

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

_____)	
In re:)	
)	
Minergy Detroit, LLC)	PSD Appeal Nos. 02-01 & 02-02
)	
Permit No. 175-00)	
_____)	

ORDER DENYING REVIEW

I. BACKGROUND

Before the Board is a Petition for Review (“Petition”), filed by Mr. Saulius Simoliunas (“Petitioner”), seeking review of a prevention of significant deterioration (“PSD”) permit decision (“Permit”) made by the Michigan Department of Environmental Quality (“MDEQ”)¹ on September 20, 2001.² The permit was issued to Minergy Detroit, L.L.C. (“Minergy”) for the

¹The State of Michigan has been delegated authority from EPA to implement and enforce the federal PSD program. *See* 45 Fed. Reg. 8348 (Feb. 7, 1980). The permits MDEQ issues in accordance with that program are considered federal permits. *See* 40 C.F.R. § 124.41; *In re Tondy Energy Company*, PSD Appeal Nos. 00-5 & 00-7, slip op. at 3 n.1 (EAB, Mar. 28, 2001), 9 E.A.D. ____.

²The Petition was postmarked October 16, 2001, but was not received by the Board until January 23, 2002. Petitioner maintains, and MDEQ has not disputed, that he provided MDEQ with a copy of the Petition and that MDEQ received the Petition on or about October 17, 2001. *See* Motion to Deny Department of Environmental Quality’s Motion for Extension of Time (dated Jan. 22, 2002, received Feb. 22, 2002). The delay in this petition reaching the Board appears to be attributable to the rerouting of Washington, D.C. mail in response to anthrax contamination concerns. All mail postmarked after October 12, 2001, and addressed to Washington, D.C. government customers was held for irradiation at the Lima, Ohio postal facility. Notably, MDEQ has not argued that this petition was untimely filed. Under these special circumstances, the Board will consider the Petition to have been timely filed with the Board. *See, e.g., In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 329 (EAB 1999) (“The Board will relax a filing deadline only where special circumstances exist”); *In re Gary Dev. Co.*, 6 E.A.D.

construction of a cyclone furnace that utilizes municipal wastewater solids and other materials and produces a glass aggregate product which, according to MDEQ, will be used for floor tiles, abrasives, roofing shingle granules and asphalt paving.

The Petition appears to raise only one issue pertaining to the Permit. In particular, it questions the adequacy of the Permit's testing requirements related to emissions from the facility's cyclone furnace, and requests that the Board "modify Special Condition No. 7 to require the testing to be done by an independent laboratory having proper certification with the participation of citizens chosen by local non governmental organizations." Petition at 3. On February 19, 2002, MDEQ filed a Motion for Summary Disposition arguing that there is no regulatory or jurisdictional basis for imposing the conditions proposed by Petitioner, and requesting that the Board decline review. *See* Michigan Department of Environmental Quality's Motion for Summary Disposition at 4 (Feb. 19, 2002). For the reasons stated below, the Petition is denied.

526, 533-34 (EAB 1996) (explanation of filing delay found insufficient to constitute "special circumstances").

On January 15, 2002, the Board received a petition from the American Federation of State, County and Municipal Employees ("AFSCME") (PSD Appeal No. 02-02). However, because this petition was undated and AFSCME has provided no evidence to indicate that, but for mail rerouting difficulties, its petition would have been timely received by the Board, it will not be considered. *See* 40 C.F.R. § 124.19(a) (petitions for review of PSD permits must be filed within thirty days after the issuance of a final permit decision); *In re Sutter Power Plant*, 8 E.A.D. 680, 695 (EAB 1999) (late-filed appeals will be dismissed as untimely). We note, however, that the issue raised in AFSCME's petition has also been raised in the Petition filed by Mr. Simoliunas which we consider to have been timely filed.

