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March 30, 2006

Via Federal Express

Ms. Erika Durr, Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1341 G Street, N.W. Suite 600
Washington, D.C. 20005

Re: Appeal Number: PSD 05-05
Permit Number: 189808AAB
Prairie State Generating Company

Dear Ms. Durr:

Enclosed for filing is one original and five copies of Petitioners' Response to Brief of the EPA Office of Air and Radiation and Region V, and one original and five copies of Petitioners' Exhibit #56.

Thank you for your assistance in this matter. If you have any questions about this filing or if I can be of any further assistance please call me.

Sincerely,

Sanjay Narayan

Enclosures

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ORIGINAL

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

IN THE MATTER OF:	)	
	)	
PRAIRIE STATE GENERATING COMPANY, LLC	)	PSD APPEAL NO. 05-05
	)	
	)	
PERMIT NUMBER 189808AAB	)	

PETITION FOR REVIEW

PETITIONERS' RESPONSE TO BRIEF OF THE EPA OFFICE OF AIR AND RADIATION AND REGION V

I. INTRODUCTION

The U.S. Environmental Protection Agency Office of Air and Radiation and Region V ("EPA") propose a new understanding of the Clean Air Act's "Best Available Control Technology" ("BACT") requirements. Brief of the EPA (March 7, 2006) ("EPA Brief") 2. That understanding would eliminate an available method of pollution control (in this case, use of lower sulfur coal) from the BACT analysis – regardless of its technological feasibility or economic viability – because according to the permitting agency, the applicants' preferred fuel supply (here, an adjacent mine) is "fundamental[]" to the source's "basic design." Id. at 5.

The Clean Air Act does not allow a permitting agency to exclude lower-sulfur coal from the BACT analysis on the basis of a purported conflict with the facility's "basic design." The Act defines the pollution controls that must be considered during the BACT analysis: "production processes and available methods, systems, and techniques," including, inter alia, "clean fuels." 42 U.S.C § 7479(3) (West 2006). That definition clearly includes low-sulfur coal. The Act defines the factors a permitting agency may "tak[e] into account" in deciding whether an available control should, or should not, be used to establish a facility's BACT limit: "energy, environmental and economic impacts and other costs." Id. That definition clearly does not include divergence from the Applicant's proposed design.

In keeping with that clear statutory language, this Board's decisions establish that the BACT analysis includes all "production processes . . . methods, systems, and techniques" that do not require a change in the source's fundamental "purpose" – not, as EPA now claims, the applicant's " proposed design." See In re Hibbing Taconite Co., 2

E.A.D. 838, slip op. at 9-10 (E.A.B. 1989), PSD Appeal No. 87-3. The *design* of the facility is precisely what the BACT analysis is intended to question. See In re Knauf Fiber Glass, GMBH, 8 E.A.D. 121, 129 (E.A.B. 1999) ("The essence of the BACT determination process . . . is to look for the most stringent emissions limits achieved in practice at similar facilities and to evaluate the technical feasibility of implementing such limits and/or control technologies for the project under consideration."). And the Board has never enshrined the applicant's *proposal*; the Act places the burden on the applicant to justify any "proposed design" that does not achieve emissions limits reflecting the most stringent available control measures. See In re Pennsauken Country, New Jersey, Recovery Facility, 2 E.A.D. 667, slip op. at 5 (Adm'r 1988), PSD Appeal No. 88-8. Accordingly, this Board's decisions confirm that the substitution of cleaner fuels is firmly within the scope of the statutory BACT analysis. In re Brooklyn Navy Yard Resource Recovery Facility, 3 E.A.D. 867, slip op. at 17-18 (E.AD. 1992), PSD Appeal No. 88-10 (use of clean fuel does not "redefine the source").

Even if the Board were to accept EPA's (mistaken) contention that the permitting agency could ignore an available pollution control which departed from the facility's "basic design," this permit would still have to be remanded. The Illinois Environmental Protection Agency ("Illinois Agency") has acknowledged that the Prairie State Generation Station (the "Station") need not be operated using "mine-mouth coal," and that it could use "coal from other mines." Pet. Ex. 12 at p.169 (explaining permit condition permitting use of coal from other sources). The use of lower-sulfur coal from alternative sources cannot, therefore, be said to "redefine the basic design of the source," even if the Act permitted the Illinois Agency to constrain its BACT analysis as EPA

suggests. EPA Brief 13. The Illinois Agency's failure to properly consider lower-sulfur coal in setting BACT limits for the Station consequently requires a remand of the permit.

EPA's assertion that the Illinois Agency "was not required . . . to respond to comments . . . that question[ed] whether there was a need to construct the facility at all" likewise contradicts the plain language of the Clean Air Act. EPA Brief 22-25. The Act requires the permitting agency to respond to comments on "the air quality impacts of [the] source, [and] alternatives thereto . . . ." 42 U.S.C. § 7475(a)(2). Not constructing the Station is an "alternative" to "the source," and therefore falls within the scope of comments to which the permitting agency must respond. The Illinois Agency erred by failing to respond to comments addressing the need for the Station to be built.

II. THE APPLICANT'S DESIRE TO USE COAL FROM AN ADJACENT MINE DOES NOT EXCUSE THE ILLINOIS' AGENCY'S FAILURE TO CONSIDER LOW-SULFUR COAL IN ITS BACT ANALYSIS

The Applicant's desire to utilize coal from an adjacent mine does not relieve the Illinois Agency from the duty to consider coal with a lower sulfur content during its BACT analysis. The EPA reaches a contrary result by elevating that desire into a "basic design parameter[]," and claiming that the Clean Air Act does not allow a permitting Agency to ask whether a facility's "basic design parameters" constitute the best available control technology. EPA Brief 13. In effect, the EPA would add a preliminary step to its traditional top-down BACT analysis: a permitting agency would designate (according to no clear standards beyond the applicant's say-so) certain elements of the applicant's preferred design as "basic," or "fundamental," and eliminate any pollution controls that would alter those elements. It would do so without ever inquiring into the controls' availability, efficacy, or cost. See In re Newmont Nevada Energy Investment, L.L.C., TS

Power Plant, slip op. at 8-9 (E.A.B. 2005), PSD Appeal No. 05-04 (describing "top-down" analysis set forth in NSR Manual). There is nothing in the Act, or in the decisions of this Board, to support that revision of the statutorily prescribed BACT analysis. See In re Spokane Regional Waste-to-Energy Applicant, 2 E.A.D. 809, 1989 WL 266360 at *3 (Adm'r. 1989) (recognizing that the Manual's top-down process is founded on "recognition [of] the statutory definition of BACT").

