

Newark, Essex County. Essex County is designated nonattainment for ozone and fine particulate matter (PM_{2.5}). On June 26, 2012, NJDEP determined that the application was administratively complete and sought public comment on the draft permit that NJDEP proposed to approve. The public hearing took place on July 26, 2012, and the public comment period closed on August 10, 2012.

On September 13, 2012, NJDEP issued an integrated final PSD permit, final Nonattainment NSR preconstruction approval, proposed Title V operating permit, and Acid Rain permit to Hess for the NEC facility. *See* Exhibit 1 attached to the Petition. The final PSD permit was issued pursuant to a delegation agreement with the United States Environmental Protection Agency (USEPA), in effect as revised in July 2011. *See* Exhibit A attached hereto. The delegation agreement pertains to the PSD program only. *Id.* The final Nonattainment NSR approval was issued pursuant to New Jersey Administrative Code (N.J.A.C.) Title 7, Chapter 27, Subchapter 18, which is New Jersey's approved Nonattainment NSR program. *See* 59 Fed. Reg. 56,019 (Nov. 10, 1994); 61 Fed. Reg. 38,591 (July 25, 1996); 40 C.F.R. §§ 52.1578, 52.1605. The proposed Title V Operating Permit was issued under NJDEP's approved operating permit program, found at Title 7, Chapter 27, Subchapter 22 of the New Jersey Administrative Code. *See* 66 Fed. Reg. 63,168 (Dec. 5, 2001); 72 Fed. Reg. 41,025 (July 26, 2007).

On October 13, 2012, Petitioners Ironbound Community Corporation (ICC) and the New Jersey Environmental Justice Alliance (NJEJA) through the Eastern Environmental Law Center submitted a joint Petition to the EAB requesting review of the PSD/NSR permits. In their petition, Petitioners claim that the alternatives analysis under State regulation N.J.A.C. 7:27-18.3 for the pollutants for which Essex County is in nonattainment was insufficient. On October 23, 2012, the EAB requested that NJDEP respond to the Petition by November 8, 2012.

For the reasons discussed below, NJDEP requests that the EAB summarily dismiss the petition for lack of jurisdiction.

III. ARGUMENT

BECAUSE THE PETITION RAISES NO ISSUES PERTAINING TO THE PSD PERMIT, THE BOARD LACKS JURISDICTION AND THE PETITION FOR REVIEW SHOULD BE SUMMARILY DISMISSED.

Pursuant to 40 C.F.R. § 1.25(e)(2), the Board “shall exercise any authority expressly delegated to it” Under 40 C.F.R. Part 124, the Board is delegated authority to issue final decisions in PSD permit appeals filed under Part 124. 40 C.F.R. §§ 124.2, 124.19. “The Board will deny review of issues that are not governed by the PSD regulations because it lacks jurisdiction over them.” *In Re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 127 (EAB 1999).

Petitioners raise no issues with respect to the PSD permit issued to Hess, nor to its terms or conditions. Rather, in their appeal, Petitioners assert that NJDEP failed to require Hess to submit an analysis of alternative sites, production processes and environmental control techniques that demonstrates that the benefits of the proposed plant outweigh its environmental and social costs, as set forth in N.J.A.C. 7:27-18.3. Petition at 3. Petitioners explain that Hess proposes to build the NEC in Essex County, which is in nonattainment for ozone and PM_{2.5}. Petition at 3. Petitioners then explain that because the proposed plant will emit nitrogen oxides (NO_x) and volatile organic compounds (VOCs), precursors of ozone, and NO_x, a precursor of PM_{2.5}, in a nonattainment area, the federal Clean Air Act and New Jersey’s state implementation plan (SIP) require Hess to submit an alternative analysis. Petition at 3. In other words, Petitioners raise issues strictly related to Nonattainment NSR, which New Jersey implements pursuant to its own state rules, as the Petition itself acknowledges. Nowhere in their argument do the Petitioners even mention PSD. Because the Board has no authority to review

State law requirements pertaining to Nonattainment NSR, the Board has no jurisdiction over this appeal and the appeal should be summarily dismissed.

The Board has repeatedly explained the limits of its jurisdiction. “The Board’s role is to consider issues raised in petitions for review that pertain to the PSD program and that meet the threshold procedural requirements of the permit appeal regulations.” *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 249 (EAB 1999) (citing *In Re Knauf, supra*, 8 E.A.D. at 126). “The Board’s jurisdiction over delegated state PSD permits ... is ‘not all encompassing ... [but] specifically restrict[ed] ... to review of federal requirements.’” *In re Seminole Elec. Cooperative, Inc.*, PSD Appeal No. 08-09, slip op. at 10 n.14 (Sept. 22, 2009), 14 E.A.D. ___ (citing *In re Milford Power Plant*, 8 E.A.D. 670, 673 (EAB 1999)).