II. DISCUSSION

To obtain review on the merits, a petitioner must demonstrate that the permit condition for which review is being sought is based on :

- (1) A finding of fact or conclusion of law [that] is clearly erroneous; or
- (2) An exercise of discretion or an important policy consideration [that] the Environmental Appeals Board should, in its discretion, review.

40 C.F.R. § 124.19(a). The burden of demonstrating that review is warranted rests with the petitioner challenging the permit condition. *Id.*; see *In re Tondu Energy Co.*, PSD Appeal Nos. 00-5 & 00-7, slip op. at 7 (EAB, Mar. 28, 2001), 9 E.A.D. _____. Mr. Simoliunas has failed to meet his burden in this regard.

As previously stated, the Petition requests modification of Special Condition 7 of the Permit to include a requirement that testing be done by an independent laboratory with the participation of local citizens. Petition at 3. The Petition provides no explanation, however, as to why the existing testing requirements are insufficient to ensure that the permit's emissions limitations are not exceeded.

Special Condition 7 of the final permit states:

Within 60 days after achieving the maximum [municipal wastewater solids ("MWWS")] feed rate, but not later than 180 days after initial operation of the [glass cyclone furnace]³ with coal and/or MWWS, the applicant shall verify the emission rate of the following from the [furnace] by stack testing:

- a. PM/PM-10
- b. Volatile Organic Compounds
- c. Lead
- d. Hydrogen Chloride

³The permit refers to this furnace as the "EUGLASSFURNACE."

- e. Sulfuric acid mist
- f. Total Flourides
- g. Arsenic
- h. Beryllium
- i. Cadmium
- j. Hexavalent chromium
- k. Mercury
- l. Manganese
- m. Nickel
- n. Acrolein
- o. Acrylonitrile
- p. Ammonia
- q. Formaldehyde
- r. Polychlorinated Biphenyls
- s. 2,3,7,8 TCDD TEQ

The stack testing shall be at owner's expense, in accordance with [MDEQ] requirements. Stack testing shall be conducted at the maximum MWWS feed rate, using coal as the auxiliary fuel. For purposes of this permit condition, the phrase "initial operation of the EUGLASSFURNACE" shall mean the commencement of operation of the furnace, marked by the first firing of solid fuel, and shall not include boil out, steam blows and shakedown. Following the date that the initial performance test(s) is completed or is required to be completed, the applicant shall thereafter conduct a performance test for all the above pollutants and operating parameters once each year, during a different season over a four year period. Upon a satisfactory demonstration verifying compliance, performance testing shall be done every five years.

Applicant shall notify [MDEQ] in writing within 15 days of the date of commencement of trial operation in accordance with 40 CFR, Part 60.7(a)(3). No less than 120 days prior to testing, a draft stack testing plan must be submitted to [MDEQ] for approval at least 60 days prior to the start of testing. Applicant shall notify [MDEQ] of any changes in the performance test dates as soon as practicable. The location of stack testing ports shall have prior approval by [MDEQ]. All test results shall be submitted to [MDEQ] in an acceptable format within 60 days following the date the test is completed. *The applicant shall use EPA reference methods for every pollutant for which they have been developed. R 336.2001, 336.2003, 336.2004.*^[4]

⁴The final three citations in Special Condition 7 are references to the provisions of the Michigan Administrative Code setting forth requirements for performance testing and sampling.

Permit No. 175-00, Special Condition 7 (emphasis added). This condition requires that testing of emissions from the furnace be conducted in accordance with EPA and MDEQ requirements. The condition also references provisions of the Michigan Administrative Code containing detailed requirements for performance testing and sampling. For example, the above-quoted condition references Section 336.2003 of the Michigan Administrative Code. That section contains specific requirements for performance testing, including reference test methods and the number and timing of samples. *See Mich. Admin. Code R. 336.2003 (2001).*

