that will use natural gas as its fuel (the "Project") at 111 Delancy Street in Newark, Essex County, New Jersey (the "Site"). Essex County and adjacent Hudson County are both currently in non-attainment of the Clean Air Act's National Ambient Air Quality Standards for Ozone (for which NO_x and VOC's are precursors) and PM 2.5 (for which NO_x is also a precursor).¹ Because the Project will emit all of these pollutants in a non-attainment area, both the CAA and New Jersey's State Implementation Plan ("SIP") regulations require Hess to submit an analysis of alternatives to the Project, including

¹ See <http://www.epa.gov/oaqps001/greenbk/ancl.html>.

alternative sites, sizes, production processes, and environmental control techniques, that demonstrates that the benefits of the proposed Project significantly outweigh its environmental and social costs. 42 U.S.C. § 7503(a)(5); N.J.A.C. § 7:27-18.3(c)(2).

a. An Alternatives Analysis is Essential to Informing Decision-makers and the Impacted Public of the Reasonable Alternatives that May Avoid or Minimize the Adverse Impacts of the Proposed Project.

Absent a detailed analysis of alternatives to the Project, it is simply impossible for decisionmakers and the impacted public to have the requisite information demonstrating that the benefits of the Project “significantly outweigh the environmental and social costs imposed as a result of its location.” 42 U.S.C. § 7503(a)(5); N.J.A.C. § 7:27-18.3(c)(2). It is instructive here to draw an analogy between the requirements for an alternatives analysis under the CAA’s New Source Review program, 42 U.S.C. § 7503(a)(5), and the requirements for an alternatives analysis under the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332(C)(iii). The D.C. Circuit Court of Appeals has held that actions taken under the CAA are essentially exempt from the requirements of NEPA because the CAA “requires the *functional equivalent* of a NEPA impact statement.” *Environmental Defense Fund, Inc. v. USEPA*, 489 F.2d 1247, 1256 (D.C.Cir. 1973)(emphasis added)(citing *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973). As NEPA, its regulations and case law demonstrate, the point behind conducting an alternative analysis is to facilitate informed decision-making in order to achieve minimal adverse impacts on the environment, including the human environment.

NEPA requires that all federal agencies conducting major actions significantly affecting the quality of the human environment prepare a “detailed statement” that includes alternatives to the proposed action under review. *Id.* In turn, the regulations adopted to implement the requirements of NEPA call the alternatives analysis the “heart” of the environmental review. 40

C.F.R. § 1502.14. The alternatives analysis should “present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” *Id.* Among other things, the NEPA regulations require an alternatives analysis to:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated. (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their merits, [and] (c) include the alternative of no action.

40 C.F.R. § 1502.14. These requirements are designed to ensure that “the most intelligent, optimally beneficial decision will ultimately be made.” *Calvert Cliffs Coordinating Comm., Inc. v. Atomic Energy Comm’n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971). Indeed, the Second Circuit described the alternatives analysis as the “linchpin” of the entire environmental review. *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 697-98 (2d Cir. 1972).

Therefore, by using NEPA as a guide for the functionally equivalent requirements of the CAA New Source Review program and New Jersey’s SIP regulations, it becomes clear that any truly informed environmental decision-making must include a robust and hard look at potential alternatives to the proposed action. The absence of an alternatives analysis deprives decisionmakers and the public of a proper frame of reference by which to continually measure our progress toward achieving the “most intelligent, optimally beneficial” environmental decisions possible.

b. Neither the Applicant nor the NJDEP Analyzed Any Alternative Sites for the Proposed Project.

New Jersey’s SIP regulations state “[t]he [NJDEP] shall not authorize the construction...of any equipment...unless the owner or operator of the facility has demonstrated

that the facility will be in compliance with all of the applicable requirements of this subchapter...” N.J.A.C. § 7:27-18.3(a). In turn, the SIP regulations require that

[a]ny person subject to this subchapter...shall submit to the [NJDEP] an analysis of alternative sites within New Jersey, and of alternative sizes, production processes, including pollution prevention measures, and environmental control techniques, demonstrating that the benefits of the newly constructed...equipment significantly outweigh the environmental and social costs imposed as a result of the location, construction...and operation of such equipment.