As the Board stated in *In re Dominion Energy Brayton Point, LLC*, “the Board’s jurisdiction to review PSD permits extends only to those issues relating to permit conditions that implement the federal PSD program.” *In re Dominion Energy Brayton Point, LLC*, PSD Appeal No. 09-01, slip op. at 2-3 (May 13, 2009) (citing *In re Hawaii Elec. Light Co., Inc.*, 10 E.A.D. 219, 238 (EAB 2001)). “The PSD review process is not an ‘open forum for consideration of every environmental aspect of a proposed project” *Id.* at 3 (quoting *In re Knauf Fiber Glass, supra*, 8 E.A.D. at 127); *see also In re Sutter Power Plant*, 8 E.A.D. 680, 688 (EAB 1999). Thus, in *In re Dominion Energy Brayton Point*, the Board denied review where “nothing in the petition before us [the Board] challenges any provision of the PSD permit governing air emissions of regulated pollutants.” *In re Dominion Energy Brayton Point, supra*, slip op. at 4; *see also In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 135 (EAB 1997) (denying review of permit condition relating to Title V operating permit requirements because that portion of the permit was a state permit over which the Board lacked jurisdiction); *In re Seminole Elec., supra*,

slip op. at 10 n.14 (explaining limits of jurisdiction and that the Board lacks authority to review conditions of a PSD permit adopted solely pursuant to state law); accord *In re BP Cherry Point*, 12 E.A.D. 209, 224-25 (EAB 2005) (denying petitioners' challenge not to any particular concerns based on PSD provisions, but to the adequacy of the PM NAAQS itself); *In re Tondu Energy Co.*, 9 E.A.D. 710 (EAB 2001) (denying review of what amounted to a challenge to the PM NAAQS and review of state law claims which are beyond the purview of the Board's proceeding under 40 C.F.R. 124.19).

Here, Petitioners do not challenge any specific condition of the permit but challenge the sufficiency of the alternatives analysis submitted under N.J.A.C. 7:27-18.3. As explained, this state regulation is part of NJDEP's Nonattainment New Source Review provisions. The regulation is not part of the PSD program; indeed, Petitioners themselves do not assert that this regulation is part of the PSD program. In *In re American Ref-Fuel Co. of Essex County Permit Applicant*, 2 E.A.D. 280 (Adm'r 1986), the petitioner challenged a condition of a PSD permit which concerned emission offsets for PM emissions. The PSD permit was part of an integrated permit that NJDEP considered in a combined permit proceeding, similar to the integrated permit issued to Hess. *Id.* at 281. The Administrator explained that emission offsets arise under and relate directly to the nonattainment provisions of Part D of the Clean Air Act, not to the attainment provisions of Part C of the Clean Air Act, under which PSD determinations are made. *Id.* at 282. As the Administrator noted, and the Petition itself asserts, "EPA has granted New Jersey unconditional authorization to administer the nonattainment provisions pursuant to its approved Part D state implementation plan (SIP), 46 Fed. Reg. 21996 (April 15, 1981)...." *Id.* Therefore, the Board recognized, "with respect to new sources in nonattainment areas, New Jersey is fully authorized to issue permits under its own regulations, and such permits are not

subject to administrative review by EPA on appeal under 40 C.F.R. 124.19.” *Id.* at 282-83. In other words, the regulation setting forth the Board’s review authority “does not embrace state-issued permits for new sources in nonattainment areas.” *Id.* at 283.

Similarly, in *In re Sutter Power Plant*, the Board denied review of an issue raised regarding emission reduction credits, because the argument was “jurisdictionally flawed.” *In re Sutter Power Plant, supra*, 8 E.A.D. at 690. “The Board may not review, in a PSD appeal, the decisions of a state agency made pursuant to non-PSD portions of the Clean Air Act or to state or local initiatives and not otherwise relating to permit conditions implementing the PSD program.” *Id.*; accord *In re Russell City Energy Center, LLC*, PSD Appeal Nos. 10-01 through 10-5, slip op. at 126 (Nov. 18, 2010), 15 E.A.D. ___ (rejecting challenge to the agency’s 24-hour PM2.5 analysis because the area was designated nonattainment for 24 hour PM2.5 at the time the final permit was issued.) The emission reduction credits were imposed through the nonattainment area permit issued by the local permitting authority; thus, the Board lacked jurisdiction. *In re Sutter Power Plant, supra*, 8 E.A.D. at 690. In so finding, the Board pointed out that petitioner failed to identify any conditions of the PSD permit or any PSD provisions in the Clean Air Act or regulations calling for emission reduction credit purchases. *Id.*