Petitioner does not explain why compliance with regulatory requirements incorporated by reference into the Permit will not ensure that the Permit's emissions limitations are not exceeded. Rather, the Petition simply states, without apparent support,⁵ that an "independent laboratory" is necessary, along with the participation of local citizens. To the extent the petitioner is suggesting that the existing condition is too lax to ensure compliance with applicable emissions limits, the petition lacks the specificity required to support a petition for review. *In re Sutter Power Plant*, 8 E.A.D. 680, 687-88 (EAB 1999) (the Board expects petitions, including those filed by persons unrepresented by legal counsel, to provide sufficient specificity to apprise the Board of the issues being raised); *see also In re Encogen Cogeneration Facility*, 8 E.A.D. 244,

⁵The Petition does make reference to Petitioner's view that there is a need both "before and after the antipollution control device (i.e., carbon injection) to determine the amounts of individual congeners of PCDDs/PCDFs," Petition at 2, and references two sets of conflicting performance data from "the Detroit Wastewater Treatment Plant," *id.* at 2-3; Motion to Deny Michigan Department of Environmental Quality's Motion for Extension of Time at 2, but fails to explain how these concerns relate to its requested relief or why compliance with the State and federal regulatory requirements incorporated by reference into the permit is not an adequate response to the stated concerns.

259-60 (EAB 1999) (petition must provide sufficient information or specificity from which the Board could conclude that the permit issuer erred in establishing a permit condition); *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 19 (EAB 1994) (petition must articulate some supportable reason as to why the permit authority erred in its permit decision or why review is otherwise warranted).

Moreover, to the extent that Petitioner is arguing that regulatory provisions incorporated by the permit are themselves deficient, we have repeatedly observed that the petition process is not the appropriate forum for challenging Agency regulations. *See, e.g., Tondy Energy*, slip op. at 8, 9 E.A.D. ___; *In re Environmental Disposal Systems, Inc.*, 8 E.A.D. 23, 35 (EAB 1998); *In re City of Port St. Joe and Florida Coast Paper Co.*, 7 E.A.D. 275, 286-87 (EAB 1997).

Finally, to the extent that the Petition hinges on the notion that Minergy cannot be relied upon to carry out its testing and reporting responsibilities under Special Condition 7 or that MDEQ will not be vigorous in requiring compliance with existing performance testing requirements, we decline to grant review on those grounds as well. First, there is no basis, factual or legal, cited in the Petition for doubting Minergy's capabilities and willingness in this regard. Second, the Board's role under the petition process is "to examine specific permit conditions that are claimed to be erroneous, not to address generalized concerns broadly directed toward the enforcement capabilities of this or any other regulatory agency." *In re Ecoelectra, L.P.*, 7 E.A.D. 56, 70 (EAB 1997); *see also In re Brine Disposal Well*, 4 E.A.D. 736, 746 (EAB 1993)

(review denied where the petitioner merely alleged generalized concerns over EPA's ability to enforce compliance with regulatory requirement).

III. CONCLUSION

For the foregoing reasons, the Petition for Review is hereby denied.

So ordered.⁶

ENVIRONMENTAL APPEALS BOARD

Dated: 3/1/2002

_____/s/_____
Scott C. Fulton
Environmental Appeals Judge

⁶The three-member panel deciding this matter is comprised of Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich. *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 Minergy Detroit, LLC, PSD Appeal Nos. 02-01 & 02-02, were sent to the following persons in the manner indicated:

First Class Mail
Postage Prepaid:

Alan F. Hoffman
Assistant Attorney General
Michigan Department of Environmental Quality
Natural Resources and Environmental Quality Div.
525 West Allegan Street
3rd Floor, North Tower
PO Box 30473
Lansing, MI 48909

Saulius Simoliunas
665 West. Warren Ave.
Detroit, MI 48201

John Riehl
American Federation of State, County
and Municipal Employees, Local 207
600 West Lafayette, Suite L-106
Detroit, MI 48226

By Pouch Mail:

Bert C. Frey (C-14J)
U.S. EPA Region V
77 West Jackson Blvd.
Chicago, IL 60604-3507

Dated: 3/1/2002

_____/s/_____
Annette Duncan