

IN RE SIERRA PACIFIC INDUSTRIES

PSD Appeal No. 02-13

ORDER DISMISSING PETITION FOR REVIEW

Decided January 7, 2003

Syllabus

Stanley W. Cleverly (“Petitioner”) appeals an October 17, 2002 decision of the Washington Department of Ecology (“WDOE”) to issue a Prevention of Significant Deterioration (“PSD”) permit to Sierra Pacific Industries (“SPI”). The permit authorizes installation and operation of a wood-waste boiler and a steam-driven electricity generating turbine at SPI’s Aberdeen, Washington facility.

During the public comment period preceding issuance of the permit, written comments objecting to the permit were submitted by David Fletcher and his consultant, John Williams. These comments were withdrawn in writing prior to the end of the public comment period. WDOE did not respond to the withdrawn Fletcher and Williams comments.

Petitioner argues that WDOE committed error because it did not require Best Available Control Technology (“BACT”) for emissions of NO_x, CO, and PM₁₀. Petitioner also argues that WDOE exercised discretion warranting review when it failed to address the withdrawn comments. In the alternative, Petitioner argues that WDOE should have considered the withdrawn comments because Petitioner incorporated them by reference into his own oral comments at the public hearing on the draft permit. WDOE argues that the issues on appeal were not preserved for review and that WDOE did not abuse its discretion by not responding to the comments submitted, but later withdrawn, by Fletcher and Williams.

Held: Petitioner failed to preserve the BACT issues he seeks to raise on appeal. Petitioner failed to incorporate by reference the BACT issues that were part of the withdrawn comments. Petitioner did not make any affirmative statement at the public hearing that he was incorporating the comments by reference; also, he indicated that he understood the comments had been withdrawn and conceded that he was not knowledgeable regarding the substance of those comments. Petitioner’s own oral comments during the public hearing lacked sufficient specificity to preserve the issues for appeal.

Petitioner has not demonstrated that WDOE exercised discretion warranting Board review when WDOE did not respond to the withdrawn comments.

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

Opinion of the Board by Judge Reich:

Before the Environmental Appeals Board (“EAB” or “Board”) is a petition seeking review of certain conditions of Prevention of Significant Deterioration (“PSD”) Permit No. PSD-02-02 (the “Permit”) issued by the Washington Department of Ecology (“WDOE”).¹ The Permit was issued on October 17, 2002, to Sierra Pacific Industries (“SPI”) for installation and operation of a wood-waste boiler and a steam-driven electricity generating turbine at SPI’s Aberdeen, Washington facility. The petition for review (“Petition”) was filed by Stanley W. Cleverly (“Petitioner”), a resident of Aberdeen who resides within 1000 feet of the proposed facility. As explained below, the Petition is dismissed because the issues for which the Petitioner seeks review were not preserved for appeal, and Petitioner has not shown an abuse of discretion by the permitting authority that warrants Board review.

I. BACKGROUND

A. Factual and Procedural Background

SPI operates a lumber mill located 2.5 kilometers east of Aberdeen, Washington. Pet. Ex. A (Permit No. PSD-02-02) at 1. On July 22, 2002, WDOE issued a draft PSD permit for a wood-waste boiler at the SPI facility. In the draft permit, WDOE preliminarily determined that the Best Available Control Technology (“BACT”)² for the boiler would be:

¹ WDOE administers the PSD program in Washington pursuant to a delegation of authority from U.S. Environmental Protection Agency (“EPA”) Region X (the “Region”). See Letter from B. McCallister, Dir. Office of Air Quality, to M. Burg, Mgr. Air Quality Program (Feb. 27, 2002), viewable on the World Wide Web, at: http://www.ecy.wa.gov/programs/air/psd/PSD_EPA_Letter.pdf. ___ Fed. Reg. ___ (2002)(publication pending). Because WDOE acts as EPA’s delegate in implementing the federal PSD program within the State of Washington, PSD permits issued by WDOE are considered EPA-issued permits for purposes of federal law, and are subject to review by the Board pursuant to 40 C.F.R. § 124.19. See *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 109 n.1 (EAB 1997); *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 765 n.1 (EAB 1997); *In re W. Suburban Recycling & Energy Ctr., L.P.*, 6 E.A.D. 692, 695 n.4 (EAB 1996).

