

**IN RE SIERRA PACIFIC INDUSTRIES,
ANDERSON DIVISION**

PSD Appeal No. 14-01

***ORDER DISMISSING APPEAL
FOR LACK OF JURISDICTION***

Decided April 10, 2014

Syllabus

In her appeal, Celeste Draisner petitions the Environmental Appeals Board (“Board”) to review Permit Number 94-VP-18d, which she asserts is a Prevention of Significant Deterioration (“PSD”) permit that the Shasta County Air Quality Management District (“Shasta County AQMD”) issued to Sierra Pacific Industries, Anderson Division, pursuant to section 165 of the Clean Air Act, 42 U.S.C. § 7475. Upon review of the challenged permit, the Board determined that it is not a PSD permit but a renewed Title V operating permit that Shasta County AQMD issued to Sierra Pacific Industries under a different part of the Clean Air Act, section 502, 42 U.S.C. § 7661a, and associated regulations at 40 C.F.R. part 70. The U.S. Environmental Protection Agency (“EPA”) had granted Shasta County AQMD interim approval to run the Title V operating program in Shasta County in 1995 and full approval in 2001 pursuant to EPA’s Title V regulations at 40 C.F.R. part 70.

Held: The Board dismisses the appeal for lack of jurisdiction. Neither the Clean Air Act nor the part 70 regulations grant the Board jurisdiction to review Title V permits that are issued by states or local authorities under part 70. Here, EPA granted Shasta County AQMD approval to administer the Title V operating program in Shasta County under part 70, and the County issued the challenged permit pursuant to that authority.

Before Environmental Appeals Judges Leslye M. Fraser, Randolph L. Hill, and Kathie A. Stein.

Opinion of the Board by Judge Hill:

I. STATEMENT OF THE CASE

Celeste Draisner (“Petitioner”) petitions the Environmental Appeals Board (“Board”) to review Permit Number 94-VP-18d,¹ which she asserts is a Clean Air Act Prevention of Significant Deterioration (“PSD”) permit that the Shasta County Air Quality Management District (“Shasta County AQMD”) issued to Sierra Pacific Industries, Anderson Division (“Sierra Pacific”). See Notice of Intent to Appeal (“Petition”) at 1 (Feb. 25, 2014). She claims that the Shasta County AQMD “committed numerous procedural and substantive errors” in issuing and/or renewing the permit, *id.*, and that Region 9 (“Region”) of the U.S. Environmental Protection Agency (“EPA”) “committed numerous procedural and substantive errors in their supervision of the issuing and renewing process” of the permit, *id.* at 2. Significantly, however, the permit in question is actually a “Title V Operating Permit” that Shasta County AQMD issued on September 27, 2013, to Sierra Pacific for its “cogeneration facility with sawmill, planer mill, and associated equipment.” See Petition Ex. 1 (Docket No. 8) (Shasta County Department of Resource Management Air Quality Management District, Title V Operating Permit for Sierra Pacific Industries, Anderson Division, at 1 (Sept. 27, 2013)) [hereinafter SPI Title V Permit].

The Region filed a response to the petition on March 18, 2014, arguing that the Board lacks jurisdiction to review the petition. See EPA Region 9’s Response to Petition and Notice of Intent to Appeal (“Response”) at 1. Ms. Draisner thereafter filed a motion seeking leave to file a reply to the Region’s response, to which she attached her proposed reply brief. The Board grants the motion.² The Board also received an amicus brief from Marily Woodhouse.³ See

¹ Although Ms. Draisner refers to this permit as number “94-VP-18b” in her petition, the copy of the permit that she submitted with her petition is numbered “94-VP-18d.” See Petition Ex. 1 at 1 (Docket No. 8). The Board assumes that “b” is a typographical error.

² Petitioner requested leave to file a reply brief because, under the part 124 regulations, the Board applies a presumption against the filing of reply briefs in PSD cases. See 40 C.F.R. § 124.19(c)(1). Technically, because the Board determines in the decision below that this matter is, in fact, a challenge to a Title V permit, the presumption would not apply. See *id.* § 124.19(c)(2). Nevertheless, because Ms. Draisner treats her petition as a PSD appeal, the Board grants her motion. For this same reason, the Board retains the original title of this matter as a “PSD appeal” in its docket.

³ The Board discusses Ms. Woodhouse’s amicus brief below in footnote 8.

Non-Party Amicus Brief (Mar. 19, 2014). For the following reasons, the Board dismisses Ms. Draisner's appeal for lack of jurisdiction.

II. STATUTORY AUTHORITY AND FACTUAL HISTORY

This appeal centers around two types of Clean Air Act permits: PSD preconstruction permits and Title V operating permits. Because Petitioner appears confused about the difference between these two types of permits and about who issues these permits in Shasta County, the Board provides history about each.

