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

IN RE:	)
CITY OF SPRINGFIELD	)
APPLICATION NO.: 0411005D	)
I.D. NO.: 167120AAO	)

PETITION FOR REVIEW

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INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), David Maulding, ("Petitioner"), petitions for review of the conditions of Construction Permit PSD Application No. 0411005D, I. D. No. 167120AAO, ("the Permit"), which was issued to City of Springfield, Illinois ("City") on August 10, 2006, by Illinois EPA. The State of Illinois is authorized to administer the Prevention of Significant Deterioration permit program pursuant to a delegation of authority by the United State Environmental Protection Agency. The permit at issue in this proceeding authorizes the City to construct a new power plant. Petitioner contends that certain pertain conditions are based on clearly erroneous findings of fact and conclusions of law, and involves important matters of policy or the exercise of discretion.

JURISDICTION AND STANDING

In April 1980, US EPA Region 5 delegated full authority to the State of Illinois to implement and enforce the federal PSD program. *See Prevention of Significant Deterioration; Delegation of Authority to State Agencies*, 46 Fed. Reg. 9580 (Jan. 29, 1981) (setting forth the delegation agreement between the State of Illinois and US EPA). The Delegation Agreement expressly delegates to Illinois the "administrative, technical and enforcement elements of the source review provisions of 40 C.F.R. § 124.41. The EAB is authorized under part 124 regulations to review "any condition of [a final PSD] permit decision." 40 C.F.R. § 124.19(a). The City's PSD permit is by its terms an "approval *** issued pursuant to the *** federal regulations promulgated *** at 40 C.F.R. § 52.21 for Prevention of Significant Deterioration of Air Quality." Ex A at 1.

Petitioner has standing pursuant to 40 C.F.R. § 124.19(a), notwithstanding the fact that he did not participate in the permit process, either by filing comments or testifying, because he seeks review only of changes made from the draft to the final permit decision. 40 C.F.R. § 124.19(a) ("Any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final permit decision.")

THRESHOLD PROCEDURAL REQUIREMENTS

Petitioner has standing to petition for review of the permit decision, even though he did not participate in the hearing on public comment process.

This appeal is limited to changes in the permit after the hearing and public comment period, and is specifically authorized by 40 C.F.R. 124.19(a).

FACTUAL BACKGROUND

The City filed its application for this permit on November 18, 2004. The City has proposed to construct a new sub-critical pulverized coal-fired boiler to power a steam turbine generator, associated pollution control equipment, auxiliary equipment, cooling tower and materials handling equipment. The new boiler will have a nominal new power output of 250 MW and will provide base load power to the electric grid on a continual basis.

A draft permit was issued on February 4, 2006, and a public hearing was held on March 22, 2006.

Thereafter, the City announced that it had already expended over $100 million on this project, despite the fact no permit had issued. The City also announced, to the surprise of the City Council and the tax- and rate-payers, that it had negotiated an agreement with the Sierra Club in order to avoid the possibility that the Sierra Club would appeal the issuance of a permit. The City argued that this project could not stand even the additional costs incurred by reason of the delay resulting from an appeal. The City argued it was compelled to come to an agreement with the Sierra Club in order to avoid any delays.

On August 10, 2006, at an evening meeting of the City Council, the Council ratified the Agreement and one addendum to the Agreement, and later that same night the Illinois EPA issued this permit. The Agreement with the Sierra Club is attached as Exhibit 1. The final Permit is attached as Exhibit 2.

The final permit differs from the draft permit in the following material respects: Finding #9 Condition 1.6.c., and Attachment 5 incorporate requirements for the proposed plant, as well as for

the existing generating units operated by the City, as set forth in the Agreement between the City and the Sierra Club.

The Permit incorporates those requirements as conditions of the permit, but only on a contingent basis. If there is an appeal of the permit, such as this instant appeal, then the additional requirements imposed by the Sierra Club Agreement shall not be effective. This appeal is limited to the changes between the draft permit and final Permit, i.e., the terms of the Sierra Club contract.

ISSUES PRESENTED FOR REVIEW

1. Petitioner asserts that IEPA has failed to document or articulate any explanation for the chanes made to the final Permit. IEPA simply notes that an agreement between the City and the Sierra Club was reached, and simply incorporates those terms into the permit, with no explanation of the decision making process, and no articulation of the impact of those contract terms on the environmental conditions at the core of the permitting process.

2. Petitioner asserts that IEPA has imposed conditions or requirements not reasonably related to the discharges associated with the proposed plant. Permit conditions must be somewhat related to the discharges from the proposed plant to have any basis in law. The conditions exceed the authority and jurisdiction of IEPA.

3. Based on this appeal, and the explicit terms of the Permit, this Permit must be amended to reflect that the contingent Conditions imposed by Condition 1.6 and Attachment 5 are null and void.

ARGUMENT

According to the Sierra Club, a Permit has never before been issued in this manner. This case presents this Board with a case of first impression on an important policy matter. The Board should take every step possible to make sure that no permit is ever again issued in this manner.

