

IN RE DPL ENERGY MONTPELIER ELECTRIC GENERATING STATION

PSD Appeal No. 01-02

ORDER GRANTING SUMMARY DISPOSITION AND DENYING REVIEW

Decided March 13, 2001

Syllabus

Mr. Stephen A. Loeschner ("Petitioner") filed a petition for review of a permit (the "Permit") issued by the Indiana Department of Environmental Management ("IDEM") to DPL Energy, for its proposed Montpelier Electric Generating Station in Wells County, Indiana. The Permit is styled as a "New Source Construction Permit and Minor Source Operation Permit" and authorizes the construction and operation of eight Twin Pac combustion turbine units, which consist of 16 simple cycle combustion turbines and eight electric generators. The Permit restricts allowable emissions of any regulated pollutant to no more than 249 tons per year and was issued pursuant to the State's minor source New Source Review ("NSR") permit program. In issuing the Permit, IDEM did not in any way invoke its permit-issuing authority pursuant to the Prevention of Significant Deterioration ("PSD") program that it administers in the State as a federal delegatee. The Petitioner contends that IDEM should have issued a federal PSD permit to DPL Energy rather than a minor source NSR permit because, according to Petitioner, the proposed DPL Energy facility, which Petitioner characterizes as a fossil-fuel fired steam electric plant and which has the potential to emit more than 100 tons per year of any air pollutant, is a major emitting facility and, thus, requires a PSD permit.

Held: The Petition for Review is denied. The Board has limited jurisdiction to hear permit appeals. None of the sources of the Board's authority to review permit determinations confers jurisdiction on the Board for the sole purpose of reviewing permits issued under an approved minor source NSR program of any State. *See In re Carlton, Inc., North Shore Power Plant*, 9 E.A.D. 692, 695 (EAB 2001). It therefore follows that the Board does not have jurisdiction to review the minor source permit issued by IDEM to DPL Energy. Also, since *Carlton* further instructs that the Board's jurisdiction to review PSD permits "is limited to federal PSD permits that are *actually issued*," it necessarily follows that a state decision *not to issue a PSD permit* (in contrast to a state decision to deny a PSD permit under a federal program) is not a reviewable decision by the Board. Accordingly, review is denied.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum and Kathie A. Stein.

Opinion of the Board by Judge McCallum:

The initial and immediate occasion for our ruling today is a motion filed by the Indiana Department of Environmental Management (“IDEM”) seeking summary disposition of a petition seeking review of a permit determination made by IDEM on December 29, 2000. The petition for review was filed by Stephen A. Loeschner (“Petitioner”) on January 23, 2001. The Environmental Appeals Board (the “Board”) has also received a motion for summary disposition from DPL Energy, the permittee in this matter.¹ Both IDEM and DPL Energy seek summary disposition of the petition for review on jurisdictional grounds. On February 15, 2001, the Board received a joint motion for leave to intervene and file a brief as amicus curiae in support of dismissing the petition for review on jurisdictional grounds from the U.S. Environmental Protection Agency’s (“EPA”) Office of General Counsel (“OGC”) and EPA’s Office of Regional Counsel in Region V (“ORC”). The joint motion was subsequently granted by the Board, and the amicus brief was filed on February 22, 2001 (“Amicus brief”). The Board also received Petitioner’s response to the motions for summary disposition on February 23, 2001. For the reasons discussed below, we grant both motions for summary disposition and deny review of the Petition.

I. BACKGROUND

After public notice and comment, IDEM issued DPL Energy a “New Source Construction Permit and Minor Source Operating Permit” (the “Permit”) on December 29, 2000, to construct the Montpelier Power Generating Station in Poneta, Indiana. *See* IDEM’s Response Seeking Summary Disposition at 2 (“IDEM’s brief”); DPL Energy’s Response to Petition for Review Seeking Summary Disposition on Jurisdictional Grounds at 1 (“DPL Energy’s Brief”).

The Permit would allow DPL Energy to construct and operate eight Twin Pac combustion turbine units, which consist of 16 simple cycle combustion turbines and eight electric generators. *Id.* In addition, the Permit restricts allowable emissions of any regulated pollutant to no more than 249 tons per year. *Id.* at 3; *see* Permit at §§ C.1 & D.1.1.

¹ On March 6, 2001, DPL Energy also filed a supplement to its motion for summary disposition.