² Facilities subject to PSD permitting requirements are required to meet emissions limitations that satisfy the definition of BACT. BACT is defined in the regulations as follows:

[BACT] means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under [the] Act which would be emitted from any proposed major stationary source or major modification which the Ad-
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For NO_x emissions:

Use of a spreader stoker boiler design;

Selective noncatalytic reduction (“SNCR”); and

A short term (24 hour average) limit of 0.15 pounds NO_x per million British thermal units (lb NO_x/MMBtu) and a limit for any twelve consecutive month period equivalent to not greater than 0.1 lb NO_x/MBtu on an 8,760 hrs/yr basis (135 TPY).

For CO emissions:

Good combustion practice, and

An emission limit of 0.35 pounds CO per million British thermal units (lb CO/MMBtu) on an hourly average basis.

For PM₁₀ emissions:

Use of an dry electrostatic precipitator (ESP), and An emission limit of 0.02 pounds PM₁₀ per million British thermal units (lb PM₁₀/MMBtu) on a 24 hour average basis. This converts to 0.01 grains per dry standard cubic foot of combustion exhaust gas.

Brady Aff., Ex. A at 11, 12 and 14 (Fact Sheet for Draft Permit No. PSD-02-02). WDOE’s BACT determination was unchanged in the final permit. Pet. Ex. A at 2-3.

During the 30-day comment period following issuance of the draft permit, a public hearing was requested by David Fletcher, Stanley and Beverly Cleverly, and an organization named Concerned Neighbors. Pet. Ex. F (Response Summary to Comments During the Public Review Period for PSD 02-02 (undated)) at 1. Because a public hearing was requested, the public comment period was automat-

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ministrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant.

40 C.F.R. § 52.21(b)(12); CAA § 169(3), 42 U.S.C. § 7479(3) (BACT defined).

ically extended to October 9, 2002, the date of the hearing, by virtue of the operation of 40 C.F.R. § 124.12(c). *Id.* Written comments were submitted to WDOE during the public comment period by Mr. Fletcher, Mr. Williams (a consultant to Mr. Fletcher), Mr. Mike Wilson (Mayor of Aberdeen), and Mr. Bob Beerbower (Chair of Grays Harbor County Commissioners). *Id.* Oral comments were presented at the public hearing by Petitioner and Mr. Bill Hagara. *Id.* at 1-2.

Mr. Fletcher's written comments were submitted to WDOE on August 14, 2002, and Mr. Williams' comments were submitted on October 8, 2002.³ However both sets of comments were also withdrawn in writing before the close of the public comment period and, in fact, before the public hearing, Mr. Fletcher withdrew his comments by letter dated October 8, 2002. *See* Pet. Ex. C last page. Mr. Williams withdrew his comments by an October 8, 2002 letter.⁴ Pet. Ex. D last page. The letters of withdrawal both stated,

The undersigned, being fully informed and advised by counsel do hereby warrant and stipulate:

a. All comments and materials made by me or on my behalf * * * and all supplementary materials be and hereby are *withdrawn for all purposes.* * * *

c. The undersigned agree they have no objection to the permits proposed for issuance to [SPI] * * * .

Pet. Exs. C & D last page (emphasis added).

On October 9, 2002, Petitioner presented oral comments on the draft permit related to BACT. He stated, after outlining the BACT process, "I was hoping to ask is that you guys will review their procedures and our WAC codes and make sure they are meeting the best that we can have to deal with." *Moody Aff., Ex. A at 2.* Petitioner also stated, after asserting that construction had begun without the requisite permits:

I was hoping that another resident that lived out there had an expert that was going to talk to you today. He is the one that withdrew his testimony. He had an expert that

³ Both sets of comments contained numerous challenges to the BACT analysis undertaken in preparation of the draft permit. *See* Pet. Ex. C at 3-4 (summary of BACT arguments); Pet. Ex. D at 2-9.

⁴ The record before us reflects that Mr. Williams submitted and withdrew his comments on the same date - October 8, 2002. The precise timing and circumstances surrounding this seemingly unusual activity are not reflected in the record.

knows these things that we were hoping would enlighten you on what is being done wrong out there. I was not privy to that so, I came in just basically hoping that you guys would make sure that we are getting what they are stating.

Id. Upon inquiry by the hearing board regarding the unnamed resident and his expert, Petitioner admitted,

I don't know who he was, we heard, we talked, we knew about, but we did not know who he was. I fully expected to see him here today and when they told me his comments and experts had been pulled then, we figured * * * they came to an agreement * * * .

Id. at 4.