A. The Plain Text of the Clean Air Act Includes the Facility's Fuel Source As A Design Element Subject to BACT Analysis

The Act defines the pollution-control measures that must be considered during the BACT analysis as all "production processes and available methods, systems and techniques, including fuel cleaning [and] clean fuels." 42 U.S.C. § 7479(3). And it specifies the considerations by which an available control measure must be evaluated: "energy, environmental, and economic impacts and other costs." Id. EPA's addition of a new basis on which to assess, and discard, an available control measure – inconsistency with the facility's "basic design or scope" – cannot be reconciled with that clear statutory scheme. See New York v. Environmental Protection Agency, __ F.3d ___ (D.C. Cir. March 17, 2006), No. 03-1380, slip op. at 15 ("Because Congress expressly included one limitation, the court must presume that Congress acted 'intentionally and purposely,' when it did not include others." (citations omitted)).

As the EPA's NSR Manual recognizes, the terms "production processes . . . methods, systems and techniques" incorporate anything that generates "identical or similar products" from "identical or similar raw materials or fuels" – in essence, all aspects of the facility between its basic input (here, coal) and its basic output (here, electricity). U.S. EPA, Office of Air Quality Planning & Standards, New Source Review

Workshop Manual at B.10 (draft Oct. 1990) ("NSR Manual"). See 123 Cong. Rec. S9434-35 (1977) (debate on Clean Air Act Amendments of 1977, P.L. 95-95) ("It is the purpose of this amendment to leave no doubt that in determining best available control technology, all actions taken by the fuel user are to be taken into account") (Statement of Sen. Huddleston).[1] Lest there be any doubt as to whether the "processes . . . methods, systems, and techniques" that must be considered include low-sulfur coal, Congress amended the Act to specifically include "clean fuels" in the definition of "best available control technology." 42 U.S.C. § 7479(3). See Letter from William G. Rosenberg, Assistant Administrator for Air and Radiation, to Henry A. Waxman, Chairman, Subcommittee on Health and Environment, House Committee on Energy and Commerce (Oct. 17, 1990) reprinted in 136 Cong. Rec. at S16917 (legislative history accompanying statement of Senator Mitchell, noting that "this amendment . . . [confirmed] that clean fuels are an available means of reducing emissions to be considered along with other approaches in identifying BACT level controls."); see also Brooklyn Navy Yard, 3 E.A.D. at *6 (holding that permitting agency must consider alternative fuels during its BACT analysis).

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[1] EPA suggests in passing that it is "not inclined" to require applicants to include certain processes and innovative combustion techniques, such as "integrated gasification combined cycle" technology ("combined cycle technology") in the BACT analysis. EPA Brief 9-10 (citing Letter from Stephen Page, EPA Office of Air Quality Planning and Standards, to Paul Plath, E3 Consulting LLC (December 13, 2005)). That issue is not before the Board in this Petition. And the memorandum ruling cited by the EPA to support its position is currently under review by the U.S. Court of Appeals, Natural Resources Defense Council v. EPA, No. 06-1059 (D.C. Cir. 2006); it conflicts with the plain language of the Act, and was issued without notice and comment in violation of the Act's procedural requirements.

EPA acknowledges that the statute, by its terms, requires that "low-sulfur coal [be] properly evaluated in the BACT analysis for . . . electric-generating facilities." EPA Brief 13. It would insert an exception, however, for cases in which the Applicant's proposed fuel source is part of "the basic design of the source" or a "basic design parameter[]." Id. The statutory text contains no such exception. See 42 U.S.C. 7479(3). The Act explicitly enumerates the bases on which a permitting agency may eliminate an available pollution control: "energy, environmental, and economic impacts and other costs." Id. Those bases do not include a conflict with the Applicant's basic design. New York, slip op. at 6.

EPA seeks to add its "basic design" exception by manufacturing a "tension" and "ambiguity" within the statute, reading an obligation to defer to the "basic facility design proposed by the applicant" into the words "such facility" and "case-by-case basis." EPA Brief 4-6 (quoting 42 U.S.C. § 7479(3)). No such tension exists. "Such facility" refers to "any major emitting facility," and offers nothing to sanctify the Applicant's desired design for the facility. Likewise, the statute's command to engage in a "case-by-case" analysis requires only that each facility be individually evaluated according to the criteria specified in the statute – it does not subtract "clean fuels" from the control technologies that must be considered, or add "design conflict" to the grounds on which a control measure may be rejected. See 42 U.S.C. § 7479(3)No principled understanding of those words suggests that a permitting agency may categorically ignore the statute's command

to consider "fuel cleaning [and] clean fuels" where an Applicant's design would use fuel from an adjacent mine.[2]

EPA reaches even further by resting its case on the use of the words "proposed facility" in other portions of the statute. EPA Brief 3 (citing 42 U.S.C. §§ 7475(a)(1), (4)). Those sections state that no "major emitting facility . . . may be constructed . . . unless . . . (1) a permit has been issued for such proposed facility [and] (4) the proposed facility is subject to the best available control technology." 42 U.S.C. §§ 7475(a)(1), (4). That language, again, contains nothing to suggest that the "proposed facility" must necessarily adhere to permit-applicant's desired design. On the contrary, it makes clear that before a "permit [can be] issued," the applicant's "propos[al]" must, unequivocally and without exception, include the best available control technology as defined above – all "methods, systems, and techniques" that do not impose excessive "energy, environmental, [or] economic impacts and other costs." Id.; 42 U.S.C. § 7479(3).

