

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

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| In the Matter of: |) | |
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| Alcoa-Warrick Power Plant |) | PSD Appeal No. 02-14 |
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| Permit No. 173-16275-00002 |) | |
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ORDER DENYING PETITION FOR REVIEW

I. INTRODUCTION

In a petition that was filed on December 10, 2002 (“Petition”), Stephen A. Loeschner (“Petitioner”) appealed the issuance of a construction permit (“Permit”) to the Alcoa-Warrick Power Plant (“Alcoa”), which is a stationary electricity-generating source. The Permit, issued by the Indiana Department of Environmental Management, Office of Air Quality (“IDEM”) on November 6, 2002, authorizes Alcoa to construct low nitrogen oxide (“NO_x”) burners to control NO_x emissions for three Alcoa boilers. Petitioner argues that the Environmental Appeals Board (the “Board”) has jurisdiction to hear his Petition by virtue of its authority to review federal prevention of significant deterioration (“PSD”) permits issued under the Clean Air Act (“CAA”), 42 U.S.C. § 7401.¹

¹ The CAA established the PSD program to regulate air pollution in areas of the country designated as
(continued...)

On December 30, 2002, IDEM filed a motion seeking summary disposition, in which it argues, among other things, that this Board does not have jurisdiction to review the permit at issue because it is not a PSD permit. As discussed below, IDEM's motion for summary disposition is granted and Petitioner's request for review is denied.

II. *FACTUAL AND PROCEDURAL BACKGROUND*

On August 5, 2002, Alcoa submitted to IDEM an application to modify three emission units (pulverized dry bottom wall-fired boilers) by installing low NO_x burners at its plant in Warrick County, Indiana. IDEM published notice of Alcoa's proposed modifications on September 30, 2002, and posted a draft version of the Permit on its website. On November 6, 2002, IDEM issued the Permit authorizing Alcoa to construct and operate low NO_x burners in the three boilers. *See* Permit ¶ A.2. The Permit provides that the boilers are permitted to fire bituminous coal and/or natural gas, and are required to use low NO_x burners to control NO_x emissions. *Id.* ¶ A.2(a)-(c).

Although IDEM implements the federal PSD program in Indiana pursuant to a delegation agreement entered into with U.S. Environmental Protection Agency ("EPA") Region V (the

¹(...continued)
"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.

“Region”),² the Permit was issued pursuant to Indiana’s authority to issue Title V³ Air Operating permits. *See* Ind. Admin. Code tit. 326, 2 (2001); 40 C.F.R. Part 70 App. A. *See also* 67 Fed. Reg. 34,844 (May 16, 2002) (granting final approval of revisions to Indiana’s Title V Operating Permit program); 66 Fed. Reg. 62,969 (Dec. 4, 2001) (granting full approval of Indiana’s Title V Operating Permit program). Significantly, while PSD permits issued by states with delegated authority are subject to Board review, Title V operating permits issued under State programs authorized by EPA under the Clean Air Act are not subject to Board review. *See* 40 C.F.R. §§ 71.11(l) and 71.1(a).

Petitioner argues that the Permit is subject to PSD requirements because it is both a major modification to the source and a major stationary source.⁴ *See* Petition. Petitioner also asserts that IDEM erroneously “misabeled” the Permit a non-PSD permit (that is, in issuing it under

² Indiana has not been approved by EPA to issue PSD Permits because Indiana’s Clean Air Act State Implementation Plan (“SIP”) does not include approvable procedures for issuing PSD permits; rather, IDEM acts as EPA’s delegate in implementing the Federal PSD program. *See* 40 C.F.R. §§ 52.21(u) and 52.793; 46 Fed. Reg. 9580, 9583-84 (Jan. 29, 1981) (delegation of PSD authority to Indiana). PSD permits issued by IDEM are considered EPA-issued permits for purposes of federal law, and are subject to review by the Board pursuant to 40 C.F.R. § 124.19. *See In re Zion Energy, L.L.C.*, 9 E.A.D. 701, 701-02 n.1 (EAB 2001); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 123 (EAB 1999); *In re W. Suburban Recycling & Energy Ctr., L.P.*, 6 E.A.D. 692, 695 n.4 (EAB 1996) (“For purposes of part 124, a delegate State stands in the shoes of the Regional Administrator [and must] follow the procedural requirements of part 124. * * * A permit issued by a delegate is still an ‘EPA-issued permit’ * * *”) (quoting 45 Fed. Reg. 33,413 (May 19, 1980)). In contrast, in circumstances in which a state’s PSD program has been approved as part of its SIP, permits issued under the state program are considered creatures of state law, not federal law, and are thus reviewable under the state system of review rather than by this Board.

³ Title V of the 1990 amendments to the federal Clean Air Act, 42 U.S.C. §§ 7661-7661f, requires certain stationary sources of air pollution to obtain permits from state air pollution agencies, and requires EPA to establish a federal permit program where no state program exists.