A. Statutory and Regulatory Framework for PSD and Title V Permits

Under the Clean Air Act, persons who wish to construct "major emitting facilities" in areas classified as in attainment or which cannot be classified as in attainment or nonattainment must obtain preconstruction approval in the form of a "PSD permit" to build such facilities. CAA § 165, 42 U.S.C. § 7475. PSD permits typically contain terms and conditions governing the construction and operation of the facility, including requirements that the facility employ the best available control technology to minimize emissions of regulated pollutants. *See* CAA § 165(a)(1), (4), 42 U.S.C. § 7475(a)(1), (4).

PSD permits are issued either by EPA, an EPA "delegated" state or local authority, or an "approved" state or other local permitting authority.⁴ 40 C.F.R. §§ 52.02, .21(a)(1), (u). In Shasta County, from 1985 until March 2003, Shasta County AQMD implemented and enforced the PSD permit program as EPA's delegatee. Response at 2. In 2003, EPA revoked and rescinded the Shasta

⁴ In some cases, EPA has "delegated" its authority to operate the PSD program to a state or local permitting authority, in which case the state or permitting authority "steps into EPA's shoes" and issues PSD permits as *federal* permits on behalf of EPA. 40 C.F.R. § 52.21(u); *In re Milford Power Plant*, 8 E.A.D. 670, 673 (EAB 1999). Alternatively, EPA can approve a state (or local) PSD program if it meets applicable federal requirements, in which case the program is incorporated into the state's "State Implementation Plan" (known as a "SIP"). *See, e.g.*, CAA §§ 110, 116, 161, 42 U.S.C. §§ 7410, 7416, 7471. In this second instance, the "approved" state or local authority would conduct PSD permitting under its own authority, and permits issued in these circumstances would not be considered "federal permits." *In re Seminole Elec. Coop., Inc.*, 14 E.A.D. 468, 473-74 (EAB 2009). Significantly, the part 124 regulations specifically restrict the Board's scope of review to permits issued by EPA or EPA delegates, stating that "[p]art 124 does not apply to PSD permits issued by an approved State." 40 C.F.R. § 124.1(e); *Milford*, 8 E.A.D. at 673-74.

County AQMD's authority to issue and modify federal PSD permits for new and modified major sources of attainment pollutants in the County. *Id.*; *In re Sierra Pacific Industries*, 16 E.A.D. 1, 6-7 & n.4 (EAB 2013) (Order Remanding in Part and Denying Review in Part).

The Clean Air Act also requires that certain sources of air pollution, including major stationary sources, obtain comprehensive operating permits to assure compliance with the requirements of the Act. CAA §§ 502(a), 504(a), 42 U.S.C. §§ 7661a(a), 7661c(a). The section of the Clean Air Act governing operating permits, often referred to as "Title V," does not itself generally establish substantive emission reduction requirements. *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 27 (EAB 2005). Instead, Title V contemplates that operating permits will incorporate and ensure compliance with the substantive emission limitations established under other provisions of the Act, such as the PSD provisions, or under applicable state and local laws and regulations. *Id.*

In general, the Clean Air Act delegates responsibility for the administration and enforcement of Title V to the States and requires that EPA promulgate regulations that set minimum standards for state Title V operating permit programs. *See* CAA § 502(b), 42 U.S.C. § 7661a(b). The regulations establishing the Title V requirements are found at 40 C.F.R. parts 70 and 71. The part 70 regulations establish the minimum elements required for state operating permit programs and the standards and procedures for obtaining EPA approval of a state operating permits program. 40 C.F.R. § 70.1(a). Part 71 establishes the federal operating permits program administered in the absence of an approved state or tribal program for the area in which the source is located. *Id.* § 71.1(a). Pursuant to part 70, EPA granted Shasta County AQMD interim approval to run the Title V operating program in Shasta County in 1995 and full approval in 2001. *See* Clean Air Act Full Approval of 34 Operating Permits Programs in California, 66 Fed. Reg. 63,503 (Dec. 7, 2001) (codified at 40 C.F.R. pt. 70 app. A); Clean Air Act Final Interim Approval of Operating Permits Program for Glenn County, Lake County, Shasta County and Tehama County, California, 60 Fed. Reg. 36,065 (July 13, 1995).

At this time, therefore, EPA is the PSD permitting authority in Shasta County and thus Sierra Pacific Industries must obtain any necessary PSD permits from EPA. *See, e.g., Sierra Pacific*, 16 E.A.D. at 6-7 & n.4. Shasta County AQMD, however, is the current Title V permitting authority in the County. 40 C.F.R. pt. 70 app. A.

