

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

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In re:	)	
	)	
Indeck-Niles, L.L.C.	)	PSD Appeal No. 02-03
	)	
PSD Permit No. 364-00	)	
	)	

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**ORDER DENYING REVIEW**

Before the Board is a petition seeking review of certain conditions of a prevention of significant deterioration ("PSD") permit decision, Permit No. 364-00 (the "Permit"), issued by the Michigan Department of Environmental Quality ("MDEQ").<sup>1</sup> The Permit was issued to Indeck-Niles L.L.C. ("Indeck"). The petition for review ("Petition") was filed by Nelson S. Slavik,

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<sup>1</sup>MDEQ administers the PSD program in Michigan pursuant to a delegation of authority from U.S. EPA Region V (the "Region"). See *In re Tondu Energy Co.*, PSD Appeal Nos. 00-5 & 00-7, slip op. at 3 n.1 (EAB, Mar. 28, 2001), 9 E.A.D. \_\_\_ (citing 45 Fed. Reg. 8348 (Feb. 7, 1980)). Because MDEQ acts as EPA's delegate in implementing the federal PSD program within the State of Michigan, the Permit is considered an EPA-issued permit for purposes of federal law, and is subject to review by the Board pursuant to 40 C.F.R. § 124.19. See *In re 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 West Suburban Recycling and Energy Ctr., L.P.*, 6 E.A.D. 692, 695 n.4 (EAB 1996).

Mary Ann Slavik, Michael S. Smith and Janet Smith (the "Petitioners").<sup>2</sup>

For the reasons explained below, we deny review.

## I. BACKGROUND

### A. Statutory and Regulatory Background

The Clean Air Act ("CAA") established the PSD permitting program to regulate air pollution in certain areas, known as "attainment" areas, where air quality meets or is cleaner than the national ambient air quality standards ("NAAQS"), as well as areas that cannot be classified as "attainment" or "non-attainment" ("unclassifiable" areas). CAA §§ 160 *et seq.*, 42 U.S.C. §§ 7470 *et seq.*; see *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 NAAQS are "maximum concentration 'ceilings'" for particular pollutants, "measured in terms of the

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<sup>2</sup>In order to have standing to file a petition for review, the petition must show that the petitioner submitted comments during the public comment period or participated in the public hearing. 40 C.F.R. § 124.19(a). If a petitioner did not participate in the public review process, he or she may only appeal issues pertaining to changes from the draft to the final permit. *In re Envotech, L.P.* 6 E.A.D. 260, 266 (EAB 1996) (citing *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 16 (EAB 1994)). Michael S. Smith has failed to show that he participated in the public hearing or submitted comments during the public comment period, and MDEQ has stated that Mr. Smith did not participate or submit comments. MDEQ Response to Petition for Review at 3. In addition, the issues raised in the Petition do not pertain to changes from the draft to final Permit. Accordingly, we dismiss the Petition with respect to Mr. Smith on the grounds that he lacks standing.

total concentration of a pollutant in the atmosphere." U.S. EPA Office of Air Quality Planning, Draft New Source Review Workshop Manual ("NSR Manual")<sup>3</sup> at C.3.

The PSD permitting requirements are pollutant-specific, which means that a facility may emit many air pollutants, but only one or a few may be subject to PSD review depending upon a number of factors including the amount of emissions of each pollutant by the facility. NSR Manual at 4. NAAQS have been set for six criteria pollutants: sulfur oxides,<sup>4</sup> particulate matter,<sup>5</sup> nitrogen dioxide ("NO<sub>2</sub>"),<sup>6</sup> carbon monoxide ("CO"), ozone ("O<sub>3</sub>"),<sup>7</sup>

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<sup>3</sup>The NSR Manual has been used as a guidance document in conjunction with new source review workshops and training, and as a guide for permitting officials with respect to PSD requirements and policy. Although it is not accorded the same weight as a binding Agency regulation, the NSR Manual has been looked to by this Board as a statement of the Agency's thinking on certain PSD issues. See, e.g., *In re Hawaii Elec. Light Co.*, 8 E.A.D 66, 72 n.7 (EAB 1998); *EcoEléctrica*, 7 E.A.D. 59 n.3; *In re Masonite Corp.*, 5 E.A.D. 551, 558 n.8 (EAB 1994).