On October 17, 2002, WDOE issued the Permit for the proposed wood-waste boiler. On November 15, 2002, Petitioner filed a timely petition for review ("Petition") of the Permit with the Board. WDOE filed a response ("Response") seeking summary disposition on December 6, 2002. Petitioner filed a timely reply ("Reply") to WDOE's response on December 16, 2002.

B. *Issues Raised in the Petition*

Petitioner argues that WDOE committed error because it did not require BACT for emissions of NO_x, CO, and PM₁₀. Petition at 5. Petitioner also argues that WDOE exercised discretion warranting review when it failed to address the withdrawn comments submitted by Mr. Fletcher and Mr. Williams ("withdrawn comments"). *Id.* at 5-6. In the alternative, Petitioner argues that WDOE should have considered the Fletcher and Williams comments because Petitioner's "verbal comments at the public hearing, * * * supported the concerns they submitted and [were] meant * * * to be taken as [his] own." *Id.* at 6. WDOE argues that the issues on appeal were not preserved for review and that WDOE did not abuse any discretion by not responding to the withdrawn comments.

For the reasons discussed below, the Petition is dismissed.

II. *DISCUSSION*

A. *Standard of Review*

The Board's review of PSD permitting decisions is governed by 40 C.F.R. part 124, which "provides the yardstick against which the Board must measure" petitions for review of PSD and other permit decisions. *In re Commonwealth*

Chesapeake Corp., 6 E.A.D. 764, 769 (EAB 1997) (quoting *In re Envotech, L.P.*, 6 E.A.D. 260, 265 (EAB 1996)). Pursuant to this regulation, the Board “begins its analysis by assessing the petitioner’s compliance with a number of important threshold procedural requirements.” *In re Sutter Power Plant*, 8 E.A.D. 680, 685 (EAB 1999).

Of particular relevance here is the requirement that a petitioner demonstrate:

that any issues being raised in an appeal were raised during the public comment period (including any public hearing) to the extent required by these regulations * * * .

40 C.F.R. § 124.19(a).

The applicable regulations require that:

all persons who believe any condition of a draft permit is inappropriate * * * must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing).

40 C.F.R. § 124.13; see *In re City of Phoenix, Ariz.*, 9 E.A.D. 515, 524 (EAB 2000). The burden of demonstrating that review is warranted rests with the petitioner, who must state his/her objections to the permit and explain why the permit issuer’s previous response to those objections is clearly erroneous, an abuse of discretion, or otherwise warrants review. *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 71-72 (EAB 1998); *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 60-61 (EAB 1997).

B. *The Issues Were Not Preserved for Appeal*

1. *Petitioner’s Comments Failed to Incorporate by Reference the Withdrawn Comments of Others*

Petitioner asserts that he “offered verbal support” for the withdrawn comments at the October 9, 2002 public hearing, and that he “incorporated the [withdrawn] comments by reference.” Petition at 4. Thus, Petitioner charges, WDOE should have considered and responded to the withdrawn comments as his own.

We disagree. Our examination of the public hearing transcript does not support Petitioner’s contention that he incorporated the withdrawn comments by reference. Rather, the transcript demonstrates that Petitioner was not “privy” to the comments that had been developed by a neighbor (presumably Mr. Fletcher) and his unnamed expert (presumably Mr. Williams). Moody Aff., Ex. A at 2, 4. Thus,

Petitioner was apparently unaware of the precise nature of Mr. Williams' and Mr. Fletcher's comments. Based on Petitioner's admission that, with respect to Mr. Williams, "I don't know who he was * * *," *id.* at 4, it seems fairly plain that Petitioner had had little substantive contact with the other commenters regarding the nature of their concerns. Petitioner never made any affirmative statement that he was incorporating the comments of his neighbor and his neighbor's expert into his own comments. *Id.* Indeed, even had he done so, it would be difficult to credit his attempt to incorporate the comments by reference since he had not familiarized himself with the concerns expressed by those comments.

Further, at the time Petitioner testified, and allegedly incorporated the comments (which he had never seen) into his testimony by reference, he knew that the comments had already been withdrawn. Since they were withdrawn, they were no longer part of the administrative record of this proceeding. *See* 40 C.F.R. § 124.18 (definition of administrative record). In accordance with section 124.13, "any supporting materials which are submitted shall be submitted in full and may not be incorporated by reference, unless they are already part of the administrative record of the same proceeding * * * ." 40 C.F.R. § 124.13. This Petitioner failed to do.

