IN RE ROCKGEN ENERGY CENTER

PSD Appeal No. 99–1

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided August 25, 1999

Syllabus

On January 25, 1999, the Wisconsin Department of Natural Resources ("WDNR") issued a prevention of significant deterioration ("PSD") permit to RockGen Energy Center authorizing construction and operation of a 525-megawatt electric power generating facility to be located in the town of Christiana, Wisconsin.

Petitioner, Responsible Use of Rural and Agricultural Land ("RURAL"), seeks Board review on the following grounds: (1) WDNR's best available control technology ("BACT") analysis for nitrogen oxides ("NO_x") was clearly erroneous; (2) WDNR abused its discretion by failing to consider demand-side management alternatives to the construction of the facility; (3) WDNR's characterization of the facility as a "peak power generating facility," and its inclusion in the final permit of a continuous emission monitoring ("CEM") exemption provision, are inconsistent with certain regulations relating to the acid rain program; (4) the startup/shutdown provision in the final permit is not federally enforceable; and (5) WDNR failed to adequately reply to written comments on the draft permit or to explain changes to the draft permit.

Held: Review is granted and WDNR's permit decision is remanded as to the following issues:

• Permit condition I.C.8.a.(2) relating to conditions under which NO_x estimation procedures may be used in lieu of CEM, because the permit condition does not accurately reflect the language of the applicable regulations. (Section II.D)

• Permit condition I.C.12 relating to exceedances of the permit's emissions limitations during startup or shutdown of the facility, so that WDNR can make an on-the-record determination as to whether compliance with existing permit limitations is infeasible and, if so, what permit changes are appropriate to minimize excess emissions. If WDNR determines that compliance with the permit cannot be achieved during startup and shutdown despite best efforts, it should specify and carefully circumscribe in the permit the conditions under which RockGen would be permitted to exceed otherwise applicable emissions limits and establish that such conditions are nonetheless in compliance with applicable requirements, including national ambient air quality standards and increment provisions. Under such circumstances, a secondary PSD limit may also be considered, provided it is made part of the PSD permit and justified as BACT. In its revision of this permit condition (unless the revision merely strikes I.C.12 from the permit), WDNR must provide the pub-

lic with an opportunity to submit comments and file a petition for review with the Board in accordance with the procedures of 40 C.F.R part 124. (Section II.E)

•Given that the record is not clear as to whether there has been meaningful compliance with the requirement that the final permit determination be based on, *inter alia,* comments received during the public comment period, 40 C.F.R. § 124.18(b)(1), WDNR must demonstrate, to a greater degree than heretofore, that it has given, or will give, as the case may be, thoughtful and full consideration to all public comments before making the final permit determination. (Section II.F)

Review is denied as to the BACT determination issue and the demand-side alternatives issue, which were not properly preserved for review in accordance with applicable procedural requirements, and as to any other issues raised in the petition for review.

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

Opinion of the Board by Judge McCallum:

Before the Board is a petition seeking review of certain conditions of a prevention of significant deterioration ("PSD") permit issued by the State of Wisconsin's Department of Natural Resources ("WDNR").[1] The permit was issued to the RockGen Energy Center ("RockGen") for the construction and operation of a power generating facility. The Petitioner, Responsible Use of Rural and Agricultural Land ("RURAL"), argues that the Board should review the permit in this case because certain of the permit's conditions are clearly erroneous or involve important policy considerations warranting Board review.

I. *BACKGROUND*

The permit was issued on January 25, 1999, and would authorize RockGen to construct and initially operate a 525-megawatt ("MW") electric power generating facility (the "facility") in the town of Christiana, Dane County, Wisconsin. The proposed facility consists of three 175-MW simple-cycle combustion turbines that would operate on natural gas as a primary fuel and on low sulfur No. 2 fuel oil as a back-up. *See* RockGen

[1] WDNR administers the PSD program in Wisconsin pursuant to a delegation of authority from EPA. *See* 53 Fed. Reg. 18,983 (May 26, 1988). Because WDNR acts as EPA's delegate in implementing the federal PSD program within the State of Wisconsin, the permit is considered an EPA-issued permit for purposes of federal law and is subject to review by the Board pursuant to 40 C.F.R. § 124.19. *See In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121, 123 (EAB 1999); *In re West Suburban Recycling & Energy Ctr., L.P.,* 6 E.A.D. 692, 695 n.4 (EAB 1996) ("'For purposes of [p]art 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)).

Energy Center Environmental Impact Statement at vi (Oct. 1998) (Administrative Record ("AR") at 421). The facility is designated as a "peak power" generating facility with varying hours of operation (not to exceed 3,800 hours per year) depending on power demand.[2]

The public was given an opportunity to submit written comments on the draft permit between December 22, 1998, and January 22, 1999. In addition, WDNR held a public hearing on January 22, 1999. Several RURAL members, as well as others (including RockGen), submitted comments during the comment period and attended the hearing. *See* AR 988–1274. When the permit was issued on January 25, 1999,[3] WDNR prepared a memorandum summarizing some of the public comments received.[4] Thereafter, WDNR prepared two other documents summarizing and responding to comments.[5] These are discussed further below.

In its petition, as amended,[6] RURAL objects to the permit on five grounds. According to RURAL, the permit warrants Board review because: (1) WDNR's best available control technology ("BACT") analysis for

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[2] *See* WDNR, Analysis and Preliminary Determination for the Construction and Operation Permits for the Proposed Construction of the Construction [*sic*] of a Nominal 525 Peak Power Electric Generating Facility for RockGen Energy Center to be Located at Town of Christiana, Christina, Wisconsin at 2–3 (Dec. 18, 1998) (AR 722–23).

[3] WDNR failed to provide contemporaneous notice of permit issuance to interested parties at the time the permit was issued. WDNR later corrected this error by sending the final permit to petitioner on March 1, 1999. *See* WDNR, Notification of Action on Prevention of Significant Deterioration Permit 98–RV–150 (Mar. 1, 1999) (AR 1275–77) (stating, among other things, that any person who filed comments on the draft permit may file a petition for review with the Board within 30 days of service of the notification). The present petition was timely filed.