B. Only Alternatives That Would Abandon the Fundamental Purpose of the Facility May Be Excluded From the BACT Analysis.

This Board has historically refused to require a permitting agency to redefine the "product or purpose" of the facility during its BACT analysis. In re Hibbing Taconite, slip op. at 9. That limitation on the BACT analysis differs sharply from the limitation proposed by EPA here, both in concept and application; any variety of "methods, systems, and techniques" may be consistent with a facility's "product or purpose," id., whereas very few may be consistent with its "basic design." EPA Brief 13. The

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[2] Of course, the agency can, as part of its BACT analysis, decide on a "case-by-case" that a facility's BACT limit should be based on the use of high-sulfur coal, because lower-sulfur coal from a more distant facility presents excessive "energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3).

"product or purpose" test thus led this Board to refuse to require consideration of permit conditions that would prevent a municipal waste incinerator from being built at all. Pennsauken, slip op. at 11 (holding that "the source itself is not a condition of the permit"). In reaching that decision, the Administrator held that discarding the facility entirely would abandon the purpose of the source, and was therefore not part of the required BACT analysis. Id. That decision turned on the fact that "the petitioner was seeking to substitute power plants (having as a *fundamental purpose*) the generation of electricity) for a municipal waste combustor (having as a *fundamental purpose* the disposal of municipal waste)." Hibbing, slip op. at 9 n.12 (Adm'r 1989) (describing Pennsauken, emphasis added). See also Knauf Fiber Glass, 8 E.A.D. at 136 (noting that "[s]ubstitution of a gas-fired power plant for a planned coal-fired plant would amount to redefining the source").

In contrast, this Board used the same test to demand consideration of alternative, low-nitrogen fuels by a municipal waste incinerator, even though the waste incinerator's design presupposed the use of high-nitrogen fuel. Brooklyn Navy Yard, slip op. at 17-19. Accord In re Genesee Power Station Ltd., 4 E.A.D. 832, *12 (E.A.B. 1993). The Board held that the use of clean fuels would not "redefine the source," because it would allow the facility to fulfill its basic purpose of generating electricity from waste. Brooklyn Navy Yard, slip op. at 18. Even where a waste incinerator would be built adjacent to its proposed fuel-source, the Board has noted that the BACT analysis should include consideration of lesser-polluting fuels: "if fuel cleaning and separation . . . would allow [the facility] to set emissions levels for regulated air pollutants that are demonstrably

lower . . . then [the Applicant] would have erred in its BACT analysis by not analyzing" the use of cleaner fuels. Spokane Regional Waste-to-Energy Applicant, 1989 WL 266360 *1-2 (holding that emissions reductions from fuel separation had not been sufficiently demonstrated).

Those decisions reflect a central concern with preservation of the facility's basic purpose, not its design. That concern does not arise from the statute's use of the words "proposed source," "case-by-case analysis," or any need to defer to the permit-applicant's desired design. See Motion for Clarification filed by Office of Air & Radiation & Region V at 10, In re Genesee Power Station Ltd. Partnership (E.A.B.), PSD Appeals Nos. 93-1 through 93-7 (filed on Sept. 21, 1993) (attached as Pet. Ex. 56) (stating that "recent [Board] decisions hold[] that a permitting authority is not compelled to 'take the source as it finds it'"). It merely recognizes that the terms "process[]" and "method[], system[], or technique[]," by definition, do not include the purpose or existence of the facility. They encompass only the means by which the facility's "end" "object," "aim," or "purpose" is achieved. Webster's New Collegiate Dictionary (1975) (defining process as "a series of actions or operations conducing to an *end*," method as "a procedure or process for attaining *an object*," technique as "a method of accomplishing *a desired aim*," and "system" as "a group of devices . . . or an organization forming a network esp. for . . . serving a common *purpose*." (emphases added)).

The "source itself" is not a process, method, system, or technique for controlling emissions, and therefore "beyond the scope" of the BACT analysis. Pennsauken, slip op. at 11 (holding that Act defines BACT as emissions limit be based on "application of production processes and available methods, systems, and techniques . . . to control the

emissions" (citation omitted)). Alternatives that allow the applicant "to manufacture the same product," however, are "production processes," or "methods, systems, and techniques" to reduce emissions, and must be considered during the BACT determination. Hibbing Taconite, slip op. at 9-10. In other words, pollution controls that retain the facility's fundamental product or purpose do not "redefine the source," regardless of whether they require modification of the permit-applicant's preferred design. Id. (noting that "EPA regulations define major stationary sources by their product or purpose"). See also 40 C.F.R. § 52.21(b)(1)(c)(iii)(aa) (defining "stationary source" by reference to "stationary source categor[ies]").

C. The Illinois Agency Was Required to Consider Lower-Sulfur Coal During Its BACT Analysis.

The use of lower-sulfur coal at the Station would consequently not redefine the source. The basic purpose of the facility would remain the same: the production of electricity, from coal. Requiring the use of lower-sulfur coal, or fuel blending, would not call into question the existence of the power plant; it would require only that the Applicant fuel its plant, at least in part, with coal from other mines.[3] Nor would it eliminate the mine; it would require only that the Applicant sell some coal from its mine to other purchasers. See also EPA Brief 10 (noting that use of low-sulfur coal would not even "require Prairie State to fundamentally change the power block at the proposed source").

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[3] There are sources within Illinois (as well, of course, as outside the state) for lower-sulfur coal than the fuel proposed by the Applicant here. The Applicant itself operates four other mines in Illinois. <http://www.peabodyenergy.com/Operations/CoalOperations-Locations.asp> (visited on March 30, 2005).