<sup>4</sup>Sulfur oxides are to be measured in the air as SO<sub>2</sub>. 40 C.F.R. § 50.4(c).

<sup>5</sup>For purposes of determining attainment of the NAAQS, particulate matter is measured in the ambient air as particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers, referred to as PM<sub>10</sub>. 40 C.F.R. § 50.6(c).

<sup>6</sup>A facility's compliance with respect to nitrogen dioxide is measured in terms of emissions of any nitrogen oxides (NO<sub>x</sub>). 40 C.F.R. § 52.21(b)(23); *Hawaii Elec. Light*, 8 E.A.D. at 69 n.4.

<sup>7</sup>A facility's compliance with respect to ozone is measured in terms of emissions of volatile organic compounds ("VOCs"). 40 C.F.R. § 52.21(b)(23); *In re Steel Dynamics, Inc.* PSD Appeal Nos. (continued...)

and lead. See 40 C.F.R. §§ 50.4-50.12. Niles, Michigan is located in an area designated attainment or unclassifiable for meeting NAAQS for particulate matter, CO, NO<sub>2</sub> and O<sub>3</sub>. 40 C.F.R. § 81.323.

In order to prevent violations of the NAAQS and, generally, to prevent significant deterioration of air quality, the PSD regulations require that new major stationary sources be carefully reviewed prior to construction to ensure that emissions from such facilities will not cause or contribute to an exceedance of either the NAAQS or the applicable PSD ambient air quality "increments." 40 C.F.R. § 52.21 *et seq.* A PSD "increment" refers to "the maximum allowable increase in concentration that is allowed to occur above a baseline concentration for a pollutant." NSR Manual at C.3; see also 40 C.F.R. § 52.21(c) (establishing increments for regulated pollutants). The performance of an ambient air quality and source impact analysis, pursuant to the regulatory requirements of 40 C.F.R. § 52.21(k), (l) and (m), as part of the PSD permit review process, is the central means for preconstruction determination of whether the NAAQS or PSD increment will be

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<sup>7</sup>(...continued)  
99-4 & 99-5, slip op. at 8 (EAB, June 22, 2000), 9 E.A.D. \_\_\_.

exceeded. See *In re Hawaii Elec. Light Co.*, 8 E.A.D. 66, 73 (EAB 1998).<sup>8</sup>

**B. Factual and Procedural Background**

The Permit would authorize Indeck to construct a 1,076 Megawatt ("MW") natural gas-fired turbine electrical generating facility at 2200 Progressive Avenue, Niles, Michigan (the "Station").

Indeck submitted its application for a PSD permit in November 2000. See Air Use Permit Application (Nov. 2, 2000). MDEQ prepared a Fact Sheet setting forth MDEQ's analysis of Indeck's application and the relevant background facts. See Fact Sheet (Sept. 10, 2001). The proposed Station is a new facility. Fact Sheet at 1. MDEQ determined that the Station will be a "major stationary source" of regulated pollutant emissions within the meaning of the PSD regulations. *Id.*<sup>9</sup> MDEQ determined that the Station has the potential to emit CO, NO<sub>x</sub>, PM<sub>10</sub>, and VOCs in

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<sup>8</sup>A second key component of the PSD regulations is the requirement that new major stationary sources, or major modifications of existing major sources, employ the "best available control technology," or BACT, to control emissions of regulated pollutants. 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 52.21(j). The Petitioners in the present case have not raised any issues regarding whether MDEQ properly determined BACT for controlling pollutant emissions.

<sup>9</sup>See 40 C.F.R. § 52.21(b)(1)(i) (major stationary source is defined as including a fossil fuel-fired steam electric plant of more than 250 million British thermal units per hour heat input that emits 100 tons per year or more of any pollutant subject to regulation under the Clean Air Act).

amounts qualifying as "significant" under 40 C.F.R.

