

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

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In re:	)	
	)	
RockGen Energy Center	)	PSD Appeal No. 99-75
	)	
PSD Permit No. 98-RV-150-R1	)	
	)	

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**ORDER DENYING REVIEW**

Before us is a petition filed by Responsible Use of Rural and Agricultural Land (“RURAL”) seeking review of a revised prevention of significant deterioration (“PSD”) permit issued by the State of Wisconsin’s Department of Natural Resources (“WDNR”), to the RockGen Energy Center (“RockGen”) for the construction and operation of an electric power generating facility. *See* Amended Petition for Review of Remanded PSD Permit (Nov. 17, 1999) (“Amended Petition”). The revised PSD permit, along with a revised response to comments document, were issued in response to the Board’s August 25, 1999 Order Denying Review in Part and Remanding in Part.<sup>1</sup> *In re RockGen Energy Center*, PSD Appeal No. 99-1 (EAB, August 25, 1999), 8 E.A.D. \_\_\_\_\_. In the August 25<sup>th</sup> Order, the Board remanded portions of the permit and required, among other things, that WDNR:

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<sup>1</sup>The facts surrounding issuance of the original permit are recounted in the August 25<sup>th</sup> Order and will not be repeated here.

[R]econsider its permit decision in light of the comments received [on the draft permit], issue a revised response to comments document responding to all significant comments submitted during the comment period, and serve this document on all persons who submitted written comments or filed an appearance slip at the public hearing.

*RockGen Energy Center*, slip op. at 31 (footnote omitted). WDNR issued the revised permit along with a revised response to comments document on October 15, 1999. The present petition for review followed.

At the Board's request, WDNR submitted a response to the Amended Petition. Department of Natural Resources' Response to Amended Petition for Review (Dec. 21, 1999).<sup>2</sup> With the permission of the Board, responses were also submitted by RockGen and the Public Service Commission of Wisconsin ("PSC").<sup>3</sup> See RockGen's Response to Amended Petition for Review (Dec. 1, 1999); Response of Public Service Commission of Wisconsin to Amended Petition for Review (Dec. 14, 1999). RURAL submitted a reply to these responses. RURAL's Reply to Responses to Petition for Review of RockGen's Remanded PSD Permit (Jan. 7, 2000). Finally, by letter dated January 11, 2000, the Village of Rockdale Board of Trustees expressed their support for the Amended Petition. For the following reason, RURAL's Amended Petition is denied.

According to the Amended Petition, in responding to two commenters during the public

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<sup>2</sup>WDNR also provided the Board with relevant portions of the administrative record to the revised permit. The record is consecutively numbered and will be cited as "AR" along with the appropriate page number(s).

<sup>3</sup>The PSC is an independent administrative agency of the State of Wisconsin charged with reviewing proposals for new electric generating capacity and determining whether to grant a Certificate of Public Convenience and Necessity ("CPCN") to authorize construction. The CPCN for the proposed RockGen facility was issued on December 18, 1998. See *RockGen Energy Center*, slip op. at 6 n.7.

comment period, WDNR erroneously concluded that it could not consider local opposition to construction of the proposed facility as part of the best available control technology (“BACT”) analysis.<sup>4</sup> The comments, submitted both orally and in writing by Ms. Karen Hafstad,<sup>5</sup> and orally by Ms. Sharon Hutchinson, are summarized in WDNR’s revised response to comments. Ms. Hafstad’s oral comments are summarized as follows:

*Comments provided by Karen Hafstad*

While she was appearing on her own behalf she pointed out that she was also a Trustee for the Village of Rockdale. She thanked [W]DNR for holding the hearing in the local community. She stated that the building site has no local zoning approval and no pending application for approval. Ms. Hafstad said that the [Public Service Commission of Wisconsin (“PSC”)] says no zoning approval is needed and that this is being appealed by the Village of Rockdale in circuit court. Ms. Hafstad presented [W]DNR with copies of several documents including: a November, 1998 letter to the PSC from Jeanne Seiling of Dane County, regarding zoning issues; a Dec., 1998, letter to the Village of Rockdale from Polsky Power regarding zoning; and a Jan., 1999, letter from the Village to Polsky putting their rezoning application on inactive status; and a Jan. 1999, Resolution by the Village of Rockdale Board in opposition to the siting of the facility in the extra-territorial zoning area of Rockdale and authorizing an appeal to circuit court. She read a copy of the Village Resolution into the record. Copies of these exhibits are attached to this hearing summary. Ms. Hafstad asked [W]DNR not to issue the air permit for the facility.