If the traditional, top-down BACT analysis reveals that the use of coal from an alternative source poses insurmountable "economic costs," the Illinois Agency's BACT determination will reflect that finding. See NSR Manual at B.44 (noting that distance from water supply may require rejection of BACT alternative requiring use of that water, but only if applicant demonstrates that "[a]cquiring water from a distant location . . . add[s] unreasonable costs to the alternative, thereby justifying its elimination on economic grounds"); see also In re Inter-Power of New York, Inc., 5 E.A.D. 130, 148 (E.A.B. 1994) (upholding permitting authority's finding that "use of coals [containing less sulfur] would not be cost-effective"). But the Illinois Agency cannot categorically eliminate lower-sulfur coal from its BACT assessment simply by citing a claimed conflict with the Applicant's proposed design. See also Knauf Fiber Glass, 8 E.A.D. at 142 n.34 (rejecting applicant's "argument regarding redefining the source" where applicant sought "to avoid performing and/or documenting a BACT analysis that considers pollution control options used by their competitors").

By compelling fidelity to that proposed design, EPA would undermine the basic policy of the traditional, top-down BACT analysis: to ensure the orderly consideration of "all available control technologies," and their "energy, environmental, or economic impacts," in an effort to determine the best available pollution controls. NSR Manual at B.1-B.2. See Knauf Fiber Glass, 8 E.A.D. at 129 n.14 (NSR Manual's BACT methodology "provides for application of all of the BACT regulatory criteria through a step-wise framework, that if followed, should yield a defensible BACT determination"). It would achieve the perverse result of excluding consideration of lower-sulfur coal, even

if the use of such coal presented an economically preferable, technologically feasible means of reducing the Station's emissions.

And it would do so on the basis of a test -- whether the Station's "basic design" requires the use of high-sulfur coal – that lacks any principled standards. In this case, the EPA claims that the presence of a planned adjacent mine makes the use of high-sulfur coal a "basic design parameter." EPA Brief 13. If the applicant planned to construct a coal-mine five miles away, connected to the Station by a rail-spur, would the use of high-sulfur coal remain a "fundamental design parameter"? If the mine were 100 miles away, or 1,000, would its preferred fuel remain "fundamental"? EPA Brief 8. If the Station were to be built next to a pre-existing mine, would high-sulfur coal be part of its "basic design"? If an existing facility proposes construction of an adjacent mine, would fuel from the mine become "fundamental" to the modified source? Cf. Hibbing, 2 E.A.D. at *3 (fuel choice not fundamental to modified source). Does blending a small quantity of low-sulfur coal into the Station's fuel impermissibly tamper with its "basic design"? If an applicant claims that a design feature is "basic," can the permitting agency second-guess the reasonableness of that claim?[4] The standard proposed by EPA, lacking any firm anchor in the statutory text, cannot offer any coherent answers to these questions.

The Illinois Agency erred by failing to properly consider low-sulfur coal during its BACT analysis. EPA's contention that the Illinois Agency's treatment of lower-sulfur

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[4] There are approximately a dozen coal-fired power plants proposed for construction in Illinois. All would prefer to use high-sulfur, Illinois coal. Each could argue that high-sulfur coal is fundamental to their design, and thereby avoid consideration of clean fuels during its BACT analysis. See <http://www.epa.state.il.us/air/permits/electric/index.html> (visited on March 30, 2006) (IEPA's listing of Electric Power Plant Construction Projects since 1998).

The Illinois Agency erred by failing to properly consider low-sulfur coal during its BACT analysis. EPA's contention that the Illinois Agency's treatment of lower-sulfur coal was sufficient to satisfy the duty to respond to comments contained in section 165(a)(2) of the Act is irrelevant. 42 U.S.C. § 7475(a)(2). See EPA Brief 16-22. It was not sufficient to satisfy the Act's concurrent and independent duty to impose emissions limits consistent with the best available control technologies. 42 U.S.C. § 7475(a)(4).

III. EVEN IF AN AVAILABLE CONTROL MEASURE MAY BE IGNORED BASED ON A CONFLICT WITH THE APPLICANT'S DESIGN, THE ILLINOIS AGENCY ERRED BY FAILING TO CONSIDER LOW-SULFUR COAL.

Even if the Illinois Agency's BACT analysis could ignore an available pollution control which conflicted with the Station's basic design, the permit would have to be remanded. The record demonstrates that the Station's "basic design" does not require the exclusive use of coal generated by the adjacent mine. The Applicant and the permitting Agency have stated that the Station could utilize coal from other mines, and amended the permit to ensure that the Station need not operate on "mine-mouth" coal. Pet. Ex. 12 at p.158 (finding it "important as a matter of public policy that the plant have a reasonably ability" to operate "with an alternative source of fuel"). The Applicant requested a permit revision to allow the use of coal from other sources, explaining that it "would like the flexibility to burn . . . coal from other mines in Illinois." Pet. Ex. 16 at 1. In granting that request, the Illinois Agency determined that "[i]t is appropriate to allow the proposed plant to have an alternative source of fuel," in addition to coal from the adjacent mine. Pet. Ex. 12 at p.26.

If the Applicant can obtain coal from another site and transport it to the Station without "significantly altering the design, scope, and purpose of the project," the

Applicant can "obtain *low-sulfur* coal from another site and transport this coal to the facility" without "significantly altering the design, scope, and purpose of the project." EPA Brief 7 (emphasis added). The use of such lower-sulfur coal does not "fundamentally redefine the basic design or scope of the project" – even if that were, as EPA incorrectly asserts, a valid basis for excluding lower-sulfur coal from the BACT analysis.[5] EPA Brief 5.

IV. THE ILLINOIS AGENCY VIOLATED THE ACT BY FAILING TO RESPOND TO COMMENTS ADDRESSING THE NEED FOR THE FACILITY

EPA's contention that the Illinois Agency was "not obligated to respond" to comments addressing the need for the Station is similarly ill-founded. EPA Brief 15. EPA acknowledges that section 165(a)(2) of the Act requires a permitting agency to consider and provide a reasoned response to comments identifying alternatives to the proposed source. Id. EPA excuses the Illinois Agency's failure to respond to comments addressing energy efficiency and demand-side management here,[6] however, by asserting that these are "outside of the scope of section 165(a)(2) of the Act." EPA Brief 23. That contention contradicts both the text of the Act's Prevention of Significant Deterioration ("PSD") provisions, as well as EPA's longstanding policies, both of which establish that a permitting agency must consider and respond to all alternatives raised by the public – including alternatives that would decline to build the proposed plant.