§ 52.21(b)(23)(i). *Id.* As such, MDEQ determined that Indeck would be required to install the best available control technology, or BACT, for controlling emissions of CO, NO<sub>x</sub>, PM<sub>10</sub>, and VOCs. *Id.*

Based on data submitted with Indeck's application and supplemental information also submitted by Indeck, MDEQ prepared an ambient air quality impact report and concluded that the emissions from the Station would not cause or contribute to any violations of the relevant air quality standards. Fact Sheet at 2. MDEQ also concluded that dry low-NO<sub>x</sub> burners and selective catalytic reduction ("SCR") technology would be BACT for controlling NO<sub>x</sub> emissions. *Id.* at 4. MDEQ concluded that BACT for controlling both CO and VOC emissions is "good combustion practices" including "good mixing of fuel and combustion air." *Id.* MDEQ determined that BACT for controlling PM<sub>10</sub> emissions is "good combustion practices" and use of pipeline quality natural gas. *Id.*

MDEQ prepared a draft permit in September 2001 and provided public notice and an opportunity to comment on both the draft permit and MDEQ's analysis during a 30-day public comment period that concluded with a public hearing on October 23, 2001. Thereafter, in December 2001, MDEQ issued the Permit and a response to the comments that were submitted during the public

comment period. See Response to Comments Document (Dec. 17, 2001) ("Response to Comments").

**C. Issues Raised in the Petition**

The Petitioners in this case have raised five issues. First, the Petitioners argue that the Station is a source of hazardous air pollutants ("HAPs"), specifically formaldehyde, and that Indeck has attempted to evade future maximum available control technology ("MACT") requirements under section 112(g) of the Clean Air Act by its characterization of the amount of HAPs to be emitted by the Station. Petition at 1. In particular, Petitioners argue that MDEQ "has relied exclusively on emission numbers provided solely by Indeck and their turbine supplier without seeking any third party review" and they state that their research shows that "the amount of hazardous air pollutants, specifically formaldehyde, will be in excess of ten tons per year," which they allege will require compliance with "future MACT requirements for gas-fired turbines." *Id.* They also argue that formaldehyde emissions should be subject to continuous emissions monitoring to ensure that such emissions are kept below threshold levels. *Id.* at 2.

Second, Petitioners argue that "air modeling studies conducted by [MDEQ] do not adequately account for the topological variability surrounding the proposed Indeck site." Petition at 2. Specifically, they argue that "[r]elying on surface

meteorological data from South Bend, Indiana and upper air data from Flint, Michigan or the Palisades Nuclear Plant in Covert, Michigan does not in any way mimic meteorological/topological interactions in the Niles area." *Id.*

Third, Petitioners request that we require "an economic impact analysis" of the potential effects of "the siting of multiple power plants in southwestern Michigan and north central Indiana." Petition at 3. Petitioners state that "[f]ailure to adequately monitor the significant increases of criteria air pollutants to the air in this area could result in this area losing the ability to attract industry that would lead to further employment opportunities, and adversely impact our community's health." *Id.*

Fourth, Petitioners argue that the Permit should contain a condition requiring Indeck to cease all gas-fired turbine activity during so-called "ozone action days." Petition at 4. Specifically, Petitioners argue that "[o]ne of the primary precursors to the formation of ozone is NOX," which will be emitted by the Station in excess of 440 tons per year. *Id.* Petitioners argue that such emissions would make the Station a potential source of increased ozone problems in Niles. *Id.*

Finally, Petitioners argue that the Permit should contain a condition requiring Indeck to immediately cease plant activities when citizens complain about ammonia odor caused by the Station.



Petition at 5. Petitioners are concerned about potential ammonia odors because the use of SCR technology for the control of NO<sub>x</sub> emissions may result in "ammonia slip," or emissions of ammonia. *Id.* at 4-5.

## 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 those regulations, a decision to issue a PSD permit will ordinarily not be reviewed unless the decision is based on either a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a); accord, e.g., *In re Zion Energy, LLC*, PSD Appeal No. 01-01, slip op. at 7 (EAB, Mar. 27 2001); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126-27 (EAB 1999); *Commonwealth Chesapeake Corp.*, 6 E.A.D. at 769. The preamble to section 124.19 states that the Board's power of review "should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional [State] level \* \* \*." 45 Fed.

Reg. 33,290, 33,412 (May 19, 1980); accord *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 114 (EAB 1997).