Here, as in *In re American Ref-Fuel* and *In re Sutter Power Plant*, Petitioners raise an issue pertaining to the Nonattainment NSR provisions set forth by state laws. The Fact Sheet (attached hereto as Exhibit B, at 20), the Statement of Basis (attached hereto as Exhibit C, at 2-3), and the Public Notice (attached hereto as Exhibit D, at 3) – all of which accompanied the proposed draft permit for public comment – each explained that the emissions offset requirements pertain to nonattainment pollutants. Similarly, the response to public comments document issued by the NJDEP hearing officer explained that the requirements of N.J.A.C. 7:27-

18 (subchapter 18) pertain to nonattainment areas, i.e., nonattainment new source review requirements. *See* Exhibit 4 attached to the Petition, at 19-23. Petitioners themselves do not assert that the issues raised in their petition are governed by the PSD regulations.¹ Therefore, the Board lacks jurisdiction over the issues raised by Petitioners and the Board should summarily dismiss the petition.

Petitioners also argue that the alternatives analysis set forth in the nonattainment provisions of the Clean Air Act and New Jersey's regulations should be analogized to the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(C)(iii). Petition at 4-5. Even if the Board had jurisdiction to consider this argument, which is unrelated to the PSD permit and therefore, for the reasons set forth above, the Board has no authority to review, Petitioners failed to demonstrate that they raised this argument during the public comment period. The threshold procedural requirements necessary for the Board's review are clear. The petition must include "a demonstration that any issues being raised were raised during the public comment period." 40 C.F.R. §§ 124.13, 124.19(a); *see In re Encogen, supra*, 8 E.A.D. at 249. This requirement is necessary because the "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." *Id.* at 250; *see also In re Kawaihae, supra*, 7 E.A.D. at 114; *In re BP Cherry Point, supra*, 12 E.A.D. at 219-20; *In*

¹ As part of Petitioners' argument regarding New Jersey's emissions offset rule, specifically N.J.A.C. 7:27-18.3, Petitioners assert that Hess' environmental justice analysis "highlights the problem" of the alleged inadequate cost-benefit analysis. Petition at 8. Petitioners mention the environmental justice analysis specifically in the context of the state requirement set forth in N.J.A.C. 7:27-18.3, over which the Board has no jurisdiction but rather is a matter of state law. *See In re Russell City Energy, supra*, slip op. at 127 n.116 (denying review of challenge to the agency's environmental justice analysis where the area was designated nonattainment for 24-hour PM_{2.5}, such that the nonattainment NSR provisions would apply, and the petitioner's challenge was premised on the petitioner's underlying assertion that the PM_{2.5} analysis was faulty, an argument that the Board rejected).

re Christian County Generation, LLC, 13 E.A.D. 449, 459-60 (EAB 2008). The burden to show that any issues raised were raised during the public comment period “rests squarely with the petitioner.” *In re BP Cherry Point, supra*, 12 E.A.D. at 216.

The Board has emphasized the procedural requirements set forth in 40 C.F.R. Part 124. *See, e.g., In re Russell City Energy Center, supra*, slip op. at 57 n.46. Here, Petitioners first failed to cite where in the comments this argument was raised. The Board has repeatedly stated that it will not and need not scour the record to determine if an issue was raised before the permitting authority. *See In re Encogen, supra*, 8 E.A.D. at 249; *In re Russell City Energy Center, supra*, slip op. at 57 n.46. Moreover, the only mention of NEPA in the comments attached to the petition was a passing reference with respect to NJEJA’s comments on cumulative impacts. *See Exhibit 2 attached to Petition (NJEJA Comments at 10)*. This passing reference does not satisfy Petitioners’ burden to raise issues “with a reasonable degree of specificity and clarity during the comment period.” *In re Russell City, supra*, slip op. at 13. For these additional reasons, the Board should not consider Petitioners’ NEPA argument.²

IV. CONCLUSION

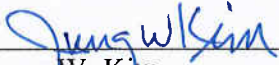
Petitioners have failed to demonstrate that the Board has jurisdiction to consider the issues pertaining to New Jersey’s Nonattainment New Source Review provisions raised in the petition. Additionally, Petitioners have failed to show that they raised their NEPA argument before NJDEP during the public comment period, which in any event has nothing to do with the PSD permit. Therefore, NJDEP respectfully requests that the Board summarily dismiss the petition. If the Board decides that the petition is not appropriate for summary disposition, NJDEP requests the opportunity to file supplemental briefing on the merits.

² PSD permits are not subject to the environmental impact statement provisions of NEPA. 40 C.F.R. § 124.9(b)(6), *In re Kawaihae, supra*, 7 E.A.D. at 129 and n.30.

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Respectfully submitted,

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