The Petitioner filed his petition for review with the Board on January 23, 2001.² In it, Petitioner asserts that the Montpelier facility, which Petitioner characterizes as a fossil-fuel fired steam electric plant and which has the potential to emit more than 100 tons per year of any air pollutant, is a major emitting facility³ and, thus, IDEM should have issued a federal prevention of significant deterioration (“PSD”) permit,⁴ not a minor source operating permit for the Montpelier Power Generating Station.

In its motion for summary disposition, IDEM contends that this Board is without jurisdiction to hear the Petition because IDEM issued the Permit under its minor New Source Review (“NSR”) program, a non-PSD permit program, which is part of its State Implementation Plan (“SIP”).⁵ See IDEM’s brief at 2, 4; Permit at § D.1.1. IDEM emphasizes that, in issuing the Permit, it did not in any way invoke its permit-issuing authority pursuant to the PSD permit program that it administers in the State as a federal delegatee. See 40 C.F.R. § 52.21(u); 40 C.F.R. §§ 52.769 -798 (approval and promulgation of Indiana’s SIP); Permit at § D.1.1.; 46 Fed. Reg. 9,580, 9,583-84 (Jan. 29, 1981) (PSD delegation of authority to Indiana). IDEM cites 40 C.F.R. § 124.19 (governing appeals to the

² Apparently, Petitioner has also filed an appeal of this permit with the Indiana Office of Environmental Adjudication. See DPL Energy’s Brief at 3.

³ For purposes of the federal prevention of significant deterioration (PSD) program of the Clean Air Act (“CAA”), 42 U.S.C. §§ 7401-7671q, a “major emitting facility” is any of several listed stationary sources of air pollutants, including certain fossil-fuel fired steam electric plants, that emit, or have the potential to emit, 100 tons per year of any air pollutant, as well as any other source with the potential to emit 250 tons per year or more of any air pollutant. CAA § 169(1), 42 U.S.C. § 7479(1).

⁴ PSD permits are issued under the CAA, 42 U.S.C. §§ 7401-7671q. The CAA established the PSD program to regulate air pollution in areas of the country designated 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 “nonattainment” (“unclassifiable” areas). CAA §§ 160-69B, 42 U.S.C. §§ 7470-92. The PSD requirements apply to new major stationary sources and major modifications of existing stationary sources. See, e.g., CAA §§ 165(a), 169, 42 U.S.C. §§ 7475(a), 7479; 40 C.F.R. § 52.21(b), (i)-(k).

⁵ Unlike the PSD program, which is a federal program in Indiana (albeit functionally administered by the State as a delegate), the minor NSR permit program in Indiana is a program created under state law and approved into the state implementation plan. 59 Fed. Reg. 51,108 (Oct. 7, 1994). As in other States, IDEM issues permits under its minor NSR program to smaller new or modified sources of pollution. In this case, the permit restricts the source emissions of any regulated pollutant to no more than 249 tons per year.

According to the amicus brief filed by OGC and Region V’s ORC, minor NSR programs serve a variety of purposes, including the creation of “synthetic minor” permits whereby a new or modified source of air pollution can employ pollution control technology, materials or fuel restrictions, limits on hours of operation or rates of pollution, or some combination thereof to establish enforceable limits on the source’s “potential to emit.” By these means, the source can limit its emissions to levels below the applicability of the PSD program and other programs that apply to “major” sources of pollution. Amicus brief at 3-4 (citing 40 C.F.R. § 70.3).

Board of certain specified permits) in support of its argument that the Board may only review PSD permits and, more specifically, ones that are actually issued. *See* IDEM's brief at 4; *see also* DPL Energy's brief at 5; Amicus brief at 3-4.

Petitioner responds that the Board does indeed have jurisdiction because Petitioner's appeal raises an "important policy consideration" and because Petitioner seeks the Board's interpretation of a "federal definition" — a federal question.⁶ *See* Rebuttal of Motions for Summary Disposition and Motion for Denial of Summary Disposition at 2 ("Petitioner's Response").