[4] *See* Memorandum from Raj Vakharia (the permit writer), WDNR, to Lloyd Eagan (Jan. 25, 1999) (AR 1019). On the same date, WDNR prepared a memorandum stating that it had received and reviewed comments from RockGen. Memorandum from Raj Vakharia, WDNR, to Dan Johnston, WDNR (Jan. 25, 1999) (AR 988). The memorandum further states that WDNR responded to comments from the facility by electronic mail and incorporated changes in response to these comments into the final permit. The memorandum attaches certain comments submitted by RockGen as well as WDNR's responses. AR 988–1018.

[5] *See* Memorandum from Raj Vakharia, WDNR, to Lloyd Eagan, WDNR (Jan. 28, 1999) (AR 1101); Memorandum from Raj Vakharia, to Lloyd Eagan (Mar. 1, 1999) (AR 1192).

Several changes were made to the draft permit in response to comments submitted by RockGen. *See* Memorandum from Raj Vakharia to Dan Johnston, re: Comments from RockGen Energy Center (Jan. 25, 1999) (AR 988–1018).

[6] The original petition was filed with the Board on April 5, 1999. On April 8, 1999, RURAL filed an amended petition correcting certain typographical errors. Amended Petition for Review ("Amended Petition").

nitrogen oxides ("NO_x") was clearly erroneous (Amended Petition at 4); (2) WDNR abused its discretion by failing to consider demand-side alternatives to the construction of the facility (*id.* at 16); (3) WDNR's characterization of the facility as a "peak power generating facility," and its inclusion in the final permit of a continuous emission monitoring ("CEM") exemption provision, are inconsistent with certain regulations relating to the acid rain program (*id.* at 22); (4) the startup/shutdown provision in the final permit is not federally enforceable (*id.* at 24); and (5) WDNR failed to adequately reply to written comments on the draft permit or to explain changes to the draft permit (*id.* at 26).

WDNR, RockGen, and the Public Service Commission of Wisconsin ("PSCW") filed responses in opposition to the Amended Petition for Review.[7] In addition to disputing the merits of the issues raised in the Amended Petition, WDNR, RockGen, and PSCW assert that certain issues raised in the Amended Petition were not raised during the comment period on the draft permit and therefore were not preserved for review with the Board. Thereafter, RURAL filed a consolidated reply to these responses. Petitioner RURAL's Consolidated Reply to Wisconsin Department of Natural Resources, RockGen, and Wisconsin Public Service Commission Responses to Amended Petition for Review ("RURAL's Consolidated Reply").[8]

II. *DISCUSSION*

A. *Standard of Review*

The Board's role in the PSD permitting process is to consider issues raised in petitions for review that pertain to the PSD program and that

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[7] *See* WDNR Response to Amended Petition for Review ("WDNR's Response"); RockGen Response to Amended Petition for Review ("RockGen's Response"); and Response of Public Service Commission of Wisconsin to Amended Petition for Review ("PSCW's Response"). The PSCW 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. PSCW's Response at 1. The CPCN for the proposed RockGen facility was issued on December 18, 1998.

[8] U.S. EPA's Office of General Counsel and Region V's Office of Regional Counsel, on behalf of the Office of Air and Radiation and Region V, have submitted an amicus brief in this matter. Amicus Brief of EPA Region V and EPA Office of Air and Radiation in Response to RURAL's Amended Petition for Review and the Response of WDNR and RockGen ("Amicus Brief") (June 11, 1999). WDNR opposes our consideration of the Amicus Brief. Upon consideration, EPA's motion to submit an amicus brief is granted and the brief has been incorporated into the record on appeal.

meet the threshold procedural requirements of the permit appeal regulations. 40 C.F.R. § 124.19; *In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121,126 (EAB 1999). The Board may grant review of a permit decision if some aspect of the decision involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a). In applying this standard, the Board is guided by language in the preamble to section 124.19 that states the "power of review should be only sparingly exercised," and "most permit conditions should be finally determined at the Regional [State] level." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord In re AES Puerto Rico L.P.,* 8 E.A.D. 324, 328 (EAB 1999). The petitioner bears the burden of demonstrating that review is warranted. *AES Puerto Rico,* 8 E.A.D. at 328.

In addition, as a prerequisite to obtaining review, a petitioner must have "raise[d] all reasonably ascertainable issues and submit[ted] all reasonably ascertainable arguments supporting [its] position by the close of the public comment period (including any public hearing) under § 124.10." 40 C.F.R. § 124.13; *In re Jett Black, Inc.,* 8 E.A.D. 353, 358 (EAB 1999); *In re Encogen Cogeneration Facility,* 8 E.A.D. 244, 249 (EAB 1999). The petition must include a demonstration that "any issues being raised [in a petition for review] were raised during the public comment period (including any public hearing)." 40 C.F.R. § 124.19. As the Board has previously explained, "[t]he effective, efficient and predictable administration of the permitting process demands that the permit issuer be given the opportunity to address potential problems with draft permits before they become final." *Encogen,* 8 E.A.D. at 249–50. "In this manner, the permit issuer can make timely and appropriate adjustments to the permit determination, or, if no adjustments are made, the permit issuer can include an explanation of why none are necessary." *In re Essex County (N.J.) Resource Recovery Facility,* 5 E.A.D. 218, 224 (EAB 1994) (quoting *In re Union County Resource Recovery Facility,* 3 E.A.D. 455, 456 (Adm'r 1990)). Any issues not previously raised may not be raised on appeal except to the extent that these issues were not reasonably ascertainable or concern changes from the draft to the final permit decision. 40 C.F.R. § 124.19(a). In the present case, RURAL has failed in some instances to establish that issues on which it now seeks review were raised during the public comment period or were not reasonably ascertainable at that time.

B. *BACT Determination*

The Clean Air Act ("CAA") established the PSD program to regulate air pollution in certain areas, known as "attainment" areas, where air quality meets or is cleaner than the national ambient air quality standards ("NAAQS"), as well as in unclassifiable areas that are neither "attainment" nor "non-attainment."[9] CAA §§ 160–169, 42 U.S.C. §§ 7470–7479; *see In re Maui Elec. Co.,* 8 E.A.D. 1, 4 (EAB 1998). The statutory PSD provisions are carried out through a regulatory process that requires preconstruction permits for new major stationary sources, such as RockGen's proposed facility. *See* 40 C.F.R. § 52.21.