⁴ 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).

Indiana's Title V Air Operating Permit program) based on IDEM's flawed interpretation of the exceptions to PSD coverage embodied in 40 C.F.R. § 52.21(b)(2)(iii)(h). *Id.* In addition, Petitioner argues that IDEM committed an abuse of discretion by declining to include carbon monoxide continuous emissions monitors, and committed clear error with respect to certain changes made from the draft permit to the final permit. *Id.*

IDEM contends that the Board lacks jurisdiction to review IDEM's permit decision because the Permit issued to Alcoa was issued under Indiana's Title V Air Operating Permit program, rather than the federal PSD program. *See* Motion For Summary Disposition at 4-5. Additionally, IDEM asserts that the Petition fails to meet the threshold requirement of timeliness⁵, *see id* at 4, as well as other aspects of the Board's requirements for review.⁶ *Id.* at 6.

⁵ The Permit was issued on November 6, 2002. Therefore, pursuant to 40 C.F.R. § 124.19(a), to be timely, the Petition for Review should have been filed by December 6, 2002, whereas it was not in fact received by the Board until December 10, 2002. However, the late filing was apparently attributable to the Board's recent move to a new office location. Specifically, the Federal Express ("FedEx") tracking sheet shows that Petitioner sent his Petition for Review on December 3, 2002, and that FedEx was unsuccessful in its attempts to deliver it on December 5 and 6, 2002, presumably because the Board was in the process of moving. On December 9, 2002, FedEx noted that the Board's address had changed, and finally delivered the Petition for Review to the Board's new address on December 10, 2002. In view of these special circumstances, we will not dismiss the Petition on timeliness grounds. *See, e.g., In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 329 (EAB 1999) (Treating petition that arrived one day after filing deadline due to aircraft problems experienced by FedEx as timely).

⁶ In particular, IDEM argues:

Petitioner restates the comments he submitted during the public comment period. This is insufficient for the Board to accept review. A petitioner bears the burden of persuading the Board that review is warranted. * * * A petitioner must specifically explain why the agency's response is clearly erroneous or otherwise warrants review.

Motion for Summary Disposition at 6. Because we find below that the Board lacks jurisdiction to review IDEM's permit decision in this case, we need not reach this issue.

Similarly, the permittee in this matter, Alcoa, filed a response to the Petition on January 21, 2002, in which it argued that the Board lacks jurisdiction to review IDEM's permit decision because that decision was made pursuant to Indiana's Title V Operating Permit program, rather than the PSD program. *See* Alcoa Response to Petition at 2.⁷

III. DISCUSSION

Petitioner argues that the Board has jurisdiction over his Petition because the project triggers PSD requirements. *See* Petition. Petitioner does not dispute IDEM's contention that the Permit was, in fact, issued under the State's Title V Air Operating permit program. Rather, Petitioner contends that, because the project represents a major modification to a major emissions source, a PSD permit should have been required. Additionally, Petitioner asserts that the Board has jurisdiction because he seeks the Board's interpretation of a "federal question": whether the Board has jurisdiction to review a PSD permit that has been "misabeled" a non-PSD permit.

The facts in this case are strikingly similar to those of *In re Carlton, Inc. N. Shore Power Plant*, 9 E.A.D. 690 (EAB 2001), as well as *In re DPL Energy Montpelier Elec. Generating Station*, 9 E.A.D. 695 (EAB 2001). The petitioners in *Carlton* challenged the Illinois Environmental Protection Agency's decision to issue a permit pursuant to Illinois' minor source New Source Review program rather than under the federal PSD program on the basis that the

⁷ Alcoa's Response to the Petition was attached to a Motion for Leave to File Response To Petition for Review Instantly. We grant that motion and accept Alcoa's Response as part of the record of this case.

proposed facility would be a major source of emissions, thus triggering PSD requirements. Similarly, in *DPL Energy*, the Petitioner sought Board review of a permit issued by IDEM to DPL Energy on the grounds that IDEM erroneously issued the permit pursuant to Indiana's minor source New Source Review Program, rather than under the federal PSD program. In denying review in both of these cases, the Board ruled that not only is its jurisdiction limited to permits issued under the federal PSD program, but its jurisdiction is limited to federal PSD permits that are *actually* issued; it does not extend to a State's decision *not* to issue a PSD permit. *See Carlton*, 9 E.A.D. at 693; *DPL Energy*, 9 E.A.D. at 699⁸. Nothing in the case before us now warrants a different orientation or outcome.