Revised Summary of and Response to Public Comments on the Air Pollution Control Permit

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<sup>4</sup>For a definition of BACT, see *RockGen Energy Center*, slip op. at 8-9.

<sup>5</sup>Ms. Hafstad’s written statement is dated January 22, 1999 (the same day as the public hearing), and was provided to the Board as Exhibit E to RURAL’s April 5, 1999 petition for review of the initial RockGen permit issued by WDNR on January 25, 1999 (PSD Appeal No. 99-1) (hereinafter “Hafstad Written Statement”).

Application for RockGen Energy Center - Town of Christiana, Dane County, Wisconsin (“Revised Summary and Response”) (October 13, 1999) at 8 (AR 214).

As the summary makes clear, Ms. Hafstad’s comments were focused exclusively on the lack of local zoning approval and an apparent dispute with PSC over whether local zoning approval was necessary. Ms. Hafstad stated that she was providing documents related to this zoning dispute, and concluded with the statement that WDNR should not issue the permit. The above-quoted comment makes no reference, directly or indirectly, to WDNR’s BACT analysis. WDNR interpreted the oral comment as a request to withhold the permit pending the resolution of a local zoning dispute, stating as follows:

[W]DNR does not have the authority to delay a decision on issuance of an air permit until zoning disputes or other legal challenges are resolved. [W]DNR must make its decision based on the criteria of s. 285.63, Wis. Stats., and independently of other permits or approvals.

Revised Summary and Response at 8 (AR 214). This interpretation is reasonable, and is also consistent with Ms. Hafstad’s actual written statement, wherein Ms. Hafstad asked that the permit not be issued “when the legal issues are unresolved.” Hafstad Written Statement at 2. Contrary to what RURAL would have us believe, the foregoing response expresses nothing on the topic of whether community opposition can be factored into the BACT analysis.

Ms. Hutchinson’s oral comments<sup>6</sup> are summarized in the record as follows:

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<sup>6</sup>In reviewing the record before us, it does not appear that Ms. Hutchinson submitted written comments.

*Comments provided by Sharon Hutchinson:*

Ms. Sharon Hutchinson asked [W]DNR to follow the law. She said the other plants allowed under Act 204 proposed to build smaller facilities in the areas zoned M 1. She pointed out that the other facilities obtained proper zoning approvals while this applicant has not. She said the RockGen facility was proposed to be much larger than what was needed and that it was avoiding local approvals by hiding behind PSC laws. She stated that 3 lawsuits had been filed already. She stated that when the substation was built here, they did not contemplate having a power plant built here but it was now a desirable spot due to the substation and the transmission lines. She stated this area was an A 1 agriculturally zoned area. Ms. Hutchinson pointed out that both the Jefferson County and Dane County Boards were opposed to siting the facility in the Town of Christiana. She was concerned about “annualized” pollution limits and said that any one day above the limits should be against the law. She stated that there was a grade school near the site and she was concerned of the impacts of lead pollution on children. She also stated that Cam-Rock Park was next to the site and while it is not a Class I PSD area, it is their park and should be protected. She asked [W]DNR to take a closer look at this permit, especially since the facility is already in litigation. She stated that areas with clear air should not be polluted up to the national air standards. *She asked that [W]DNR postpone its decision on the permit until the issues in litigation were resolved.*

Revised Summary and Response at 14 (AR 220) (emphasis added). While these comments are more free-ranging than those of Ms. Hafstad, the more focused request for relief in the last sentence is confined to the issue of whether the permit should be postponed pending the outcome of State litigation. Thus, in responding to this issue on remand, WDNR gave essentially the same response it gave earlier to Ms. Hafstad’s comments. In particular, WDNR stated:

Although the RockGen Facility may be subject to litigation on other aspects of the project, [W]DNR does not have the authority to delay a decision on the air permit until zoning disputes or other legal challenges are resolved. [W]DNR must make its decision on the air permit independently of other permits or approvals.