The CAA and the PSD regulations require, among other things, that new major stationary sources and major modifications of such sources employ the "best available control technology" to minimize emissions of regulated pollutants. CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 52.21(j)(2). The PSD regulations define BACT in part as follows:

> *Best available control technology* means an emissions limitation * * * based on the maximum degree of reduction for each pollutant subject to regulation under [the CAA] which would be emitted from any proposed major stationary source * * * which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source * * *.

40 C.F.R. § 52.21(b)(12). Under the rules governing the PSD permitting process, the permit applicant is responsible for proposing an emissions limitation that constitutes BACT for each regulated pollutant and for providing information on the control alternatives that can be used to achieve it. 40 C.F.R. § 52.21(n)(1)(iii). The ultimate BACT decision is made by the permit-issuing authority.

In making BACT determinations, permit issuers frequently rely on a guidance document issued by the Agency in 1990. *See* U.S. EPA, New

[9] The proposed site of the facility is in an area that is attainment for pollutants for which NAAQS have been established. RockGen Energy Center Environmental Impact Statement at 19 (AR 436). The NAAQS are "maximum concentration 'ceilings' measured in terms of the total concentration of a pollutant in the atmosphere." U.S. EPA, New Source Review Workshop Manual C.3 (draft Oct. 1990). NAAQS have been set for six criteria pollutants: sulfur dioxide, particulate matter, NO_x, carbon monoxide, ozone, and lead. *See* 40 C.F.R. §§ 50.4–50.12.

Source Review Workshop Manual (draft Oct. 1990) ("NSR Manual").[10] Under the process set forth in the NSR Manual, the permit issuers use a "top down" method for determining BACT:

> The top-down process provides that all available control technologies be ranked in descending order of control effectiveness. The PSD applicant first examines the most stringent—or "top"—alternative. That alternative is established as BACT unless the applicant demonstrates, and the permitting authority in its informed judgment agrees, that technical considerations, or energy, environmental, or economic impacts justify a conclusion that the most stringent technology is not "achievable" in that case.

NSR Manual at B.2.[11]

In the present case, to meet the emissions limitation representing BACT for NO_x, the permit requires the use of Dry Low NO_x Burners ("DLN") when the facility is burning natural gas and a water injection system when the facility is burning fuel oil. WDNR states that it followed the "top-down" method discussed above in reaching this determination. WDNR Response at 3, 11. Under this approach, WDNR maintains that it eliminated Selective Catalytic Reduction ("SCR") technology as BACT to control NO_x emissions when the facility is burning natural gas because WDNR determined that conventional SCR technology was not technically

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[10] Although the NSR Manual is not a binding rule, we have looked to it as a statement of the Agency's thinking on certain PSD issues. *AES Puerto Rico,* 8 E.A.D. at 331 n.8.

[11] As the Board explained in *Maui Elec. Co.,* 8 E.A.D. at 5–6, the NSR Manual provides for a five-step procedure for implementing the top-down analysis. The first step is to identify all "available" control options. NSR Manual at B.5. (The term "available" is defined as "those air pollution control technologies or techniques with a practical potential for application to the emissions unit and the regulated pollutant under evaluation." *Id.*) The second step is to eliminate "technically infeasible" options. *Id.* at B.7. This involves first determining for each technology whether it is "demonstrated," which means that it has been installed and operated successfully elsewhere, and if not demonstrated, then whether it is "available" and "applicable." (The term "available" in this context refers to whether the technology is commercially available. *Id.* at B.17. An available technology is considered to be "applicable" if it can be installed and operated on the source under consideration. *Id.*) Technologies identified in step one but that are not demonstrated and either not available or not applicable are eliminated under step two from further analysis. The third step of the BACT analysis is to list the remaining options (not eliminated in step two) in order of stringency, with the most stringent option listed first. *Id.* at B.7. In step four, energy, environmental, and economic impacts are considered and the top alternative is either confirmed as appropriate or is determined to be inappropriate. *Id.* at B.29. Finally, under step five, the most effective control alternative not eliminated in step four is selected as BACT. *Id.* at B.53.

feasible for this facility. *Id.* at 3–5; AR 732–34. In its petition, RURAL asserts that WDNR's elimination of SCR technology during the BACT analysis was erroneous. Similarly, RURAL asserts that the selection of water injection rather than SCR to control NO_x when the facility is burning fuel oil was erroneous. Amended Petition at 5.

WDNR and RockGen (referred to collectively as "respondents") urge the Board to dismiss RURAL's assertions in this regard because, according to respondents, this issue was not raised during the comment period and thus was not preserved for review with the Board. RURAL disputes this assertion, citing to various portions of the administrative record where it alleges the issue was raised. For the following reasons we agree with respondents that because the issue of whether SCR should have been selected as BACT was reasonably ascertainable[12] but was not raised during the comment period, the issue was not preserved for review by the Board.

In support of its assertion that this issue was raised during the comment period, RURAL cites to comments submitted by two RURAL members, Mr. Rod Clark and Mr. Fred Redford. RURAL's Consolidated Reply at 4. During the public comment period, Mr. Clark raised three questions concerning DLN: (1) whether DLN technology was currently being applied to combustion turbines of the size proposed by RockGen; (2) how many facilities similar to RockGen were currently utilizing DLN technology and what kind of performance information was available; and (3) what chemicals are used with DLN technology. Memorandum from Raj Vakharia, WDNR, to Lloyd Eagan, WDNR, at 3 (Mar. 1, 1999) ("March 1st Memo") (AR 1192, 1193).[13] While Mr. Clark's comments raise certain

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[12] Public notice of the proposed permit determination was published on December 22, 1998, and the draft permit as well as relevant documents (including the preliminary BACT determination) were made available for public review at the WDNR Bureau of Air Management Headquarters in Madison, Wisconsin, and at the Dane County Library Service. AR 865–66, 873–75. RURAL does not allege, nor does the record reflect, that the public was unable to obtain access to relevant information during the comment period.

[13] WDNR responded to these questions as follows:

Answer to Question #1:

Currently [DLN] combustor technology is available and being used on the combustion turbines (similar in size to the one being proposed by RockGen Energy Center) that are operating in the combined cycle mode operation. For example the LS Power Co-Gen facility in Whitewater, Wisconsin. General Electric expects the 185 MW combustion turbine * * * to become commercially available in 1999.