As we noted in both *Carlton* and *DPL Energy*, the authority of the Board to review permit decisions is limited by the statutes, regulations, and delegations that authorize and provide for such review. *See Carlton*, 9 E.A.D. at 692 (*citing* 57 Fed. Reg. 5,320 (Feb. 13, 1992)); *DPL Energy*, 9 E.A.D. at 698. In those cases, as well as the case before us, the relevant statute is the Clean Air Act ("CAA") 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 regulatory provisions are the federal PSD regulations at 40 C.F.R. § 52.21, and the consolidated permitting regulations at 40 C.F.R. § 124.19, which provide for the appeal of federal PSD permits. The relevant delegations are, in turn, (1) the delegation of authority, pursuant to 40 C.F.R. § 52.21(u),

⁸ As we have previously explained, 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 DPL Energy*, 9 E.A.D. at 699 n.7; *see also In re W. Suburban Recycling & Energy Ctr., L.P.*, 6 E.A.D. 692 (EAB 1996).

from the Region to IDEM to administer the federal PSD program in Indiana; and (2) the delegation from the Administrator of EPA to the Board of her authority to decide appeals of federal PSD permits, including PSD permits issued by delegated States such as Indiana. *See* 57 Fed. Reg. 5,320-21.

None of these sources of the Board's authority to review permit determinations confers jurisdiction to review permits issued solely under a state's approved Title V program. Such permits are regarded as creatures of state law that can be challenged only under the state system of review. *See In re Geon Co.*, CAA Appeal No. 00-7, at 4-5 (June 1, 2000) (dismissing petition for Board's lack of jurisdiction to review permit granted pursuant to an authorized State's Title V operating permit program); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 135 (EAB 1997) ("The permit condition in question relates to Title V operating permit requirements, and the Board does not have jurisdiction to review the non-PSD Title V portion of this permit, since that portion of the permit is a State permit."); *see also In re Sutter Power Plant*, 8 E.A.D. 680, 690 (EAB 1999) ("The Board may not review, in a PSD appeal, the decisions of a state agency made pursuant to non-PSD portions of the CAA or to state or local initiatives * * *"); *In re Milford Power Plant*, 8 E.A.D. 670, 673-74 (EAB 1999) ("[T]he Board's authority to review PSD permits is not all-encompassing. The regulations specifically restrict the Board's scope of review to federal requirements * * *"); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 171 (EAB 1999) (denying review of issues not within the purview of the federal PSD program); *In re Great Lakes Chem. Corp.*, 5 E.A.D. 395, 396-97 (EAB 1994) (denying review of issues related to permit conditions imposed by Arkansas pursuant to its authorized program).

As noted, Indiana does not have a PSD program approved as part of its SIP and, consequently, the PSD program in Indiana is a federal program. The Permit in this case was not, however, issued under the PSD program. Rather, the Permit was issued pursuant to Indiana's EPA-approved Title V Air Operating Permit program.⁹ Accordingly, the Permit falls outside the body of federal permits subject to Board review. As we stated previously, the Board's jurisdiction is limited to federal PSD permits that are *actually issued*; it does not extend to state decisions reflected in state-issued permits, even when those decisions lead to the conclusion not to require a PSD permit at all. *See Carlton*, slip op. at 5-6; *see supra* note 8. Review of decisions of this kind is reserved to other fora. *Id.* In particular, Petitioner should invoke his appeal rights under State law to address his concerns regarding the permit's provision for monitoring CO emissions. His argument that IDEM mislabeled the Permit may be amenable to this forum as well. *See Ind. Admin. Code tit. 326, 4-21.5-7-3.*¹⁰

⁹ Specifically, IDEM determined that Alcoa qualified for the exemption embodied in 40 C.F.R. § 52.21(b)(2)(iii)(h), which provides that a facility seeking to add, replace, or use a pollution control project at an existing electric utility steam generating unit need not obtain a PSD permit if certain criteria are met. IDEM based its determination on EPA's interpretation of section 52.21(b)(2)(iii)(h) as embodied in the July 1, 1994 memorandum from John S. Seitz, Director of the Office of Air Quality Planning and Standards ("Seitz Memorandum").

¹⁰ In fact, Petitioner acknowledges in his Petition that the option of challenging that determination to the Indiana Office of Environmental Adjudication is available to him, but does not indicate whether he has pursued, or will pursue this path. Furthermore, since Petitioner is, in essence, alleging that the construction project contemplated by the Permit will violate the CAA requirement that major sources obtain PSD permits, there are options in the enforcement arena for addressing his concern, including exercising the right to bring a citizen suit under CAA §304(a)(3), 42 U.S.C. § 7604(a)(3), or requesting the Region to bring an action to enforce the CAA requirement to obtain a PSD permit. *See, e.g., CAA §§ 113(a)(5), 167, 42 U.S.C. §§ 7413(a)(5), 7477.*

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Denying Petition for Review in the matter of Alcoa-Warrick Power Plant, Appeal No. PSD 02-14 were sent to the following persons in the manner indicated:

By Certified Mail

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Dated: March 5, 2003

/s/

Annette Duncan
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