The burden of demonstrating that review is warranted rests with the petitioner challenging the permit decision. 40 C.F.R. § 124.19(a); accord, e.g., *Kawaihae Cogeneration*, 7 E.A.D. at 114; *In re EcoEléctrica L.P.*, 7 E.A.D. 56, 61 (EAB 1997); *Commonwealth Chesapeake Corp.*, 6 E.A.D. at 769. We have explained that in order to establish that review of a permit is warranted, section 124.19(a) requires that a petitioner both state the objections to the permit that are being raised for review and explain why the permit decision maker's previous response to those objections (i.e., the decision maker's basis for the decision) is clearly erroneous or otherwise warrants review. See *Kawaihae Cogeneration*, 7 E.A.D. at 114; see also *In re Puerto Rico Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995); *In re Genesee Power Station L.P.*, 4 E.A.D. 832, 866-67 (EAB 1993). It is not enough simply to repeat objections made during the comment period. See, e.g., *Zion Energy*, slip op. at 7; *Knauf Fiber Glass*, 8 E.A.D. at 127.

The Board will also assess whether the issues that are raised pertain to the PSD program, and are thus within the Board's jurisdiction, or fall outside of the Board's jurisdiction. See, e.g., *Zion Energy*, slip op. at 8; *Knauf Fiber Glass*, 8 E.A.D. at 127.

In the present case, we conclude as explained below that four of the five issues raised by Petitioners are not within the Board's jurisdiction or are otherwise beyond the issues considered as part of the federal PSD process. We also conclude with respect to the remaining issue, that the Petitioners have failed to sustain their burden of showing that MDEQ's response to comments was clearly erroneous.

**B.** *Jurisdiction and Related Limits on the Scope of Review (Dismissal of Issues One, Three, Four and Five)*

Four of the five issues raised in the Petition fall outside the purview of the PSD program or are otherwise not typically considered by the Board. As noted above, in considering petitions for review, the Board will assess whether the issues that are raised pertain to the PSD program or, alternatively, whether the issues are not governed by the federal PSD regulations. See, e.g., *Zion Energy*, slip op. at 8; *Knauf Fiber Glass*, 8 E.A.D. at 127. We have explained as follows:

The PSD review process is not an open forum for consideration of every environmental aspect of a proposed project, or even every issue that bears on air quality. In fact, certain issues are expressly excluded from the PSD permitting process. The Board will deny review of issues that are not governed by the PSD regulations because [the Board] lacks jurisdiction over them.

*Knauf Fiber Glass*, 8 E.A.D. at 127. Board jurisdiction extends only to issues that relate either to explicit requirements of the Clean Air Act PSD provisions or EPA's implementing regulations or

that are "otherwise linked to the federal PSD program in the context of this case." *Id.* at 162; see also *id.* at 161-172 (denying review of issues concerning hazardous air pollutants under CAA § 112(b), use of local landfills for waste disposal, and the local political process, among other things); *In re Tondu Energy Co.*, PSD Appeal Nos. 00-5 & 00-7, slip op. at 9-10, 16-18 (EAB, Mar. 28, 2001) (denying review of state law issues and solid waste handling issues); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 259-60 (EAB 1999) (declining to review noise and water related issues, among other things).

Petitioners' first issue relating to emissions of HAPS, and specifically formaldehyde, falls outside of the Board's jurisdiction. We have previously explained that the PSD statutory provisions and regulations generally do not apply to HAPS listed in CAA section 112(b). *Zion Energy*, slip op. at 8; *Knauf Fiber Glass*, 8 E.A.D. at 163. The only exception to this general rule is "if a technology has 'an incidental effect of increasing or decreasing emissions of unregulated pollutants,' consideration of that effect may be taken into account in selecting BACT for a facility." *Knauf Fiber Glass*, 8 E.A.D. at 163 n.56 (quoting *In re Genesee Power Station*, 4 E.A.D. 832, 848 (EAB 1993); see also *Zion Energy*, slip op. at 8; *In re North County Res. Recovery Assocs.*, 2 E.A.D. 229, 230 (Adm'r 1986). Petitioners' arguments in this case regarding formaldehyde, and

HAPs more generally, do not claim error in the determination of BACT on the basis of whether any incidental increase or decrease of HAPs emissions was considered in the BACT analysis.