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questions regarding the selection of DLN technology, nowhere do they suggest that the BACT analysis was erroneous because WDNR failed to select SCR over DLN as BACT for NO_x.

RURAL also states that during the public hearing Mr. Redford raised similar questions about the use of DLN technology. In particular, Mr. Redford stated, in part, that "looking only at DLN burners and meeting Clean Air Act requirements is a narrow vision. * * * DLN burners have not been widely tested." Memorandum from Raj Vakharia, WDNR, to Lloyd Eagan, WDNR, at 3 (Jan. 28, 1999) (AR 1103). As with Mr. Clark's comments, however, we find nothing in the above-quoted comments arguing the point now posited—that WDNR's BACT analysis was flawed because it failed to select SCR over DLN for control of NO_x.

RURAL also points to Mr. Redford's written comments, which, according to RURAL, specifically mention SCR technology as an alternative to DLN combustors. These comments state, in pertinent part:

> No matter how much we talk about selective catalytic reductions, using lanthium, titanium, or xerolite as catalysts or Dry NO_x Reduction, * * * the fact still remains: the amount of emissions from this project is still more than being emitted from that piece of land at present which is ZERO!

Testimony of Fred Redford: Air Permit Hearing (Jan. 22, 1999) (Exhibit D to Amended Petition). Contrary to RURAL's assertion, this comment does

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Answer to Question #2:

There are few facilities who have installed simple combustion turbines, 83 MW, that have [DLN] combustor technology. The BACT/LAER clearinghouse information provides the names of the facilities that have been permitted to construct simple cycle combustion turbines having [DLN] combustors. Also the BACT/LAER Clearinghouse information provides the dates the PSD permits were issued by the appropriate State Agencies. These similar turbines have been able to meet a NO_x emission limit of 9 ppmdv at 15% 0_2.

The BACT/LAER Clearinghouse information was shared with Mr. Clark after the hearing was concluded.

Answer to Question #3:

There are no chemicals being used in the [DLN] technology.

March 1st Memo at 3.

not state that WDNR erred in its selection of DLN. Rather, it states that regardless of what technology is selected, emissions will be greater than if the facility were not built. Since it does not advocate the relative merits of SCR over DLN, this comment is unrelated to the issue RURAL seeks to raise on appeal, and thus does not preserve the issue for review.

Finally, RURAL points out that in responding to various comments, WDNR referred "repeatedly" to the BACT analysis conducted for this facility. Thus, according to RURAL, by virtue of WDNR's response to comments, WDNR tacitly recognized "that these comments relate directly to the Department's BACT analysis." RURAL's Consolidated Reply at 4. We find this argument unpersuasive. There is nothing in WDNR's response to comments to suggest that the comments were somehow addressing the relative merits of SCR over DLN. The fact that a permitting authority responds to a specific question regarding DLN control technology by referring to the BACT analysis does not mean that all questions relative to the BACT analysis may be raised in a petition for review. *See Maui Elec. Co.*, 8 E.A.D. at 12 (mere reference to a previously issued permit for a different facility was insufficient to apprise the permit issuer that the permittee sought to challenge the draft permit's conditions for controlling [sulfur dioxide emissions] based on an alleged inconsistency with the previously issued permit); *see also In re Florida Pulp & Paper Assoc.,* 6 E.A.D. 49, 54–55 (EAB 1995) (comment regarding one aspect of testing of sludge required by a Clean Water Act permit was not sufficient to preserve for appeal the general question of authority to require any sludge testing); *In re Amoco Oil Co.,* 4 E.A.D. 954, 975 (EAB 1993) (argument regarding whether the EPA needed information that was required to be provided as a RCRA permit condition was not preserved for review where comment only raised issue regarding burden of proving the information); *In re Pollution Control Indus. of Ind., Inc.,* 4 E.A.D. 162, 166–69 (EAB 1992) (comments on two particular aspects of testing requirement of a Resource Conservation and Recovery Act permit were not sufficient to raise general objection to any testing requirement).

In the present case, although commenters raised certain questions regarding DLN technology, nothing in the comments suggests that WDNR's elimination of SCR during the BACT analysis was erroneous; nor did anyone claim that DLN was not BACT. Further, upon examination of the record before us, we have found no comments (nor does the Amended Petition cite to any) asserting that the WDNR erroneously selected water injection rather than SCR as BACT for control of NO_x when the facility is burning fuel oil rather than natural gas. Accordingly, this issue will not be considered as a basis for review of the permit now before us.

C. *Demand-Side Alternatives*

RURAL asserts that WDNR abused its discretion by failing to consider demand-side management ("DSM") alternatives as part of its BACT analysis or at some other stage of the permitting process before issuing the permit in this case. Amended Petition at 16–21. RURAL states:

> Energy conservation and load management are "demand-side" alternatives to "supply-side" electric generating facilities. Demand-side alternatives (e.g., high efficiency motors, appliances, lighting, *etc*.) are simply alternative "production processes * * * methods, systems and techniques" for meeting consumers' energy service needs. 42 U.S.C. § 7479(3) and 40 C.F.R. § 52.21(b)(12). Air emissions are reduced when demand-side "nega-watts" are substituted for megawatts generated by burning gas or oil in facilities like the proposed RockGen project.

Amended Petition at 17. Because this issue was reasonably ascertainable but was not raised during the comment period, it was not preserved for review.

In attempting to demonstrate that this issue was raised during the comment period, RURAL refers the Board to the testimony of Mr. Chris Deisinger during the public hearing. In that testimony, Mr. Deisinger stated, in pertinent part:

> RURAL is objecting to the decision to substitute an accelerated review by the [PSCW] and the [WDNR] for the customary [Wisconsin Environmental Policy Act] process, which has prevented the exploration of potentially significant environmental impacts of the proposed project and all reasonable alternatives.

Testimony of Chris Deisinger, on behalf of RURAL at 1 (AR 1039). According to RURAL, the term "reasonable alternatives" must refer to DSM. Specifically, RURAL states that "[s]ince, in a thermodynamic sense, DSM is ultimately the only real alternative to a power plant—it is clear that Mr. Deisinger's comments about alternatives were, in large part, about DSM." Consolidated Reply at 7. We reject this argument for two reasons.