Petitioner is aware of the limited review allowed by law, but asserts that this fact pattern raises important matters of policy, and raises important issues about the exercise of discretion by IEPA which warrant review. 40 C.F.R. 124.19(a).

1. **Petitioner asserts that IEPA has failed to document or articulate any explanation for the changes made to the final Permit. IEPA simply notes that an agreement between the City and the Sierra Club was reached, and simply incorporates those terms into the permit, with no explanation of the decision making process, and no articulation of the impact of those contract terms on the environmental conditions at the core of the permitting process.**

IEPA issued this permit the evening of August 10, 2006, after the Springfield City Council approved the Agreement with the Sierra Club earlier that evening.

Finding 9 of the Permit states as follows:

> This permit also includes requirements for proposed Dallman Unit 4, the existing generating units operated by the City at its Springfield power plant, and the City that have their origin in an agreement between the City and the Sierra Club. (See Condition 1.6.) The City initiated discussions with the Sierra Club and voluntarily entered into this agreement with the objective of avoiding an appeal of this permit, which would act to delay the effectiveness of the permit. These additional requirements would only take effect if this objective is achieved, i.e., the issuance of the permit is not appealed. <u>These requirements go beyond applicable regulatory requirements and address matters that the Illinois EPA would not normally be able to address during permitting</u>. However, these additional requirements are reasonably related to the emissions and the air quality and environmental impacts of the proposed project and the City's activities and may be appropriately included in this permit. In this regard, these requirements are similar to the ambitious commitments and stringent restrictions at times voluntary accepted by sources for certain proposed projects to keep the projects from being major, with

the objective of avoiding the substantive and procedural requirements for permitting of a major project.

The IEPA admits that the requirements go beyond applicable regulatory requirements, and are outside the normal scope of matters addressed in the permitting process. The process by which this permit was issued raises a very serious public policy issue. This entire regulatory process is designed to allow development of new power plants, with acceptable, uniform regulatory guidelines. The Sierra Club has used the threat of delay, by reason of an appeal of the permit, to impose on the City, and on IEPA, matters that would not normally be involved in the process.

The Board, in order to insure the integrity and the uniformity of the permitting process, must remand this matter to the IEPA, with instructions to issue a permit, considering only issues allowed by law.

This Board has often warned permit issuers to adequately document their decision making process. 40 C.F.R. 124.17(a)(1) requires that the agency specify the changes to the draft permit which have been charged in the final Permit decision, and the reasons for the change. This Board has remanded permits in those instances when the agency has failed to document or explain the changes. *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997) (remanding RCRA permit because permitting authority's rationale for certain permit limits was not clear and therefore did not reflect considered judgment required by regulations); *In re Austin Powder Co*, 6 E.A.D. 713, 720 (EAB 1997) (remand due to lack of clarity in permitting authority's explanation).

In this Permit, the IEPA imposes, on a contingent basis, certain emission limitations in Table 1-C different than the emission limitations set forth in Table 1-A of the draft permit. The only explanation for adopting this contingent requirement is because the City and the Sierra Club agreed to the numbers.

The IEPA fails to disclose the regulatory basis for Table 1-C, and fails to disclose why it imposed the requirements of Table 1-C as an alternative to the requirements of Table 1-A.

The IEPA was apparently satisfied that the emission standards required in Table 1-A satisfied the regulatory requirements, and would have issued the permit with those standards intact. IEPA fails to articulate any regulatory basis for these alternate Permit requirements, and fails to explain why the requirements of Table 1-A are insufficient.

Attachment 5 to the Permit imposes as Permit Conditions the terms of the Sierra Club's agreement. IEPA fails to provide any explanation for the incorporation of those terms in the Permit. What is the IEPA rationale for incorporating into the Permit a requirement for increased advertising for an energy efficiency program? (Attachment 5.1(2)). Why impose as a Permit Condition the establishment of a college internship program? (Attachment 5.1(2)). Why impose as a Permit Condition an Energy Efficiency Study (Attachment 5.1(4)) or citizen input in a Community Participation program? (Attachment 5.1(8)). No explanation is forthcoming.

What is the regulatory basis for imposing a requirement for the purchase of wind power? If there is a regulatory basis for such a requirement, why is that requirement not included as a condition of the Permit, rather than as a contingent requirement in Attachment 5.3? Again, no explanation is forthcoming.

The same question can be asked of the set-aside programs in Attachment 5.4 and the emission limitations in Attachments 5.5 and 5.6. Again, the IEPA fails to explain why these are necessary requirements in the permitting process.

It is the role of IEPA to issue, or not issue, permits according to the applicable regulations, and to explain its decision making process within that regulatory context. The IEPA has failed to

properly perform that function. Rather, it seems to have delegated its regulatory function to a privately negotiated contract between the City and the Sierra Club, and has allowed those terms and conditions to be imposed as alternate requirements for this Permit. No explanation is forthcoming to establish why those alternate restrictions are required by, or even related to, the regulatory or permit process. IEPA fails to explain why the terms of the draft permit do not satisfy the regulatory requirements.