B. *Factual History*

Sierra Pacific operates a lumber mill in Anderson, California. *See* SPI Title V Permit at 1; *see also* *Sierra Pacific*, 16 E.A.D. at 6. In 1995, Shasta County AQMD issued a PSD permit to Sierra Pacific for the construction and operation of a 4-megawatt wood-fired stoker boiler cogeneration unit at the site.⁵ Response at 2. Thereafter, in July 2000, Shasta County AQMD issued an initial Title V operating permit to Sierra Pacific to operate the cogeneration facility. *Id.* In September 2006 and then again on September 27, 2013, Shasta County AQMD issued renewed Title V operating permits to Sierra Pacific for the facility.⁶ *Id.* It is the latter permit that Petitioner challenges in this case.

Around the same time that Shasta County AQMD was considering Sierra Pacific's latest Title V operating permit renewal request, Sierra Pacific also filed a PSD permit application with the Region to construct and operate a new 31-megawatt biomass and natural gas boiler at the same location as its lumber mill. *Sierra Pacific*, 16 E.A.D. at 6. The Region issued a PSD permit on February 22, 2013, which was appealed by several parties, including

⁵ At that time, Sierra Pacific became subject to both the PSD preconstruction permit program and the Title V permit program because the facility is a major source of criteria air pollutants regulated under the Clean Air Act. Response at 2; *see also* CAA §§ 165, 502, 42 U.S.C. §§ 7475, 7661a. Thus, Sierra Pacific was required to obtain a PSD permit prior to construction of the lumber mill and also was required to maintain an operating permit under Title V while the facility was in operation. The Clean Air Act further would require Sierra Pacific to obtain another PSD permit should it desire to construct a new or modified major source. Sierra Pacific did seek another PSD permit in 2010, which was the subject of the Board's July 18, 2013 decision.

⁶ Petitioner appears to question whether Sierra Pacific's 2006 Title V permit had expired. *See* Petition at 1. The Board notes that, in most if not all permitting programs, where a permittee timely files a request for a renewal but the permit issuer is unable to process the request by the expiration date of the original permit, the statute and/or regulations typically provide that the original permit be, in essence, administratively extended until the permit issuer makes a decision on the renewal request. *See, e.g.*, 40 CFR § 70.7(c)(1)(ii). The Administrative Procedure Act is the underlying source of these regulatory requirements. It provides that, "[w]hen the [permittee] has made timely and sufficient application for a renewal * * * in accordance with agency rules, a [permit] with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency." 5 U.S.C. § 558(c). According to information in the record, the permittee filed a timely and complete permit renewal prior to the original permit's expiration as is required by regulation to "administratively stay" the expiration date. *See* Petition Ex. 2.

Ms. Draisner. *Id.* at 3. The Region issued the PSD permit to Sierra Pacific instead of Shasta County AQMD because, as noted above, EPA had revoked and rescinded Shasta County AQMD's PSD authority. On July 18, 2013, the Board remanded the 2013 PSD permit to the Region for it to hold a public hearing. *Id.* at 54. The Board denied review in all other respects. *Id.* at 54-55. In the decision, the Board explained that it was not requiring, and would not accept, further appeal to the Board on the final PSD permit decision the Region issues following remand proceedings, *id.* at 55, which means that issuance of the PSD permit by the Region will constitute final agency action and be subject to judicial review. At this time, however, the PSD permit is still pending at the Region and is not at issue in the present case.

III. ANALYSIS

As has been explained on several occasions, the Board is “a tribunal of limited, not general, jurisdiction.” *E.g., In re Hess Newark Energy Ctr.*, PSD Appeal No. 12-02, at 4 (EAB Nov. 20, 2012) (Order Dismissing Petition). The Board's authority to review permit decisions is “limited by the statutes, regulations, and delegations that authorize and provide standards for such review.” *In re DPL Energy Montpelier Elec. Generating Station*, 9 E.A.D. 695, 698 (EAB 2001) (quoting *In re Carlton, Inc. N. Shore Power Plant*, 9 E.A.D. 690, 692 (EAB 2001)). The Board may not assert jurisdiction over a matter simply because it has jurisdiction over other types of appeals under the same statute. *In re Energy Answers Arecibo, LLC*, 16 E.A.D. 294, 316 (EAB 2014) (explaining that while Board may have authority to review the PSD permit at issue, its authority does not extend to include nonattainment new source review permits issued under Part D of the Clean Air Act); *In re Stericycle, Inc.*, CAA Appeal 13-01, at 4-5 (Nov. 14, 2013) (Order Dismissing Appeal for Lack of Jurisdiction) (dismissing appeal because Board does not have authority to consider petitions requesting that the Administrator object to a Title V permit issued under part 70).