First, the comment is principally objecting not to WDNR's failure to consider any specific alternatives, but to the accelerated permitting procedures being applied in this case. Thus, it is far from clear that the comment was intended to address consideration of DSM. And second, the

term "alternatives," as used here, is too broad to enable the permitting authority to meaningfully react. Apart from DSM, the term could just as easily refer to any number of variations of the project as proposed (e.g., the selection of an alternative site). Indeed, in a footnote to the above-quoted statement in RURAL's Consolidated Reply regarding the meaning of the term "alternatives," RURAL states that "[i]n addition to DSM, Mr. Deisinger's remarks about alternatives were almost certainly intended to convey concern about the state regulatory agencies' failure to consider alternative * * * sites for the plant." RURAL's Consolidated Reply at 7 n.3. Thus, RURAL itself concedes that the term does not focus attention on DSM.[14]

RURAL also asserts that the comments of a Dane County Board Supervisor, Mr. Bob Salov, addressed the DSM issue by criticizing the size of the proposed facility. Consolidated Reply at 8. Mr. Salov states, in pertinent part, that the capacity of the facility is three times greater than the identified need. (AR 1037). This comment, however, does not address WDNR's alleged failure to consider DSM. If anything, the comment suggests that the generating capacity of the plant should be scaled back because it exceeds existing need, not that, with the use of DSM, the existing need can be otherwise addressed. Indeed, this is precisely how the comment was interpreted by WDNR, which responded as follows:

> The [WDNR] does not have any regulatory authority to dictate how many Megawatts of capacity should be built. Energy capacity and electric need issues are regulated and approved by the Public Service Commission independently of [WDNR] regulatory authority and approvals. The Department does and has ensured in its review that the proposed power plant meets all applicable criteria for permit approval * * *.

Memorandum from Raj Vakharia, WDNR, to Lloyd Eagan, WDNR at 4 (Mar. 1, 1999) (AR 1192, 1194).

At a minimum, commenters must present issues with sufficient specificity to apprise the permit issuing authority of the issues raised. Absent such specificity, the permit issuer cannot meaningfully respond to

[14] We note further that in its Amended Petition, RURAL states that it has filed a State appeal of what RURAL characterizes as "numerous" deficiencies in the Environmental Impact Statement ("EIS") prepared by WDNR and PSCW. Amended Petition at 16; RURAL's First Amended Petition for Review, before the State of Wisconsin Circuit Court Branch 9, ("State Appeal") (Exhibit M to Amended Petition). In the section of the State Appeal in which RURAL asserts that the EIS failed to consider reasonable alternatives, the only example of such an alternative that RURAL provides is the consideration of an alternative site for construction of the facility. State Appeal at 6.

comments. *See In re Spokane Regional Waste-to-Energy,* 2 E.A.D. 809, 816 (Adm'r 1989) ("Just as 'the opportunity to comment is meaningless unless the agency responds to significant points raised by the public,' * * *, so too is the agency's opportunity to *respond* to those comments meaningless unless the interested party clearly states its position.") (quoting *Northside Sanitary Landfill, Inc. v. Thomas,* 849 F.2d 1516, 1520 (D.C. Cir. 1988)) (internal citations omitted).

Under the circumstances of this case, we conclude that the issue of whether WDNR's permit decision was erroneous because it allegedly failed to consider DSM, was not raised with sufficient specificity during the comment period and thus was not preserved for review by the Board. Moreover, the Amended Petition fails to include the required "demonstration that any issues being raised were raised during the public comment period." 40 C.F.R. § 124.19(a). Review is therefore denied on this issue.[15]

D. *Characterization of the Facility as a "Peaking Unit"*

RURAL asserts that the permit improperly characterizes the facility as a "peaking unit." According to RURAL:

> In the CAA context, peaking unit is a term of art with a very specific meaning. It is wholly inappropriate for a PSD permit that authorizes a facility to operate for up to 3800 hours per year to characterize that facility as a "peak power generating facility."

Amended Petition at 23. RURAL points out that the acid rain regulations define "peaking unit" as a unit that has:

> (i) An average capacity factor of no more that 10.0 percent during the previous three calendar years and
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> (ii) A capacity factor of no more than 20.0 percent in each of those calendar years.

40 C.F.R. § 72.2. Under the acid rain provisions, a facility that fails to meet the above-quoted definition of a peaking unit is required to install a NO_x continuous emission monitoring ("CEM") system. 40 C.F.R. § 75.12(a). A "peaking unit," on the other hand, may, in lieu of complying with CEM

[15] We note that in its Amicus Brief, the Agency argues that this issue was preserved for review. Amicus Brief at 17 n.5. For the reasons stated above, however, we disagree.

requirements, provide information regarding NO_x emissions by estimating the hourly NO_x emission rate using a procedure specified in the regulations. 40 C.F.R. § 75.12(c).

The CAA acid rain and PSD provisions are separate programs under the Act.[16] Notwithstanding their separate statutory origins, a state may choose to implement certain aspects of the acid rain program in conjunction with the issuance of the PSD permit.[17] WDNR did so in this instance by adding the following acid rain provision to the PSD permit at the suggestion of RockGen:[18]

> (2) * * * NO_x estimation procedures may be used in lieu of CEM for determining the average NO_x emission rate and hourly NO_x emission rate as long as the unit's operation does not exceed either of the following criteria:
>
> (a) The electrical output does not exceed 328,224 megawatt-hours in any calendar year (20 percent of the unit nameplate capacity of 187.3 MW times 8760 hours per year);
>
> (b) The electrical output does not exceed 492,224 megawatt-hours in any three consecutive years (10 percent of the unit nameplate capacity of 187.3 MW times 8760 hours per year times three years).

Permit Condition I.C.8.a.(2)(a)–(b) (AR 978). According to WDNR, this provision accurately reflects the above-mentioned provisions of the acid rain program and "actually made the [PSD] permit more stringent." WDNR Response at 15.