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[5] Moreover, the Illinois Agency's failure to consider low-sulfur coal violated not only the Act's BACT requirements, but also the Act's command to avoid "adverse impacts" resulting from the Station's sulfur emissions on the nearby Mingo National Wildlife Refuge Class I airshed. 42 U.S.C. § 7475(d)(2)(C)(ii); 40 C.F.R. § 52.21(p)(4). See Petition for Review 80-87; Petitioners' Reply 18-22.

[6] Petitioners hereafter use the term "energy efficiency" to include conservation and demand-side management.

Section 165(a)(2) of the Act requires the permitting agency to respond to comments regarding both "the air quality impact of [the] source" as well as "alternatives thereto." 42 U.S.C. 7575(a)(2). Not building the proposed coal-plant, and pursuing energy efficiency instead, is an "alternative" to the source, and therefore plainly within the ambit of that section. See American Corn Growers Ass'n v. EPA, 291 F.3d 1, 12 (D.C. Cir. 2002) ("[T]he PSD program 'does not require that . . . deterioration occur. Nor does it create an entitlement to degrade air quality in general or visibility in particular, because nothing in the [Act] provides for issuance of a PSD permit as a matter of right.'"); see also Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations 46 Fed. Reg. 18,026, 18,027 (March 23, 1981). (construing "alternative" as used by National Environmental Policy Act, 42 U.S.C. 4332(C)(iii), and finding that "it is difficult to think of a situation where it would not be appropriate to address a 'no action' alternative. . . . Inclusion of such an analysis . . . is necessary to inform the Congress, the public, and the President as intended by NEPA.").

EPA has consistently recognized, contrary to its claim here, that the Act and its legislative history demonstrate that Congress intended the question of need to be addressed through the federal PSD program: "the authority to consider 'alternatives' to the source . . . extends not only to siting decisions, but also . . . more fundamentally, to alternative means of fulfilling the economic purpose of the proposed source." Pet Ex. 56 at 10. It has stated that the Clean Air Act "authorizes permit agencies to consider energy conservation and other alternatives in reviewing PSD permits." Pet Ex. 40 at 15 (Response of EPA Region II & EPA Office of Air & Radiation to Mr. Arana's Petition

for Review, In re Ecoelectrica LNG Import Terminal & Cogeneration Project (E.A.B.), PSD Appeal No. 96-8 (filed on Dec. 24, 1996)). See also Pet. Ex. 41 at 19 (Amicus Brief of EPA Region V & EPA Office of Air & Radiation in Response to RURAL's Amended Petition for Review & the Responses of WDNR & Rockgen, In re Rockgen Energy Center (E.A.B.), PSD Appeal No. 99-1 (filed on June 11, 1999))

This Board has never suggested that the Clean Air Act does not require a permitting agency to respond to comments "question[ing] whether there was a need to construct the facility at all." EPA Brief 22 (emphasis added).[7] This Board has held that a permitting agency may avoid considering the need for a particular facility – but only where another state agency is charged with conducting such an analysis. In re Kentucky Utilites Co., PSD Appeal No. 82-5, at 2 (Adm'r 1982); In re Ecoelectrica, L.P., 7 E.A.D. 56, 74 (E.A.B. 1997). In those situations, the Act's command that "interested persons" be allowed to "submit written or oral presentations on . . . alternatives" to the facility prior to the facility's construction has been effectively satisfied. 42 U.S.C. 7475(a)(3). As EPA admits, Illinois does not have a separate state agency that assesses the need for new power plants. EPA Brief 22, 25.

EPA now asserts that, regardless, the Clean Air Act categorically prohibits a permitting authority from considering the need for new power plants, urging the Board to rule that all states are prohibited from "us[ing] need as a basis to condition or deny a PSD permit." EPA Brief 25. No decision of this Board supports that view. Both Kentucky

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[7] EPA has long lauded the benefits of energy efficiency and the role it plays in meeting our energy needs and reducing air pollution. It has entire websites dedicated to helping promote energy efficiency at the individual, local and state level. Now, in a remarkable about face, EPA claims that it is unlawful for a permitting agency to consider

Utilities and Ecoelectrica held only that need issues would be appropriately addressed by other state agencies, because under the particular state regulatory regimes in question, those other agencies were already, or would soon, undertake an analysis of need. PSD Appeal No. 82-5; 7 E.A.D. at 74. Neither decision addresses a state like Illinois, which lacks an agency specifically charged with the task of assessing the need for new power plants. And EPA has opined that in such states, the PSD permitting agency must properly respond to comments raising the issue. Ex. 41 at 18-20 (arguing that because the PSD permitting agency failed to assess need, "the Board should remand the issue of the size of the plant and reasonable alternatives for meeting electricity demand to the [permitting agency] for further consideration.").[8]

A rigorous analysis of alternatives is a particularly important part of the permitting process for coal-fired power plants. First, coal plants are, in most communities across America, the single largest source of air pollution, and therefore the largest consumers of PSD increments. Second, electricity is a public necessity, and therefore the public has a heightened interest in how and where the product is generated. Third, there are multiple clean alternatives to building a new coal plant, including renewable energy sources such as wind and solar, natural gas, and energy efficiency. Finally, while any less-polluting alternatives may not displace the entire need for a large

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whether to limit the size of a coal-fired power plant because a portion of the proposed plant could be met with energy efficiency measures.