Under the Clean Air Act and its implementing regulations, the Board has been granted authority to consider appeals in certain specified Clean Air Act-related matters. For example, part 124 of title 40 of the Code of Federal Regulations provides for Board review of federal PSD permits issued by EPA (or its delegatee), such as the 2013 PSD permit. 40 C.F.R. § 124.19(a); *Sierra Pacific*, 16 E.A.D. at 14. The part 71 regulations also grant the Board authority to review petitions challenging *federal* Title V operating permit decisions issued by EPA (or its delegatee). 40 C.F.R. § 71.11(l)(1); *see, e.g., In re Peabody W. Coal Co.*, 12 E.A.D. 22, 28-29 (EAB 2005); *see also* EAB Practice Manual at 59 (Aug. 2013).

Importantly, however, nothing in the Clean Air Act or in part 70 grants the Board jurisdiction to review Title V permits issued by approved states pursuant to part 70. *See* 40 C.F.R. pt. 70; *compare* 40 C.F.R. § 71.11(l), (n)(2) (providing various appeals to the Board) *with* 40 C.F.R. § 70.8(d) (providing no corresponding appeal provisions to the Board). The Board, therefore, has no authority to consider appeals of Title V permits issued under part 70. *See, e.g., In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 135 & n.36 (EAB 1997) (declining to review the Title V portion of a permit because that part was “a State permit” issued pursuant to Hawaii’s approved program); *In re Alcoa-Warrick Power Plant*, PSD Appeal No. 02-14, at 8-10 (EAB Mar. 5, 2003) (Order Denying Petition for Review) (concluding Board lacked jurisdiction where appeal sought review of Title V operating permit issued by an approved state under part 70).

As already noted above, EPA fully approved Shasta County AQMD’s Title V operating program in 2001. Shasta County AQMD issued the challenged permit, Permit Number 94-VP-18d, under that authority in 2013. *See generally* SPI Title V Permit. The permit, on its face, declares that it is a Title V operating permit. *Id.* at 1. A review of the permit also reveals that, while it may incorporate some of the 1995 PSD permit requirements, Permit Number 94-VP-18d is *not* itself a PSD permit. Moreover, this Title V renewal permit appears to only cover the boiler cogeneration unit and not the proposed biomass and natural gas boiler. *See, e.g., id.* at 2-3. The permit Ms. Draisner challenges in this matter is therefore a state-issued Title V operating permit and not subject to Board review.

Ms. Draisner argues on reply that, because the Board previously had authority to review the 1995 PSD permit that Shasta County AQMD issued to Sierra Pacific, its jurisdiction cannot be taken away retroactively. Reply at 2. Her argument reflects the understandable confusion as to which type of Clean Air Act permit is at issue here. PSD permits that are issued by state or local authorities acting as EPA’s delegatee are considered EPA-issued permits and are reviewed by the Board. *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 123 (EAB 1999) (reviewing PSD permit issued by Shasta County AQMD as EPA delegatee). Thus, the 1995 PSD permit issued by Shasta County AQMD would have been subject to Board review if challenged, as was the 2013 PSD permit issued by the Region. In contrast, none of the Title V permits issued to Sierra Pacific by Shasta County AQMD under part 70 in 2000, 2006, or 2013 were ever subject to Board review.

While Ms. Draisner may have recourse in another forum to timely challenge the Title V permit,⁷ the Board has no jurisdiction to review it and thus must dismiss Ms. Draisner's appeal.⁸

IV. CONCLUSION AND ORDER

As explained above, the Board lacks jurisdiction to hear this appeal. This matter is therefore dismissed.

So ordered.

⁷ See 40 C.F.R. § 70.4(b)(3)(x), (b)(3)(xii) (approved part 70 programs must provide for an opportunity for judicial review in State court of Title V permits within up to 90 days of issuance of the permit).

⁸ Ms. Woodhouse, in her amicus brief, appears to be challenging aspects of a public meeting that the *Region*, and not Shasta County AQMD, held on December 10, 2013, after issuance of the Title V permit Ms. Draisner challenges in this appeal. See Non-Party Amicus Brief at 1. Had this been a PSD case, her amicus brief likely would have been considered untimely. See 40 C.F.R. § 124.19(e) (requiring amicus curiae briefs in PSD cases to be filed within 21 days of the filing of the PSD petition). However, because the Board determines that the present case involves a Title V and not a PSD permit appeal, as a technical matter, Ms. Woodhouse's amicus brief was timely filed under the part 124 regulations. See *id.* (requiring amicus curiae briefs to be filed within 15 days of the filing of the response brief in most cases). Nevertheless, because her concerns appear to be related to the Region's ongoing PSD permitting process and not to the Title V operating permit Shasta County AQMD issued on September 27, 2013, that is the subject of the present case, the Board does not address her concerns in this decision.