In objecting to the specifics of this permit condition, RURAL states that a more restrictive definition of "peaking unit" was added to the acid rain provisions in what is referred to as the NO_x State Implementation Plan ("SIP") rule. *See* 63 Fed. Reg. 57,356 (Oct. 27, 1998). Under this rule, certain states, including Wisconsin, were required to submit SIP revisions by September 30, 1999, containing provisions "adequate to prohibit

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[16] *Compare* CAA §§ 160–169, 42 U.S.C. §§ 7470–7479 (Prevention of Significant Deterioration of Air Quality), *with* CAA §§ 401–416, 42 U.S.C. §§ 7651–7651o (Acid Deposition Control).

[17] The State of Wisconsin has been authorized to implement the acid rain program. *See* 60 Fed. Reg. 12,128 (Mar. 6, 1995).

[18] *See* E-Mail message from RockGen to WDNR (Jan. 25, 1999) (AR 937A).

sources in those states from emitting NO_x in amounts that contribute significantly to nonattainment in, or interfere with maintenance by, a downwind State." *Id.* at 57,358. As, however, the SIP requirements of this rule have been stayed by the United States Court of Appeals for the District of Columbia, we need not address this issue. *See Michigan v. EPA,* No. 98–1497 (D.C. Cir. May 25, 1999).

Upon examination of the permit condition I.C.8.a.(2), however, we conclude that it does not accurately reflect the language of the acid rain regulation that it purports to implement. In order to be considered a "peaking unit" and use procedures for estimating hourly NO_x emissions in lieu of complying with CEM requirements, a unit must meet the definition of a peaking unit at 40 C.F.R. § 72.2. That section states that a peaking unit must have an "*average* capacity factor of no more than 10.0 percent during the previous three calendar years." 40 C.F.R. § 72.2 (emphasis added). The language in RockGen's final permit, however, states that NO_x estimation procedures may be used where electrical output does not exceed 10 percent of capacity "in *any* three consecutive years." Permit Condition I.C.8.a.(2)(b) (AR 978) (emphasis added). This language departs from the language of the regulations and, in so doing, creates an ambiguity that should be resolved before the permit becomes effective.

The permit language is ambiguous in that it can be interpreted as being either more stringent or less stringent than the applicable regulation. That is, this language could be interpreted as prohibiting electrical output from ever exceeding 10 percent over a three-year period. Such an interpretation would make the permit more stringent than the above-quoted regulatory provision, which states that *average* electrical output may not exceed 10 percent of capacity, whereas annual electrical output may be as high as 20 percent in any single year. On the other hand, this language could also be interpreted as less stringent than the regulation. Specifically, as currently worded, the permit allows the permittee to pick any three-year period as a reference point rather then the "previous three calendar years" required by the rule. Under these circumstances, the permit is remanded to WDNR for appropriate revisions.[19]

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[19] We note that because the disputed permit provision implements a requirement of the acid rain program, had WDNR omitted this provision entirely it would not have affected the validity of the PSD permit. While it is not the Board's role to initiate inclusion of acid rain requirements in a PSD permit while exercising its authority under 40 C.F.R. § 124.19, once a state permit-issuing authority has taken steps to include an acid rain provision in a PSD permit, the Board may then exercise plenary authority over the PSD permit to ensure that any non-PSD requirements do not jeopardize the integrity of the PSD permit *qua* permit.

E. *Startup/Shutdown Provisions*

Permit condition I.C.12 allows RockGen to exceed the permit's emission limitations "if the emissions are temporary and due to startup or shutdown of operations carried out in accord with a plan and schedule approved by the Department. (s. NR 436.03(2)(b) Wis. Adm. Code)."[20] Permit Condition I.C.12.a.(1) (AR 981). In addition, this provision states:

> If the permittee plans to submit a startup and shutdown plan and schedule, the permittee shall submit the plan and schedule to the Department, South Central Region, no later than 4 months prior to initial operation of the facility. If the plan is approved by the Department, the permittee shall thereafter comply with the conditions, schedules, reporting, recordkeeping and all other requirements in the approved plan.

Permit Condition I.C.12.b (AR 981).

RURAL asserts that the Board should invalidate this condition because it is not federally enforceable. In particular, RURAL states:

> As drafted, the RockGen final permit allows the permittee to seek a custom startup and shutdown plan outside of the PSD permitting process. There is no indication that such a plan would be subject to federal review and approval—and, consequently, the terms of such a plan would not appear to be federally enforceable. On its face, permit condition I.C.12 violates the basic requirement that all emission limitations in a PSD permit must be federally enforceable.

Amended Petition at 25. Thus, according to RURAL, WDNR erred in including this provision in the final permit. *Id.*

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[20] The cited provision of the Wisconsin Administrative Code states, in part:

> Exceptions in excess of emission limitations set in chs. NR 400 to 499 may be allowed in the following circumstances: * * * (b) When emissions in excess of the limits are temporary and due to scheduled maintenance, startup or shutdown of operations carried out in accord with a plan and schedule approved by the department.

Wis. Admin. Code § 436.03(2)(b) (1999).

In response, WDNR states that the disputed permit condition is authorized under Wisconsin law and is necessary in the present case. According to WDNR:

> It may not be technically feasible to comply with all of the stringent BACT emission limits during startup and shutdown of a combustion turbine. For example, all of the BACT emission limits in the Permit require that the Facility operate at not less than 50% load. Clearly, while the Facility is starting up and shutting down it cannot comply with the "50% load" BACT emission limit. Other emission limits which *may* be exceeded during startup and shutdown are the limits for CO, NO_x and visible emissions. Any combustion source operating at low loads has difficulty satisfying stringent emission limitations for those emissions that are directly related to the quality of combustion, namely CO, NO_x and visible emissions. In general, combustion proceeds efficiently when there is ample time for the combustion reactions to occur, when furnace temperatures are high enough throughout the furnace to get the reactions to go thermodynamically, and when there is sufficient mixing to bring reactants together and, thereby, sustain the combustion process. When a combustion source is barely operating, for example at startup and shutdown, the combustion process is not efficient. At such times, the furnace temperatures are both considerably lower than at design conditions and unevenly distributed throughout the furnace volume. Gas flow rates at these conditions are also much lower than at design conditions. Consequently, the flames are not ideal, resulting in elevated CO emissions due to incomplete combustion. For this same reason the visible emissions may also be elevated. It is also possible for NO_x emissions to be elevated during startup and shutdown as a consequence of, for example, excessive combustion air levels in the furnace.