[8] EPA also mischaracterizes this Board's decision in In re Rockgen Energy Center, 8 E.A.D. 536 (E.A.B. 1999). EPA argues that in Rockgen, "[t]he commenter had clearly raised the question of need." EPA Brief 23. In fact, the Board concluded that the petitioner failed to preserve this issue and refused to reach it on those grounds. Rockgen, 8 E.A.D. at 548. As a result, the decision says nothing about the proper consideration of comments addressing need.

are viable alternatives for reducing the overall size for any new coal plant and thereby reducing air pollution.[9]

The Clean Air Act obligates the Illinois Agency to respond to comments addressing the need for the Station. It failed to do so. That failure mandates a remand of the permit.

[9] EPA is incorrect when it states that the Illinois Agency offered reasoned, non-arbitrary reasons in response to the comments it received about alternatives to building a large coal plant. The Agency received comments urging construction of a smaller power plant as a way to minimize the impact of the plant of air quality. Ex. 12 at p.14. The Illinois Agency did not respond to this comment. Similarly, the Illinois Agency received comments urging consideration of wind, energy efficiency and solar, *in combination*, as a way to minimize the size of the proposed coal plant. Id. at p.14-15 Here too, the Agency simply stated that neither solar nor wind on its own could substitute for the entire 1500MW coal plant. See id. at 16. EPA fails to acknowledge these shortcomings.

V. CONCLUSION

For these reasons we respectfully urge the Board to reject the positions stated in the EPA Brief, and remand the permit.

Respectfully submitted, this 30th day of March, 2006,

By: _____

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On behalf of Petitioners

ORIGINAL

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

IN THE MATTER OF: PRAIRIE STATE GENERATING STATION PERMIT NUMBER 189808AAB	))))))	PSD APPEAL NO. 05-05

CERTIFICATE OF SERVICE

On March 30, 2006 I served a copy of the PETITIONERS' RESPONSE TO BRIEF OF THE EPA OFFICE OF AIR AND RADIATION AND REGION V on the following parties via United States first class mail, postage pre-paid:

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PET. EX. #56

BEFORE THE ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	
Genesee Power Station Limited Partnership	PSD Appeal Nos. 93-1 through 93-7
Permittee	

MOTION FOR CLARIFICATION

INTRODUCTION

Pursuant to 40 CFR § 124.19(g) the Office of Air and Radiation and Region V of the Environmental Protection Agency jointly request clarification of the Environmental Appeals Board decision in the above-captioned matter, Genesee Power Station Limited Partnership, PSD Appeal Nos. 93-1 through 93-7 (September 8, 1993).[1]

For the reasons set forth below, movants respectfully assert that two aspects of the Board's order reflect erroneous interpretations of the Clean Air Act (the Act) and are inconsistent with recent PSD appeal decisions. Accordingly, movants request that the Board issue a revised decision reflecting the appropriate interpretations of law regarding the

[1] 40 CFR § 124.19(g) authorizes motions for reconsideration of a final order. The authority to clarify is a logical subset of reconsideration. Thus, the authority at § 124.19(g) to reconsider a decision implicitly includes the authority to clarify a decision. Further, the authority to issue clarification of prior decisions is inherent to the Board's function as an administrative tribunal.

scope of the review that may be conducted by a PSD permitting authority. The Board's order contains alternative grounds to support the decisions implicated by this motion. Thus, granting this motion would not affect the outcome reached by the Board with respect to claims presented by petitioners. Rather, it would ensure that the reasoning of the Board's decision is consistent with the legal views held by movants' respective Offices and with administrative case law.

Movants believe that the Board should revise its legal rationale regarding the following specific issues.

First, the Board rejected petitioner Richard Dicks' claim that the issuance of the PSD permit to Genesee represented "environmental racism" because, inter alia, it believed that section 131 of the Act, 42 U.S.C. § 7431, restricts the authority of a PSD permitting agency to "consider community opposition to the proposed location of the ... facility." Genesee at 9-11.[2] As explained more fully below, movants believe that section 131 imposes no such restriction and that PSD permitting authorities have plenary power to consider alternatives to the proposed site of a major emitting facility.

Second, on a related point, the Board rejected the claim of petitioner American Lung Association of Michigan (ALAM) regarding

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[2] The Board's rejection of this claim is independently supported by the reasons set forth in Genesee at 11-13, rejecting petitioner's claim on its merits.

best available control technology (BACT) for PM-10. In assessing ALAM's argument that the permit application failed to consider the cost of electricity production by other means, the Board reasoned, inter alia, that "[t]he BACT requirement does not authorize the permitting authority to redefine the proposed source as a method of controlling emissions, even if such redefinition would obviously bring about a substantial reduction in emissions."[3] Genesee at 21, n. 16 (citations omitted). For the reasons discussed below, movants believe that the Act does not limit the scope of a permitting authority's review in the manner ascribed by the Board.

ARGUMENT

A. Section 131 of the Clean Air Act Does Not Prevent a PSD Permitting Authority from Considering Alternatives to the Site Proposed by the Permit Applicant.

The PSD provisions call for a comprehensive review prior to the issuance of a PSD permit. See generally section 165 of the Act, 42 U.S.C. § 7475. An important aspect of that review is a public hearing, the scope of which is defined broadly to include

> opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations.

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[3] The Board provided an independent basis for rejecting this argument when it found that the claim was not presented with sufficient specificity to merit review. Genesee at 21, n. 16.

Section 165(a)(2), 42 U.S.C. § 7475(a)(2) (emphasis added). Thus, in addition to an assessment of the specific air quality impacts of the proposed source, the statute plainly provides an opportunity for consideration of alternatives to the proposed source. This authority to consider alternatives necessarily includes authority to consider siting the plant elsewhere if the permitting authority decides to do so based upon consideration of community views.

The BACT provisions of the PSD program also authorize consideration of the air quality impact of the proposed source on the character of the community. The Board recognized that the determination whether a proposed source meets the PSD requirement to implement BACT under section 165(a)(4) of the Act, 42 U.S.C. § 7475(a)(4), involves the consideration of the "energy, environmental and economic impacts" of the source. Genesee at 10 & n. 8 (quoting section 169(3)). Nevertheless, the Board concluded that the BACT requirement does not extend to the decision to locate a facility at a particular site. Genesee at 10-11.