N.J.A.C. § 7:27-18.3(c)(2). Applicants in New Jersey who wish to build new major stationary sources of CAA criteria air pollutants in non-attainment areas must therefore not only submit an analysis of alternatives, but they must also demonstrate that the benefits of their proposed projects *significantly outweigh* the environmental and social costs imposed by the project.

If these requirements are to serve as functional equivalents of NEPA reviews, then it is apparent that the analysis of alternatives to Hess’s proposed Project is woefully inadequate and in violation of the law. The Environmental Appeals Board should remand this permit to the NJDEP and instruct it to require Hess to submit an actual alternatives analysis and to then reopen the public comment period to afford the impacted residents of Essex and Hudson Counties an opportunity to comment.

Hess did not propose one single alternative site for its Project. *See* Hess NEC Application for PSD and NSR Preconstruction Permit, attached hereto as Exhibit 5, at 2-15. Hess states in its application that “[t]he Hess NEC site was selected due to its ideal location,” and that “[n]o other sites are within NEC’s control that would be more suitable.” *Id.* In support of this assertion, Hess refers to the Site’s proximity to a natural gas supply and a supply of cooling water without providing any detailed information or data. *Id.* However, absent any alternative sites, let alone data regarding such alternative sites’ access to natural gas, cooling water, or other infrastructure, it is simply impossible for decisionmakers and the impacted public to properly

analyze the potential environmental and social costs and benefits of the proffered Site. Without any analysis of potential alternative sites, it is impossible to present the environmental impacts of the proposal and the alternatives in comparative form, and impossible to define the issues and provide a clear basis for choice among the non-existent options. *See* 40 C.F.R. § 1502.14. Hess's supposed alternative site analysis is therefore in clear violation of the requirements of the CAA New Source Review program and New Jersey's SIP regulations.

Both Petitioners offered comments to highlight this glaring omission from Hess's permit application. *See* Exhibits 2 and 3. However, rather than require Hess to provide some alternative sites so that the NJDEP and the public could better understand the rationale behind the choice of the proffered Site among other options, NJDEP instead chose to offer a post-hoc rationalization of the chosen location. Exhibit 4, at 22-24. First, NJDEP seemed to simply take at face value the applicant's assertions that the purpose of the Project is to respond to regional energy needs, and that there are simply no other sites within the state of New Jersey with comparable access to infrastructure. *Id.* Second, NJDEP offered no data or information to support its own assertion that siting the facility outside of the region in which the power is needed would result in more emissions because of electricity loss during transmission. *Id.* And third, NJDEP offered no data or information with regard to its assertions that siting the proposed Project at another location would essentially have no impact whatsoever on the attainment of the CAA's national ambient air quality standards for ozone and fine particulates. *Id.*

It is theoretically possible that in the end, after a robust and hard look at several potential alternative sites, the benefits of the proffered Site may have proved to significantly outweigh its environmental and social costs when compared with the other sites. The point Petitioners wish to make is that in the complete absence of any proposed alternative sites, it is

impossible to reach that conclusion. Appellants believe that the requirement for an analysis of alternative sites spelled out in the CAA's New Source Review program and New Jersey's SIP regulations requires more than a virtual rubber stamp of approval by the permitting authority for the applicant's chosen site. The Environmental Appeals Board should remand this permit to the NJDEP and instruct it to require Hess to conduct an actual alternative sites analysis.

c. Neither the Applicant nor the NJDEP Offered Any Information or Data Demonstrating that the Benefits of the Proposed Project Outweigh its Environmental and Social Costs.