Accordingly, we are reluctant to find, on the record before us, that Petitioner incorporated by reference withdrawn comments when he concedes that he was not knowledgeable regarding the substance of those comments, did not make any affirmative statement that he was incorporating them by reference, and indicated that he understood the comments had been withdrawn.

The practical consequence of Petitioner's failure to properly incorporate the withdrawn comments by reference is obvious. Since those comments were not part of the final administrative record for this proceeding, we cannot determine what they were (based on the record) and thus cannot determine if the issues on appeal warrant review. Further, since the comments had been withdrawn, WDOE understandably did not address the comments in its response to comments, and thus we do not have the benefit of WDOE's views on those issues at the time of permit issuance. A response to comments is an essential part of the administrative record that forms the basis of our review. 40 C.F.R. § 124.18(b)(4).

Therefore, we conclude that Petitioner did not incorporate the withdrawn comments into his own testimony by reference and thus they were not preserved for appeal.⁵

⁵ Petitioner argues in his Reply that the Board's decision in *In re Three Mountain Power, LLC*, allows for petitions based on comments submitted by others during the public comment period and should control here. *See* Reply at 4-5. *Three Mountain Power* is distinguishable from this case because there the comments of others were specifically incorporated by the petitioner during the public com-

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2. *Petitioner's Comments Lacked Specificity*

Further, our examination of the public hearing transcript leads us to conclude that Petitioner's comments at the hearing were insufficient to preserve the BACT issues for appeal. Petitioner did not assert any specific errors in WDOE's BACT determination. Rather, Petitioner simply reiterated the BACT definition then asked that the hearing board "review their procedures and our WAC codes and make sure they are meeting the best that we can have to deal with." Moodie Aff., Ex. A at 2. As we stated in *City of Phoenix*, the purpose of the public comment requirements is to "alert the permit issuer to potential problems with a draft permit and to ensure that the permit issuer has an opportunity to address the problems before the permit becomes final." *In re City of Phoenix, Ariz.*, 9 E.A.D. at 526 (citations omitted). In this case, Petitioner's general request that WDOE ensure that its own and SPI's actions are consistent with applicable codes lacks the specificity required to alert WDOE to potential problems with the draft permit. Petitioner cannot now raise the specific BACT challenges that were required to be raised during the public comment period. 40 C.F.R. § 124.19(a) (petitioner must show that any issues raised on appeal were raised during the public comment period to the extent required by the regulations); 40 C.F.R. § 124.13 (all reasonably ascertainable issues must be raised during the public comment period); *In re Rockgen Energy Ctr.*, 8 E.A.D. 536, 547-48 (EAB 1999) (denying review where administrative record reflected that the issue on appeal was not raised with sufficient specificity during the public comment period). The Petition is denied on this ground.

C. *Petitioner Has Not Demonstrated an Abuse of Discretion Warranting Review*

Petitioner argues that because the Fletcher and Williams comments allegedly "had considerable merit," WDOE abused its discretion by not responding to them despite the fact that they had been withdrawn. *See* Petition at 6. However, while WDOE was certainly aware of the Fletcher and Williams comments, it was also in receipt of the explicit and broad request by Fletcher and Williams that their comments be "withdrawn for all purposes." Pet. Ex. C and D. These purposes would include not only inclusion in the administrative record, but also consideration in the response to comments required by 40 C.F.R. § 124.17. Without these

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ment period, and the original commenter did not withdraw its comments at any time. *See In re Three Mountain Power, LLC*, 10 E.A.D. 39, 43-44 (EAB 2001). Thus, even though the original commenter did not petition for review, its comments were part of the administrative record and preserved for review. Here, the comments were explicitly withdrawn by the commenters and not incorporated by reference by Petitioner, thus never becoming part of the administrative record and not preserved for appeal.

comments in the administrative record, WDOE was under no legal obligation to respond to them and, as such, did not exercise any discretion warranting review when it concluded that the comments had been withdrawn and no response was needed.

It is Petitioner's burden to demonstrate that WDOE has exercised discretion in a manner that warrants this Board's review. *See* 40 C.F.R. § 124.19(a)(2); *In re Three Mountain Power, LLC*, 10 E.A.D. 39, 46-47 (EAB 2001). For the reasons stated above, Petitioner has failed to meet its burden. Accordingly, review is denied on this ground.

III. CONCLUSION

Because Petitioner failed to preserve the issues for review, and did not demonstrate an abuse of discretion warranting review, the Petition is hereby dismissed.

So ordered.