Congress took a more expansive view of these considerations when adopting the PSD program. The legislative history demonstrates that Congress intended the concerns of the community regarding the overall impact of the source on air quality to be factored into the BACT components of the PSD permitting decision:

> [W]hen an analysis of energy, economics, or environmental considerations indicates that the impact of a major facility

> could alter the character of that community, then the State could, after considering those impacts, reject the application or condition it within the desires of the State or local community.

S. Rep. No. 127, 95th Cong., 1st Sess. 31 (1977) reprinted in Senate Comm. on the Environment and Public Works, 95th Cong., 2d Sess., A Legislative History of the Clean Air Act Amendments of 1977, vol. 3 at 1405 (1978) (hereafter 3 1977 Legislative History).

Further, the Board's reasoning did not fully address the manner in which provisions regarding the maximum allowable increases in air pollution ("increments") for areas subject to PSD, sections 163 and 165(a)(3), 42 U.S.C. §§ 7473 and 7475(a)(3), can enable a permitting authority to reject the configuration of a proposed source. Congress recognized that States may decline to permit a source in a particular location as an adjunct of increment management, even if the source would not violate the maximum allowable concentration. Under the PSD program, States may judge how much of the increment "will be devoted to any major emitting facility" and whether it should "refuse to permit construction, or limit its size." 3 1977 Legislative History at 1405 (Senate Report).

This passage refutes the Board's finding, see Genesee at 9, that a permitting authority may deny a permit in the proposed location only if its air quality impact would violate minimum air quality requirements. Rather, in consideration of the need to preserve limited clean air resources while providing

opportunities for future economic growth, see section 160(3), 42 U.S.C. § 7470(3), a permitting authority may decline to issue a permit for a source at the proposed site in order to retain a portion of the growth increment. See generally 3 1977 Legislative History at 1405 (Senate Report). The permitting authority may reasonably conclude that a proposed source that would use most or all of the available increments in a given area but would not violate maximum permissible concentrations should nevertheless not be permitted in the applicant's desired configuration. Such a decision may avoid the need to "ratchet down" on existing sources in the future, which might require an economically wasteful and politically difficult decision to retrofit pollution controls on the source now being permitted in order to accommodate future economic growth. This reasoning also extends to more generalized air quality concerns regarding the siting of a proposed plant in a particular locale.

In contrast to these expressions of broad authority under the PSD program to consider air quality impacts in siting decisions, section 131 of the Clean Air Act merely preserves in general terms the existing authority of counties and cities to plan or control land use. Considering the location of a source required to obtain a PSD permit is not a land use decision in the "conventional sense" and may be entertained in issuing a PSD permit. 3 1977 Legislative History at 722 (Statement of Senator Muskie); see also 3 1977 Legislative History at 1389 (Senate

Report). In adopting the PSD program, Congress intended to distinguish between land use planning and the "examination of the air quality impact of a particular site location decision." 3 1977 Legislative History at 722 (Statement of Senator Muskie). As explained by Senator Muskie, principal sponsor of the 1977 Senate bill,

> [s]pecific decisions regarding construction of a facility must be reviewed to examine the associated effects of that facility. This is not a requirement for land use planning, but a requirement for examining the air quality impact of land use decisions.

Id.[4]

The Act does not direct that the need to consider air quality impacts is limited to circumstances where a proposed project would violate a specific, quantitative air quality norm. However, the reasoning of the Board's broad interpretation of section 131 appears to inappropriately restrict the authority of states and EPA to ensure that industrial development decisions are consistent with air quality needs not only under the PSD program, but under other Clean Air Act programs as well. Section

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[4] The 1977 Senate Report also elaborates on this distinction. While the Administrator may review the siting component of a state PSD permitting decision for air quality purposes, she may not use this authority "to force land use or site selection decisions unrelated to air quality." 3 1977 Legislative History at 1386.

131 must be construed by EPA in a manner that reconciles, not nullifies, other provisions of the Act.[5]

For example, when a permitting authority is considering an application for a major stationary source that would locate in a nonattainment area, section 173(a)(5) of the Clean Air Act explicitly requires

> an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification.

42 U.S.C. § 7503(a)(5) (emphasis added). This alternative siting analysis -- which is directly analogous to the alternatives analysis required in PSD areas under section 165(a)(2)[6] -- is

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[5] See U.S. v. Nordic Village, Inc., 112 S.Ct. 1011, 1015 (1992) (rejecting an interpretation that "violates the settled rule that a statute must, if possible, be construed in a fashion that every word has some operative effect") (citation omitted); Boise Cascade Corp. v. U.S. EPA, 942 F.2d 1427, 1432 (9th Cir. 1992) ("[u]nder accepted canons of statutory interpretation, we must interpret statues as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous") (citations omitted).

[6] Of course, there are important distinctions between these alternatives analyses. In the nonattainment area context, where air quality is already at unacceptable levels, the burden is on the applicant to demonstrate the overall fitness of the site chosen by the applicant. In PSD areas, so long as the proposed source would not cause a violation of increments or standards, there clearly is a presumption in favor of the applicant's chosen site. In such cases, the statute provides that EPA and the general public may have an opportunity to persuade the permitting authority that, nevertheless, construction should not be allowed at that site due to air

(continued...)

separate from and in addition to the requirement in section 173(a)(1), 42 U.S.C. § 7503(a)(1), that major new sources in nonattainment areas meet air quality impact requirements in the form of emissions offsets. It serves to refute the Board's reasoning that Congress intended, in adopting section 131 of the Clean Air Act, to declare a hands-off approach to siting decisions unless a proposed source would violate specific, quantitative air quality impact requirements if constructed at the site chosen by the applicant.

B. PSD Permitting Authorities May, But Are Not Required to, Utilize the BACT Requirement to Consider "Redefining the Source" Proposed by the Permit Applicant.