The role of the IEPA to determine appropriate Conditions for the issuance of a permit cannot be abrogated in favor of conditions imposed by a contract between the Sierra Club and the City. It is the function of this Board to insure that IEPA issues permits within the regulatory structure, and does not, as it admittedly has done in this case, incorporate outside factors into the permitting process. That deviation from the normal scope of the permitting process constitutes a significant policy issue, and is well-within the jurisdictional reach of this Board.

It is not the role of the IEPA in the permit issuance process, to impose as Conditions of a Permit, any terms and conditions negotiated by a proposed Permittee and the Sierra Club. The factual background demonstrates that the City, however unwisely, had expended in excess of $100 million, or about 25% of the cost of this plant, without having Permit in hand. The City was desperate to avoid a Sierra Club appeal of the Permit, and so negotiated the Agreement with the Sierra Club.

Certainly the City and Sierra Club can come to terms in a binding contract between those two parties, enforceable as any private contract. That is not the issue in this case.

The issue in this case is why those terms are imposed as Alternate Conditions in the Permit, and there is no answer to that question on this record.

For that reason, this matter should be remanded to IEPA for explanation of the basis for the incorporation of the Alternate Conditions.

2. Petitioner asserts that IEPA has imposed conditions or requirements not reasonably related to the discharges associated with the proposed plant. Permit conditions must be somewhat related to the discharges from the proposed plant to have any basis in law. The conditions exceed the authority and jurisdiction of IEPA.

The Alternate Conditions exceed the jurisdiction and authority of IEPA as they are not reasonably related to this Permit.

Permit Conditions must be reasonably related to the discharges to be valid. (*U. S. v. Mango*, 199 F.3d 85 (2d Cir. 1999).

IEPA fails to articulate how a college internship program is related to the discharges from the proposed plant.

IEPA fails to articulate how increased advertising is related to the discharge from the proposed plant.

Attachment 5.5 and 5.6 prohibit CWLP from selling Mercury credits, if and when such a program becomes available. IEPA fails to articulate how a prohibition from participation in a program that does not yet exist is reasonably related to the discharge from this plant. In addition, it appears that such a prohibition would remove any economic incentive to lower Mercury emissions. The possible sale of credits provides the City an incentive to lower emissions, in order to garner those credits for sale. If the City cannot sell credits, there is no incentive to create credits by lowering emissions. This Condition would seem to encourage higher, rather than lower, emissions of Mercury.

IEPA has imposed as Alternate Conditions under this Permit a series of conditions unrelated to the emissions from this plant, and this Permit should be remanded to IEPA to reconsider those Conditions.

3. Based on this appeal, and the explicit terms of the Permit, this Permit must be amended to reflect that the contingent conditions imposed by Condition 1.6 and Attachment 5 are null and void.

As alternative relief, in the event the Board rejects the requests for relief set out above, this Board should remand this Permit to the IEPA, for the purpose of allowing the immediate issuance of a Permit, free from an restrictions different than the draft permit.

The Permit, as issued on August 10 contained certain Conditions which would be valid, only on the condition that no appeal was filed following the issuance of the Permit.

Finding 9 of the Permit establishes that those conditions will not be binding if an appeal was filed.

Finding 9 is based on the Addendum to the Sierra Club Agreement which provides in pertinent part:

> (ii) This Settlement Agreement shall terminate, and its provisions be rendered null and void, if any person appeals Illinois EPA's issuance of the PSD permit for Dallman Unit 4, pursuant to federal law, under 40 CFR Part 124 or other federal regulations or provisions under the Clean Air Act, pursuant to state law, under the Environmental Protection Act or other state law or regulations thereunder, or under common law, in any administrative or judicial venue.

Both the Permit and the Sierra Club agreement contain mandatory language: the Conditions shall terminate, and be rendered null and void if any person files an appeal. That requirement having been met, this Board should declare that this Permit is in force, free from any of the Alternate Conditions imposed by the Sierra Club Agreement. Finding 9, § 1.6, and all of Attachment 5 should

be stricken from this permit. In the alternative, the Board should remand this matter to the IEPA for issuance of a permit free from those conditions.

CONCLUSION

For the foregoing reasons, Petitioner requests relief as follows:

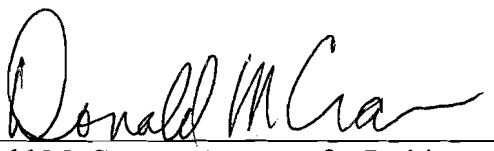
1. That this Board remand this Permit to IEPA for a full explanation of the decision-making process to include the Sierra Club conditions in this permit, despite the fact they are outside the recognized regulatory scope of the permit-issuing process.

2. That this Board remand this Permit to IEPA, for the purpose of considering the issuance of a permit with only appropriate conditions, reasonably related to the discharges from this proposed plant.

3. That this Board declare that Conditions 1.6, Finding 9 and Attachment 5 are null and void, and stripped from this Permit, and the Permit is otherwise validly issued, or in the alternative, to remand this Permit to IEPA for re-issuance of this Permit, stripped of Condition 1.6, Finding 9 and Attachment 5 in its entirety.

Respectfully submitted,

DAVID MAULDING, Petitioner



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