As mentioned above, in addition to submitting an alternatives analysis, applicants proposing to construct new major stationary sources of CAA criteria pollutants in non-attainment areas must, in the context of an alternatives analysis, demonstrate that the benefits of their project significantly outweigh the environmental and social costs imposed as a result of its chosen location. 42 U.S.C. § 7503(a)(5); N.J.A.C. § 7:27-18.3(c)(2). Again, given the complete absence of any analysis of any alternative sites throughout this entire application process, it is impossible for decisionmakers or the public to credibly reach the conclusion that the benefits of the proffered Site significantly outweigh its environmental and social costs in comparison with other sites.

For example, the applicant's supposed environmental justice analysis highlights the problem. *See* Exhibit 5, at 5-1. The applicant correctly identified that pursuant to USEPA Region 2's guidelines for environmental justice analyses, as well as New Jersey's Executive Order 131, a thorough environmental justice analysis will demonstrate that the proposed project will not result in a disproportionately high and adverse burden on environmental justice communities. *Id.* Hess then identified Newark and Jersey City as environmental justice communities due to the high percentages of their populations that are either minority or low

income. *Id.* at 5-2. However, this is where Hess's environmental justice analysis effectively stopped. Hess did not assess or catalogue the presence of other sources of pollution in these communities, nor did it bother to assess any relevant and available public health data that could further assist it in its analysis. Instead, after identifying the presence of environmental justice communities in the vicinity of the Project, Hess simply concludes that because its dispersion modeling suggests that the Project's emissions will come in below the significant impact levels (SIL) for all pollutants and averaging times, with the exception of 1-hour NO₂, then "there will be no disproportionately high and adverse burden on communities in the area." *Id.* at 5-3. One is left wondering, if the exceedance or non-exceedance of an SIL is sufficiently determinative on its own of the presence or non-presence of a disproportionately high and adverse burden on communities in the area, why Hess even bothered to go through the exercise of identifying the presence of environmental justice communities?

Indeed, as Hess's own application explains, whether a facility must conduct a Significant Impact Level analysis is not dependent upon the presence of an environmental justice community. *See* Exhibit 5, at 3-5. Therefore, it seems logically invalid to conclude that simply because a proposed facility's modeled emissions come in below the SIL's there are no disproportionate and adverse impacts on environmental justice communities. Had Hess fulfilled its obligation to analyze alternative sites, NJDEP and the public would have had an opportunity to assess whether, for example, such other sites are in locations that have more or less adverse environmental burdens on their surrounding communities than the proffered Site. The NJDEP and the public would have also been able to assess whether the ambient air quality in those other sites was better or worse than the air quality at the proffered Site, and whether the communities surrounding those sites might suffer from abnormally high adverse health conditions, such as

asthma. Not all communities in which Hess's proposed Project's modeled emissions would come in below the SIL's are identical. By apparently assuming that they are, Hess rendered its environmental justice analysis meaningless.

Additionally, in doing so Hess failed to fulfill its obligation to demonstrate that the benefits of its Project and Site significantly outweighs its environmental and social costs in comparison with other sites. 42 U.S.C. § 7503(a)(5); N.J.A.C. § 7:27-18-3(c)(2). Though Hess's emissions modeling may show that the Project's emissions will be below the relevant SIL's, there very well may be other potentially suitable sites in which the Project would not exceed the SIL's and where the surrounding communities do not have such high proportions of low income and/or minority residents, or such high concentrations of other sources of pollution. Under such circumstances, the balance of environmental and social costs and benefits could very well tip in favor of such alternative sites. Again, the point that Petitioners wish to make in this regard is that faced with the complete absence of any potential alternative sites for the project, it is simply impossible for decisionmakers and the public to accurately assess the costs and benefits associated with the proffered Site and advocate for "the most intelligent, optimally beneficial decision." *Calvert Cliffs Coordinating Comm., Inc.*, 449 F.2d at 1114. A justification for one chosen site does not make, or fulfill the objectives of, an alternative analysis. Hess should be required to make a good faith demonstration that the benefits of its Project significantly outweighs its environmental and social costs in comparison with other potential sites.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Environmental Appeals Board remand the permit issued for the Hess NEC and instruct NJDEP to require Hess to submit an alternatives analysis and provide the public with an opportunity to comment.

Respectfully Submitted,



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