II. DISCUSSION

The Board has recently denied review, on jurisdictional grounds, of an Illinois permit decision in a case strikingly similar to this one. *See In re Carlton, Inc. North Shore Power Plant*, 9 E.A.D. 690 (EAD 2001). There the petitioner sought this Board's review of an Illinois minor source permit, contending that the proposed facility rather than being a true minor source was in reality a major source of emissions, thus triggering PSD requirements. Because, in the petitioner's view, the Illinois facility was a major source of emissions, the petitioner in that case contended that a PSD permit should have been required. For the reasons explained in *Carlton*, specifically, that the Board's authority to review PSD permit appeals is limited only to issued PSD permits, we find that the Board does not have jurisdiction to review the minor source permit issued in this case to DPL Energy. *Id.*

The Board explained in *Carlton* that its authority to review permit decisions is "limited by the statutes, regulations, and delegations that authorize and provide standards for such review." *Id.* at 4; *see also* 57 Fed. Reg. 5,320 (Feb. 13, 1992). In both this case and *Carlton*, the relevant statute is the Clean Air Act ("CAA" or "Act") and, in particular, the major source permitting requirements of the PSD provisions in section 165 of the Act, 42 U.S.C. § 7475; the relevant regulations are the federal PSD regulations at 40 C.F.R. § 52.21 and the consolidated permitting regulations at 40 C.F.R. § 124.19; and the relevant delegations are (1) the delegation of authority, pursuant to 40 C.F.R. § 52.21(u), from the Region to the state agency (in this case IDEM) to administer the federal PSD program in that State; and (2) the delegation from the Administrator of EPA to the Board of

⁶ Petitioner has recently filed an additional motion requesting leave to rebut U.S. EPA's amicus brief in this matter. Petitioner's motion asserts only that he "feels entitled to respond to any amicus brief presented by (hostile) intervenor, USEPA." Motion for Leave to Rebut USEPA Amicus Brief and Motions for Orders to Improve Service at 1 (March 9, 2001). We deny Petitioner's request to file an additional response. The Board believes its recent decision in *In re Carlton, Inc., North Shore Power Plant*, 9 E.A.D. 690 (EAB 2001), discussed in the text of this order, is directly on point regarding the issues presented in this matter and further briefing from the parties would be unnecessary.

her authority to decide appeals of federal PSD permits, including PSD permits issued by delegated States such as Indiana.

None of the foregoing sources of the Board's authority to review permit determinations confers jurisdiction on the Board for the sole purpose of reviewing permits issued under an approved minor source NSR program of any State. *See Carlton*, 9 E.A.D. 692. It therefore follows, and we must hold, that the Board does not have jurisdiction to review the minor source permit issued by IDEM to DPL Energy. Also, since *Carlton* further instructs that the Board's jurisdiction to review PSD permits "is limited to federal PSD permits that are *actually issued*," *id.*, it necessarily follows that a state decision *not to issue a PSD permit* is not a reviewable decision by the Board.⁷ Therefore, whether or not Petitioner is correct in asserting that IDEM should have issued a PSD permit to DPL Energy is not something over which the Board may take cognizance for purposes of exercising its review powers under 40 C.F.R. § 124.19.⁸ Any review of that decision must be reserved for other fora.

We note that, although the Petitioner cannot obtain relief from the Board, he is not without the ability to pursue potential avenues of relief. In addition to continuing to pursue the relief Petitioner has already requested from the Indiana Office of Environmental Adjudication,⁹ Petitioner may also request that EPA, through Region V, exercise its enforcement authority in response to IDEM's permit decision.¹⁰ Additionally, the Petitioner may pursue his own federal remedy. For instance, the Clean Air Act provides that a citizen may bring a civil action in federal district court against any person who proposes to construct a major new facility without a required PSD permit. *See* CAA § 304(a)(3), 42 U.S.C. § 7604(a)(3).

⁷ A state decision not to issue a PSD permit is not to be confused with a state decision to deny an application for a PSD permit. The latter decision is reviewable by the Board, provided the PSD program in the State is a federal program. *See In re West Suburban Recycling & Energy Ctr., L.P.*, 6 E.A.D. 692 (EAB 1996).

⁸ The Board does not reach the merits of the petition since we dismiss on jurisdictional grounds.

⁹ *See supra* note 2.

¹⁰ We recognize that, given that OGC and ORC reject the Petitioner's contention that a PSD permit is required, requesting Region V to challenge IDEM's permit decision may not be a viable option. *See* Amicus brief at 5-9.

III. CONCLUSION

Accordingly, we grant both motions for summary disposition, and deny the petition for lack of jurisdiction.

So ordered.