In particular, as noted above, Petitioners only argue that MDEQ "has relied exclusively on emission numbers provided solely by Indeck and their turbine supplier without seeking any third party review," and they state that their research shows that "the amount of hazardous air pollutants, specifically formaldehyde, will be in excess of ten tons per year," which they allege will require compliance with "future MACT requirements for gas-fired turbines." *Id.* They also argue that formaldehyde emissions should be subject to continuous emissions monitoring. *Id.* at 2. We rejected similar arguments in *Zion Energy* as beyond the scope of the Board's jurisdiction. Specifically, the petitioners in *Zion Energy* argued that "the potential to emit HAPs is higher than reflected in the permit \* \* \* and the permit should require HAP testing." *Zion Energy*, slip op. at 4, 8. The Petitioners in the present case have not shown why we have jurisdiction to consider arguments that are substantially similar to those that we previously held to be beyond the Board's jurisdiction in *Zion Energy*. Accordingly, we reject the first issue raised by Petitioners.

Petitioners' fourth and fifth issues are also beyond this Board's jurisdiction. In their fourth issue, the Petitioners

argue that the Permit should contain a condition requiring Indeck to cease all gas-fired turbine activity during so-called "ozone action days." Petition at 4. In their fifth issue, the Petitioners argue that the Permit should contain a condition requiring Indeck to immediately cease plant activities when citizens complain about ammonia odor caused by the Station. Petition at 5. Both of these environment-related issues would appear to arise under state or local laws or programs, not under the federal PSD regulations.

In particular, the term "ozone action days" to which the Petitioners refer is not a federal PSD regulatory requirement but, instead, as explained by MDEQ, that term refers to a voluntary program implemented on a local level. MDEQ Response at 7-8. Likewise, as observed by MDEQ, possible ammonia odor is regulated in the Permit by authority of section 336.1901 of the Michigan Air Pollution Control Rules, not by any PSD regulation. MDEQ Response at 8. We have consistently held that such issues arising under state regulations or programs administered locally that are not otherwise linked to the federal PSD program are not within this Board's jurisdiction, but rather must be raised in the state or local system of review. See e.g., *In re Tondu Energy Co.*, PSD Appeal Nos. 00-5 & 00-7, slip op. at 9-10 (EAB, Mar. 28, 2001) (denying review of state constitutional law issues and state nuisance law issues); *Zion Energy*, slip op. at 9

("Because State noise requirements and other unspecified State regulations are not requirements of the federal PSD program, and because [petitioner] has not shown that [its] assertions in this regard otherwise fall within the purview of the program, the Board must deny review."); *Knauf Fiber Glass*, 8 E.A.D. at 163 n.57 ("The issue of odor falls into the category of unregulated pollutants."); *In re Spokane Reg'l Waste-to-Energy Project*, 3 E.A.D. 68, 70 (Adm'r 1990); *In re Texas Indus., Inc.*, 2 E.A.D. 277, 278 n. 2 (Adm'r 1986). In the present case, the Petitioners have not shown how their issues concerning ammonia odor and ozone action days fall under the federal PSD regulations.<sup>10</sup> Accordingly, we deny review of these issues.

Petitioners' third issue requests an analysis of the potential economic effects of "the siting of multiple power plants in southwestern Michigan and north central Indiana." Petition at 3. While issues relating to siting are not necessarily beyond the Board's jurisdiction, nevertheless they

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<sup>10</sup>In their response to MDEQ's motion for summary disposition, Petitioners concede that "the ammonia slip issue may not be an issue for appeal." Petitioners' Response to MDEQ's Motion for Summary Disposition at 6 (Feb. 17, 2002). Notably, Petitioners have not argued that MDEQ failed to properly consider the potential emission of ammonia slip as an incidental effect, or collateral impact, of the technology selected as BACT for NO<sub>x</sub> emissions, nor have they argued that a different technology should have been selected as BACT for NO<sub>x</sub>. See, e.g., *Three Mountain Power, LLC.*, PSD Appeal No. 01-5, slip op. at 25-30 (EAB, May 30, 2001) (denying review of permit issuer's determination that collateral impact of ammonia slip did not require rejection of SCR technology as BACT).