Movants also believe that the Board misinterpreted the terms of the Clean Air Act and several prior PSD appeal decisions when it stated that "the BACT requirement does not authorize the permitting authority to redefine the proposed source as a method of controlling emissions." See Genesee at 21 n. 16, and cases cited therein. As discussed below, permitting authorities may exercise their PSD responsibilities in this manner, but are not required to do so.

Movants suggest that Pennsauken County, New Jersey Resource Recover Facility, PSD Appeal No. 88-8 at p. 11 (Remand Order, Nov. 10, 1988) falls short of a flat denial of authority, and in

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[6](...continued)
quality concerns. Compare section 173(a)(5) with section 165(a)(2).

any event is superseded by other, more recent PSD permit appeal decisions holding that a permitting authority is not compelled to "take the source as it finds it." Moreover, Pennsauken was decided prior to enactment of the Clean Air Act Amendments of 1990, the Pollution Prevention Act of 1990, 42 U.S.C. §§ 13,101, et seq., and the Energy Policy Act of 1992, 42 U.S.C. §§ 13,201, et seq. These enactments and other recent developments reinforce the need to look beyond "end-of-the-pipe" solutions to air pollution by calling attention to strategies that reduce pollution at the source. With respect to the Clean Air Act, the discussion above regarding siting demonstrates that PSD permitting authorities need not accept a proposed source as immutable beyond debates over add-on pollution control technologies. Instead, the authority to consider "alternatives" to the source as proposed under section 165(a)(2) extends not only to siting decisions, but also to the fuel to be burned and, more fundamentally, to alternative means of fulfilling the economic purpose of the proposed source.

In addition, the 1990 Clean Air Act Amendments revised section 169(3) to explicitly provide for consideration of "clean fuels" as part of the BACT determination itself. See section 403(d) of the Amendments, Pub. L. No. 101-549, 104 Stat. 2399, 2631-32. The Board has recognized the broad reach of this enactment. In Hawaiian Commercial & Sugar Co., PSD Appeal No. 92-1 at 5, n. 7 (July 20, 1992), the Board stated that "the

definition of BACT includes consideration of both clean fuels and use of air pollution control devices." Thus, in considering the environmental impacts of a proposed source, permitting authorities are not barred from requiring a source to consider construction of a different facility that will enable efficient use of cleaner fuels than can be utilized by the source as configured in the PSD application (e.g., through construction of a combined cycle gas turbine in lieu of a coal-fired boiler).

Contrary to the proposition for which the Board cited Hawaiian Commercial & Sugar Co. in this case, see Genesee at 21 n.16, movants believe that the earlier case did not interpret the BACT requirement as limiting the scope of a PSD review. Instead, that decision favorably cites EPA's October 1990 draft New Source Review Workshop Manual, which provides at p. B 13 that permitting authorities may require an applicant to consider building a fundamentally different facility than the one proposed, but are not required to do so under current EPA regulations or policy. See Hawaiian Commercial & Sugar Co. at 7 ("[t]he cited draft guidance makes clear that the permitting authority is entitled to wide latitude in how broad a BACT analysis it wishes to conduct"). Other recent decisions are in agreement. See, e.g., Old Dominion Electric Cooperative, PSD Appeal No. 91-39 at 25 (Order Denying Review, Jan. 29, 1992) ("EPA construes the 1990 Amendments as conferring discretion on the permit issuer to consider clean fuels other than those proposed by the permit

applicant" (citation omitted)); Brooklyn Navy Yard, PSD Appeal No. 88-10 (Remand Order, Feb. 28, 1992) at 20 n. 7 (need to consider source separation in permitting of municipal waste combustors may call for planning of a smaller facility than would otherwise be proposed). Old Dominion also made clear that the authority to require consideration of a different facility in order to utilize clean fuels should not be read "as being limited to instances where an applicable [national ambient air quality standard] or increment is at risk." Id. at 25.[7]

C. Recognizing the Authority to Consider Siting and Source Configuration Under the PSD Provisions of the Act Does Not Dictate Any Particular Analyses But Simply Preserves Discretion to Consider "all the consequences" of a Permitting Decision, as Provided in Section 160(5) of the Act.

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[7] Although the Board's decision was couched in terms of limitations on the BACT requirement of the PSD program, in assessing a PSD permitting authority's ability to consider alternatives to a source as proposed, there does not appear to be any practical reason to distinguish between its power to establish BACT under section 165(a)(4) of the Act and its power to consider "alternatives" under section 165(a)(2). Moreover, this authority applies with equal force to a federally approved state program meeting the requirements of 40 CFR § 51.66 and to a federal program (whether administered directly by EPA or, as here, by a state pursuant to a delegation agreement) under section 110(c)(1) of the Act, 42 U.S.C. § 7410(c)(1) and 40 § 52.21. Compare Genesee at 11 with Central Arizona Water Conservation Dist. v. U.S. EPA, 990 F.2d 1531, 1541 (9th Cir. 1993), cert. requested June 23, 1993 ("[a]cting in place of the state...pursuant to a[] FIP under 42 U.S.C. § 7410(c), EPA 'stands in the shoes of the defaulting State, and all of the rights and duties that would otherwise fall to the State accrue instead to EPA'") (citation omitted).

Finally, movants wish to emphasize that they are not asking the Board to mandate that PSD permitting authorities engage in any particular form or degree of analysis of alternatives to the site or configuration of a proposed major new source of air pollution. Movants merely request the Board to clarify that permitting authorities have the ability to address these important issues. See section 160(5), 42 U.S.C. § 7470(5) (PSD permitting authorities must undertake a "careful evaluation of all the consequences" of "any decision to permit increased air pollution").

CONCLUSION

For the foregoing reasons, the Board should issue a revised decision regarding two of its rationales for the September 8, 1993 decision in the Genesee matter.

Respectfully submitted,

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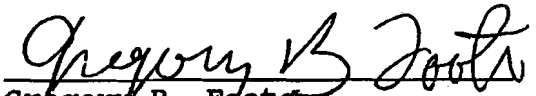

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