WDNR Response at 17–18. With regard to the enforceability of any start-up/shutdown plan approved by the state, WDNR states that because the permit provides that RockGen must comply with the approved plan, the plan would be enforceable by both the state and EPA. *Id.* at 19. Upon consideration, we conclude that the permit must be remanded on this issue.

While it may be true that emission limitations are likely to be exceeded during startup and shutdown, EPA guidance indicates that such exceedances are common and can be reduced or eliminated with careful planning.[21] In particular, EPA guidance states, in part, that:

> Startup and shutdown of process equipment are part of the normal operation of a source and should be accounted for in the planning, design and implementation of operating procedures for the process and control equipment. Accordingly, it is reasonable to expect that careful and prudent planning and design will eliminate violations of emission limitations during such periods.

Rasnic Memo at 2; *see also* 1983 Bennett Memo at 1; 1982 Bennett Memo attachment at 1.

WDNR, citing the Rasnic Memo, acknowledges that "normal operations [of the facility] necessarily include startup and shutdown." WDNR Response at 18. In addition, WDNR has acknowledged that during startup and shutdown, emissions may exceed permit requirements. Nevertheless, it does not appear from the record before us that WDNR gave sufficient consideration to design or other possible changes to the proposed facility to address this issue. On the contrary, it appears as if the disputed permit provision was added as an afterthought in response to language suggested by RockGen four days before the permit was issued. *See* AR 989.

Although RockGen is required to comply with the provisions of a plan to be approved by WDNR at a later date, there is no provision for the plan itself to be subject to the public notice and review requirements of 40 C.F.R. § 52.21 and part 124. The provision authorizing the plan does not specify what conditions might be included in a plan or indicate what criteria the State will use in approving the plan. Thus, although the permit appears to contemplate that emissions in excess of the limits established in the permit may well occur during startup and shutdown, it does not appear as if WDNR gave sufficient consideration to appropriate measures to minimize or eliminate such emissions. As currently drafted, the

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[21] *See,* e.g., Memorandum from John B. Rasnic, Director, Stationary Source Compliance Division, Office of Air Quality Planning and Standards, U.S. EPA, to Linda M. Murphy, Director, Air, Pesticides and Toxics Management Division, U.S. EPA Region I (Jan. 28, 1993) ("Rasnic Memo"); Memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation, U.S. EPA, to Regional Administrators, Regions I–X (Feb. 15, 1983) ("1983 Bennett Memo"); Memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation, U.S. EPA, to Regional Administrators, Regions I–X (Sept. 28, 1982) ("1982 Bennett Memo").

permit "could effectively shield excess emissions arising from poor operation and maintenance or design, thus precluding attainment." Rasnic Memo at 2.[22]

Under these circumstances, we conclude that the permit provision must be remanded to WDNR. On remand WDNR must reconsider and revise this provision. In particular, if WDNR intends to include such a provision, it must make an on-the-record determination as to whether compliance with existing permit limitations is infeasible during startup and shutdown, and, if so, what design, control, methodological or other changes are appropriate for inclusion in the permit to minimize the excess emissions during these periods.[23] In so doing, the State may also require that once the facility is operational any permit provisions designed to reduce emissions during startup and shutdown be refined over time so as to increase their efficiency and effectiveness. *See,* e.g., *In re Hadson Power 14—Buena Vista,* 4 E.A.D. 258, 291 (EAB 1992) (acknowledging permit provision requiring review of NO_x emission limitation prior to issuance and each renewal of an operating permit, and stating that "[w]e would expect that if the performance of [the facility] * * * demonstrates the achievability of a more stringent emission limitation, the current limit will be reconsidered and adjusted appropriately."); *In re Pennsauken County, N.J. Resource Recovery Facility,* 2 E.A.D. 768, 771 (Adm'r 1989) (noting the addition of an optimization clause in the permit requiring the State to minimize emissions of NO_x and ammonia based on tests conducted after permit issuance). If WDNR determines that compliance with the permit cannot be achieved during startup and shutdown despite best efforts, it should specify and carefully circumscribe in the permit the conditions under which RockGen would be permitted to exceed otherwise applicable emissions limits and establish that such conditions are nonetheless in compliance with applicable requirements, including NAAQS and increment provisions. Under such circumstances, a secondary PSD limit may also be considered, provided it is made part of the PSD permit and justified as BACT. In its revision of this permit condition (unless the revision merely strikes I.C.12 from the permit), WDNR

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[22] We also note, as the Agency states in its Amicus Brief, that "there is no assurance that the establishment of [a startup and shutdown plan] will be subject to the public notice and review requirements of 40 C.F.R. §§ 52.21 and 124." Amicus Brief at 13. The Agency states further, and we agree, that the permit provision improperly allows for modification outside of the PSD permitting process. *Id.*

[23] Mandating the consideration of such design and other changes to address excess emissions is consistent with the definition of BACT in the PSD regulations, which requires, among other things, an emissions limitations that the Administrator determines is achievable "through application of production processes or available methods, systems, and techniques * * * for control of such pollutant." 40 C.F.R. § 52.21(b)(12).

must provide the public with an opportunity to submit comments and file a petition for review with the Board in accordance with the procedures of 40 C.F.R part 124.

F. *Response to Comments*

RURAL asserts that WDNR failed to adequately respond to comments submitted during the comment period as required by 40 C.F.R. § 124.17(a). Amended Petition at 26. That section requires states to issue a response to comments when a final permit is issued. The response must, among other things, briefly describe and respond to all significant comments raised during the comment period or the public hearing and be made available to the public. 40 C.F.R. § 124.17(a)(2), (c). RURAL states that WDNR did not issue a publicly available response document when the permit was issued on January 25, 1999. According to RURAL, the only publicly available document containing responses prepared by WDNR was dated January 28, 1999, three days after the permit was issued. *See* Memorandum from Raj Vakharia, WDNR, to Lloyd Eagan, WDNR (Jan. 28, 1999) ("January 28th Memo") (AR 1101). It further asserts that a later document, dated March 1, 1999, containing responses to comments was never found among the documents in the administrative record whenever it conducted periodic searches of WDNR's RockGen files from early February through mid-March. See Memorandum from Raj Vakharia, WDNR, to Lloyd Eagan, WDNR (Mar. 1, 1999) ("March 1st Memo") (AR 1192). As to the March 1st Memo, it asserts that "RURAL's experience suggests that the document may not have been 'publicly available,' as required by 40 C.F.R. § 124.17(c)." RURAL'S Consolidated Reply at 19–20.