are issues on which we typically defer to agencies within the state and local government that are assigned the task of determining zoning and land use planning. For example, in *Sutter Power*, we declined to include within the PSD permitting process a review of alternative locations for the proposed power plant. *In re Sutter Power Plant*, 8 E.A.D. 680, 689 (EAB 1999). Similarly, in *EcoEléctrica*, we upheld the permitting authority's decision to defer to the appropriate state entities the question of whether alternative methods, such as energy conservation, might render the proposed power plant unnecessary. *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 71-74 (EAB 1997). Likewise, in *Hawaii Electric*, we held that land use planning issues "are more properly addressed by agencies within the local government." *In re Hawaii Elec. Light Co.*, 8 E.A.D. 66, 109 (EAD 1998). See also CAA § 131, 42 U.S.C. § 7431.

Petitioners have not shown a sufficient reason for us to depart from the reasoning of these cases. Accordingly, we decline to grant review of the Permit based on arguments that are focused on local business or land-use planning issues properly left to other agencies within the local government.

**C.** *Ambient Air Quality and Source Impact Analysis (Dismissal of Issue Two)*

Petitioners further argue (as their second issue) that "air modeling studies conducted by [MDEQ] do not adequately account



for the topological variability surrounding the proposed Indeck site." Petition at 2. Specifically, they state that "the city of Niles straddles the St. Joseph River and would be the recipient of air emissions from the proposed plant during periodic climatic temperature inversions and the more frequent wind direction/speed phenomena that occurs almost daily in which during early morning and evening hours there are winds from the northeast at six to seven miles per hour." *Id.* Petitioners argue that local climate variations are caused by the proximity of Lake Michigan. *Id.* ("This area is known for its varying precipitation conditions due to its proximity to Lake Michigan."). They argue that "[r]elying on surface meteorological data from South Bend, Indiana and upper air data from Flint, Michigan or the Palisades Nuclear Plant in Covert, Michigan does not in any way mimic meteorological/topological interactions in the Niles area." *Id.*

We conclude that the Petitioners have failed to show that MDEQ's response to the comments raising these arguments during the public comment period is clearly erroneous or that the issue otherwise warrants review. First, MDEQ explained that actual topological data were used in the modeling analysis. Response to Comments at 7 ("Terrain elevations were obtained from the U.S.G.S. Digital Elevation Model (DEM) data sources."). Thus,

contrary to Petitioners' suggestion, MDEQ's analysis was based on the actual topography of the affected area.

Turning to Petitioners' arguments regarding meteorological data, we begin by noting that "the issue of proper location for mixing height data is highly technical in nature. '[A]bsent compelling circumstances, the Board will defer to a [permit issuer's] determination of issues that depend heavily upon the [issuer's] technical expertise and experience.'" *Hawaii Elec. Light*, 8 E.A.D. at 106 (quoting *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 403 (EAB 1997)). For the following reasons, we conclude that Petitioners have failed to show clear error or any other sufficient reason why we should not defer to MDEQs technical expertise regarding meteorological data and mixing zone issues.

In its response to comments, MDEQ explained its use of meteorological data as follows:

It is recognized that the cooler air from Lake Michigan can cause low-level inversions thus trapping pollutants near the surface. This type of weather phenomena is accurately detected and recorded at the surface air stations by measuring atmospheric stability. National Weather Stations, such as South Bend, measure the atmospheric stability by determining how the wind direction varies. During very stable conditions (i.e. low level inversions when there is very little ability for the atmosphere to vertically move and mix air), wind speed is very light and wind direction varies greatly. Air pollutants during these inversion conditions are suppressed close to the earth's surface and are not mixed vertically or horizontally.

Response to Comments at 6. MDEQ stated further that

Surface meteorological data from South Bend, Indiana was considered representative of the Niles area. Upper-air data, measured twice daily by balloon, was collected from Flint, Michigan. The upper air data, provided by balloon soundings, are not significantly altered by surface features. This explains why upper air data collection points can be widely distributed yet accurately depict the features and patterns of upper atmospheric air. To demonstrate that the combination of South Bend surface data and Flint upper air data was representative of the Niles area, additional data from the Palisades nuclear plant in Covert, Michigan was used. This meteorology data is obtained from a 200 foot tower adjacent to the Michigan Lake shore and directly measures low level inversion layers with temperature sensors at the bottom and top of the tower. Modeled impacts using the Palisades meteorology data were actually lower than impacts predicted using South Bend data.