Revised Summary and Response at 14-15 (AR 220-21). Once again, WDNR’s response understandably includes nothing regarding consideration of local opposition as part of the BACT

analysis. Rather, the response is limited to the issue raised. While Ms. Hutchinson also touched upon additional concerns regarding issuance of the permit, WDNR's Revised Summary responded to these concerns as well, and RURAL has not asserted that WDNR's responses to these concerns were erroneous.<sup>7</sup>

In sum, although RURAL would have us interpret WDNR's revised response to comments as a refusal to consider local community opposition when determining BACT, the record before does not support such an interpretation. Rather, as the above discussion demonstrates, WDNR was appropriately responding to a very different issue: whether permit issuance should be postponed pending the outcome of a local zoning dispute. WDNR responded in the negative and, based on the

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<sup>7</sup>In responding to Ms. Hutchinson's other comments, WDNR stated:

The [W]DNR's authority over issuance of air permits to power plants does not extend to determining their total power output (size) except to the extent that the proposed plant's size would cause an exceedance of a NAAQS, PSD air increments or other air quality-related standards. The RockGen Facility, if operated in compliance with its permit terms and conditions will not "pollute up to the national air standards;" the emissions limitations, in particular, will ensure emissions well below the NAAQS and will leave a significant portion of the air increment for future growth in the area.

Regarding "annualized pollution limits," with the exception of the 12 ppm NO<sub>x</sub> limit on natural gas, all of the emission limits in the draft permit must be met on a continuous basis in order to comply with the permit. Compliance with the 12 ppm NO<sub>x</sub> limit on a 24 hour average basis is in addition to a limit of 15 ppm which must be met on a continuous basis. As described in the response to RockGen's comment #7, above, the 12 ppm NO<sub>x</sub> limit in the draft permit will be made more stringent in the final permit by reducing the averaging period from 12 months to 24 hours.

RockGen's emissions will not cause a violation of the NAAQS, including the standards for lead, nor will the emissions exceed the air increments for any criteria pollutant.

Revised Summary and Response at 14.

record before us, we can not say that this determination was erroneous.<sup>8</sup> In effect, RURAL has asked the Board to consider a matter not previously raised in the comments on the permit determination.<sup>9</sup> As the Board has previously held, the Board will not consider arguments made for the first time on appeal. *See In re Sutter Power Plant*, PSD Appeal Nos. 99-6 & 99-73, slip op. at 16 (EAB, Dec. 2, 1999), 8 E.A.D. \_\_\_\_\_. Accordingly, the Amended Petition is denied.

So ordered.

Dated: 3/3/2000

ENVIRONMENTAL APPEALS BOARD

By: \_\_\_\_\_/s/  
 Ronald L. McCallum  
 Environmental Appeals Judge

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<sup>8</sup>*See In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 781 (EAB 1997) (denying review of PSD permit for construction of a power plant on the ground that construction would convert agricultural land to industrial use, and holding that the State permitting authority did not clearly err in deferring to the State policy and choosing to leave siting issues to be addressed through local planning and zoning processes); *In re Ecoelectrica, L.P.*, 7 E.A.D. 56, 76 (EAB 1997) (litigation regarding siting does not “constitute grounds for holding this PSD permit process in abeyance.”); *In re Beckman Production Services*, 5 E.A.D. 10, 23 (EAB 1994) (where neither the pendency nor outcome of ongoing litigation implicates the criteria applied in issuing the permit, objections to the permit founded on pending litigation about use conditions for the site are irrelevant to the Board’s determination).

<sup>9</sup>We note that in response to RURAL’s Amended Petition, WDNR expresses the view that nothing in the Clean Air Act would require it, as part of the BACT analysis, to deny or condition an air permit based on local opposition to the project. However, as this topic was not raised as an issue during the public comment period, WDNR’s views on appeal are not relevant to the issue presented here, the scope of which is confined to the public comments and WDNR’s response thereto.

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of RockGen Energy Center, PSD Appeal No. 99-75 were sent to the following persons in the manner indicated:

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Dated: 3/3/2000

/s/

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Annette Duncan  
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