In response to RURAL's petition, WDNR states that it adequately responded to all significant public comments. In particular, WDNR cites to three documents in support of its contentions. These are: (1) a January 25, 1999 memorandum purporting to summarize and respond to public comments;[24] (2) the January 28th Memo, which responded to selected questions raised at the public hearing and to comments made by four RockGen representatives; and (3) the March 1st Memo responding to all significant comments, including those made by opponents and supporters of the proposed facility. WDNR asserts that, taken together, these three documents satisfied WDNR's obligation to adequately respond to public comments and that these documents were available to the petitioner as part of the permit record.

[24] Memorandum from Raj Vakharia, WDNR, to Lloyd Eagan, WDNR (Jan. 25, 1999) ("January 25th Memo") (AR 1019).

Based on our examination of the administrative record submitted by WDNR, it is clear that WDNR failed to issue a complete response to comments at the time the permit was issued as required by the regulations. The only document issued contemporaneously with the permit was the January 25th Memo. Although this memorandum appears to summarize the bulk of the public comments, it does not actually respond to those comments despite the fact that it expressly states that it contains summaries of "the Department's responses to the comments." Thus, there is no verifiable indication in the administrative record submitted to the Board that WDNR actually considered these comments either before or at the time it made its final permit determination. In its January 28th Memo, WDNR revised the January 25th Memo to include summaries of comments submitted by four representatives of RockGen. The January 28th Memo also summarizes and responds to three questions raised by an opponent of the project at the public hearing and briefly responds to those questions. As far as we can determine from the administrative record, this is the first occasion on which WDNR offered responses of any kind to any public comments, yet this effort is incomplete inasmuch as it fails to respond to the other commenters. The March 1st Memo is also a revision of the January 25th Memo but, in this instance, makes good with its representation of responding to public comments. The Memo includes responses to comments referenced in both the January 25th and January 28th Memos.

Given the state of the record on appeal, it is not clear to us that there has been meaningful compliance with the requirement that the final permit decision be based on the administrative record, which includes comments received during the public comment period. *See* 40 C.F.R. §§ 124.18(a), (b)(1). The fact that there was no response to comments in the record on January 25, 1999, combined with a delay of over a month before the required response surfaced in the March 1st Memo, creates at least the appearance of WDNR not giving consideration to the public's comments before the permit was actually issued. In addressing a similar issue regarding the failure of the Agency to timely respond to comments on a federally issued Resource Conservation and Recovery Act permit, the EPA Administrator stated:

> One purpose of requiring the Region to issue a response to comments at the time of permit issuance is to insure that such comments are given serious consideration during the course of the permit-writing process. If the Region prepares a response to comments after it has already made its final permit decision, it runs the risk that the comments will not be considered with an open mind but instead with an eye toward defending the decision.

In re Atochem N. Am., Inc., 3 E.A.D. 498, 499 (Adm'r 1991). Although *Atochem* involved a permit issued by an EPA regional official rather than a state agency, we think the concerns expressed in *Atochem* apply in this case. The rules providing for public comments and requiring that the permit issuer respond to those comments contemplate that the permit issuer will be informed by and give serious consideration to public comments. From the record before us, a reasonable basis exists for doubting that this occurred.

Under these circumstances, this matter must be remanded to WDNR so it can demonstrate, to a greater degree than heretofore, that it has given, or will give, as the case may be, thoughtful and full consideration to all public comments before making the final permit determination. *See In re West Suburban Recycling & Energy Ctr., L.P.,* 6 E.A.D. 692, 710–11 (EAB 1996) (remanding PSD permit determination and requiring that state permit-issuing authority comply with permit decision process under part 124). We take this action even though it does not appear as if RURAL has suffered any particularized prejudice from WDNR's failure to timely respond to comments. Indeed, RURAL does not allege, and the record does not reflect, that RURAL has been denied the opportunity to seek review on any issue. Further, given the fact that WDNR asserts in its brief on appeal that it fully responded to and considered all comments received during the comment period, WDNR Response at 20–21, it may be that a remand on this basis will not result in any change in WDNR's permit determination. Nevertheless, in order to ensure that the permit issuer complies with the requirement to give adequate and timely consideration to public comments, we believe a remand is appropriate on this issue. The Clean Air Act states that the PSD provisions of the statute are designed "to assure that any decision to permit increased air pollution * * * is made only after consideration of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process." CAA § 160(5), 42 U.S.C. § 7470(5). The failure of WDNR to comply fully with the public participation requirements of the regulations implementing this statutory requirement, combined with a reasonable perception from the record that WDNR may not in fact have given consideration to the public's comments beforehand, undermines the statutory objective and should be rectified.

Accordingly, on remand, WDNR must reconsider its decision in light of the comments received, 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. Any person who participated during the public comment period will then have

an opportunity to file an appeal with the Board on any issues raised during the comment period in accordance with the requirements of 40 C.F.R. part 124.[25] The Board will not, however, entertain petitions seeking review of issues otherwise disposed of by this decision.

III. *CONCLUSION*

The permit is remanded to WDNR. On remand, WDNR must: (1) revise the language of permit condition I.C.8.a.(2)(b) to accurately reflect the applicable regulatory language; (2) reconsider and revise permit condition I.C.12 and, unless the revision merely strikes I.C.12 from the permit, provide the public with an opportunity to submit comments on the revision and seek review by the Board in accordance with 40 C.F.R. part 124; and (3) reconsider its permit decision in light of the comments received, 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.[26] On all other issues raised in the amended petition, review is denied.

So ordered.

[25] Although this may result in parties other than RURAL seeking Board review after WDNR issues a revised response to comments document, given the importance of these procedures we believe that such a result is justified.

[26] Although 40 C.F.R. § 124.19 contemplates that additional briefing typically will be submitted upon a grant of review, a direct remand without additional submissions is appropriate where, as here, it does not appear as though further briefs on appeal would shed light on the issues to be addressed on remand. *See In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121, 176 (EAB 1999).