Response to Comments at 9-10.

These responses to comments by MDEQ show that MDEQ understood Petitioners' concerns regarding localized weather inversions. MDEQ's response to comments also shows that MDEQ analyzed whether the meteorological data were representative of the local conditions and that MDEQ concluded that the data were sufficiently representative. In particular, MDEQ explained that it used data from Covert, Michigan to confirm whether the proximity of Lake Michigan would significantly change the modeling results. MDEQ explained that the data collected adjacent to Lake Michigan resulted in modeled impacts that "were actually lower than impacts predicted using South Bend data," *id.* at 10, thereby, in effect, showing that the South Bend data were

sufficiently representative for purposes of determining whether the Station's emissions would result in an exceedence of any of the applicable air quality standards.

We have recognized that "representative" meteorological data, rather than actual site-specific meteorological data, may be used in an ambient air quality and source impacts analysis. *Hawaii Elec. Light*, 8 E.A.D. at 105. In particular, the NSR Manual explains that "[m]eteorological data used in air quality modeling must be \* \* \* representative of the area of interest."

NSR Manual at C.39 (emphasis added). It states further that

Use of site-specific meteorological data is preferred for air quality modeling analysis if 1 or more years of quality-assured data are available. If at least 1 year of site-specific data is not available, 5 years of meteorological data from the nearest National Weather Service (NWS) station can be used in the modeling analysis. Alternatively, data from universities, the Federal Aviation Administration, military stations, industry, and State or local air pollution control agencies may be used if such data are equivalent in accuracy and detail to the NWS data, and are more representative of the area of concern.

NSR Manual at C.39.

The Petitioners in this case have not shown that one or more years of site-specific and quality-assured data are available; nor have they shown in their Petition through record evidence any error in MDEQ's conclusion that data measured at South Bend, Indiana is sufficiently representative of the weather inversions that occur around Niles, Michigan, to serve as a predicate for the conclusion that the Station's emissions would not result in

an exceedence of any applicable air quality standards. Petitioners' only argument is that the South Bend data do not represent the effect of Lake Michigan on the meteorological conditions in Niles, Michigan. Petitioners, however, have failed to explain why MDEQ's reliance on meteorological data measured adjacent to Lake Michigan at Covert, Michigan is not sufficient to confirm the representativeness of the South Bend data. Accordingly, we conclude that Petitioners have failed to sustain their burden of showing that MDEQ's response to comments was clearly erroneous, and, therefore, we deny Petitioners' request that we review MDEQ's ambient air quality and source impacts analysis.

### III. CONCLUSION

For the reasons set forth above, we deny the petition for review.

So ordered.<sup>11</sup>

Dated: March 11, 2002

ENVIRONMENTAL APPEALS BOARD

By: \_\_\_\_\_/s/\_\_\_\_\_  
Edward E. Reich  
Environmental Appeals Judge

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<sup>11</sup>The three member panel deciding this matter is comprised of Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein. See 40 C.F.R. § 1.25(e)(1) (2001).

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing, Order Denying Review, in the matter of Indeck-Niles L.L.C., PSD Appeal No. 02-03, were sent to the following persons in the manner indicated:

By First Class, U.S. Mail  
and by fax as indicated:

Alan F. Hoffman  
Assistant Attorney General  
Natural Resources and Environmental  
Quality Division  
300 S. Washington Square, Ste. 315  
Lansing, MI 48913  
(Fax: 517-335-6668)

Nelson S. Slavik, et al  
Environmental Health Management  
2617 Korn Street  
Niles, MI 49120

Rich Robinson  
Indeck Energy Service  
600 N. Buffalo Grove Road  
Buffalo, NY 60089

By Pouch Mail and  
by fax:

Bert C. Frey, Regional Counsel  
Office of Regional Counsel  
U.S. EPA, Region V  
77 West Jackson Boulevard  
Chicago, IL 60604-3507  
(Fax: 312-886-0747)

Dated: March 11, 2002

\_\_\_\_\_/s/  
Annette Duncan  
Secretary