

IN RE CARLTON, INC. NORTH SHORE POWER PLANT

PSD Appeal No. 00-9

ORDER DENYING PETITION FOR REVIEW

Decided February 28, 2001

Syllabus

Verena Owen and the Lake County Conservation Alliance (“Petitioners”) filed a Petition for Review of a construction permit (“Permit”) issued to the Carlton, Inc. North Shore Power Plant (“Carlton”) by the Illinois Environmental Protection Agency (“IEPA”) for the construction of a natural gas-fired peak load electrical power generating facility in Zion, Illinois. Petitioners challenge IEPA’s decision to issue the Permit pursuant to Illinois’ minor source New Source Review (“NSR”) program rather than under the federal Prevention of Significant Deterioration (“PSD”) program, on the basis that the proposed facility will be a major source of emissions, thus triggering PSD requirements.

Held: The Petition for Review is denied. The Board’s jurisdiction is limited to permits issued under the federal PSD program. The Permit in question was issued pursuant to a minor NSR program that has been approved by U.S. EPA Region V (the “Region”) as a component of the Illinois Clean Air Act State Implementation Plan, rather than the federal PSD program. Moreover, the Board’s jurisdiction is limited to federal PSD permits that are actually issued; it does not extend to a State’s decision not to issue a PSD permit. Review of such decisions is reserved to other fora. Accordingly, review is denied because the Board lacks jurisdiction to hear it.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Fulton:

In a petition that was timely filed on December 11, 2000 (“Petition”), Verena Owen and the Lake County Conservation Alliance (“Petitioners”) appealed the issuance of a construction permit (“Permit”) to the Carlton, Inc. North Shore Power Plant (“Carlton”). The Permit, issued by the Illinois Environmental Protection Agency (“IEPA”) on November 10, 2000, authorizes Carlton to construct a natural gas-fired peak load electrical power generating facility in Zion, Illinois. Petitioners argue that the Environmental Appeals Board (the “Board”) has jurisdiction to hear their Petition by virtue of its authority to review federal prevention of significant deterioration (“PSD”) permits issued under the Clean Air Act

("CAA"), 42 U.S.C. § 7401.¹

IEPA filed a motion to dismiss the Petition on January 5, 2001, arguing, among other things, that this Board does not have jurisdiction to review the permit at issue because it is not a PSD permit. As discussed below, IEPA's motion to dismiss is granted and Petitioners' request for review is denied.

I. BACKGROUND

On November 10, 2000, IEPA issued the Permit, authorizing Carlton to construct either three General Electric ("GE") frame 7 FA simple cycle turbines with a nominal capacity of 187 megawatts each, or six GE Frame 7 EA simple cycle turbines with a nominal capacity of 98.2 megawatts each, along with ancillary equipment. *See* Permit ¶ 3a. The Permit provides that the turbines are permitted to fire only natural gas, and are required to use dry low oxides of nitrogen combusters. *Id.* ¶ 3c.

Although IEPA implements the federal PSD program in Illinois pursuant to a delegation agreement entered into with U.S. Environmental Protection Agency ("EPA") Region V (the "Region"), the Permit was issued pursuant to a minor new source review ("NSR") program that has been approved by the Region as a component of Illinois' CAA State Implementation Plan ("SIP").²

On December 11, 2000, Petitioners filed a petition for review raising the following issues: (1) the proposed facility (the "Source") is not a minor source of emissions as posited by the Permit, but is rather a major source of carbon monoxide ("CO"), and nitrogen oxides ("NOx") and, as such, is subject to PSD requirements;³ (2) the Source is a major source of volatile organic materials ("VOM") and hazardous air pollutants ("HAPs") and, as such, should be subject to nonattainment NSR and maximum achievable control technology ("MACT"); (3) the emissions calculations utilized in the major/minor determination should have included other sources under common control; and (4) IEPA failed to notify Peti-

¹ The CAA established the PSD program to regulate air pollution in areas of the country designated as "attainment" areas, where air quality meets or is cleaner than the national ambient air quality standards ("NAAQS"), as well as areas that cannot be classified as "attainment" or "nonattainment" ("unclassifiable" areas). CAA §§ 160-69B, 42 U.S.C. §§ 7470-92.

² EPA's approval and promulgation of a SIP renders the elements of the SIP the applicable law for purposes of the CAA, and empowers the State to administer various CAA programs under its own authority. *See* CAA §§ 110, 116, 161, 42 U.S.C. §§ 7410, 7416, 7471.

³ The PSD requirements apply to new major stationary sources and major modifications of existing stationary sources. *See, e.g.*, CAA §§ 165(a), 169, 42 U.S.C. §§ 7475(a), 7479; 40 C.F.R. § 52.21(b), (i)-(k).

tioners of the issuance of the Permit and to respond to comments at the time of the Permit's issuance. *See* Petition at 2-6.

IEPA filed a motion to dismiss the Petition on January 5, 2001, in which it argued that the Board lacked jurisdiction to review IEPA's permit decision because the Permit issued to Carlton was issued under IEPA's minor NSR program, rather than the federal PSD program. *See* Motion to Dismiss at 6-7. Petitioners filed a Response to IEPA's Motion to Dismiss on January 18, 2001. On January 22, 2001, the Board issued an order requesting that U.S. EPA's Office of General Counsel ("OGC") prepare an amicus brief on the issue of whether the Board has jurisdiction over this matter. OGC subsequently filed an amicus brief advancing the view that the Board is without jurisdiction in this case.

II. DISCUSSION

Petitioners argue that the Board has jurisdiction over its Petition because there is substantial evidence that the proposed facility, rather than being a true minor source, should be regarded as a major source of emissions, thus triggering PSD requirements. *See* Petitioners' Response to Motion to Dismiss at 5. Petitioners do not appear to dispute IEPA's contention that the Permit was, in fact, issued under the State's minor source NSR program. Rather, Petitioners contend that, because the Source is in Petitioners' view a major emissions source, a PSD permit, rather than a minor source NSR permit, should have been required.

The authority of the Board to review permit decisions is limited by the statutes, regulations, and delegations that authorize and provide standards for such review. *See* 57 Fed. Reg. 5,320 (Feb. 13, 1992). In this case, the relevant statute is the Clean Air Act and, in particular, the major source permitting requirements of the PSD provisions in section 165 of the Act. 42 U.S.C. § 7475. The relevant regulatory provisions are the federal PSD regulations at 40 C.F.R. § 52.21 and the consolidated permitting regulations at 40 C.F.R. § 124.19 which provide for the appeal of federal PSD permits. The relevant delegations are (1) the delegation of authority, pursuant to 40 C.F.R. § 52.21(u), from the Region to IEPA to administer the federal PSD program in Illinois; and (2) the delegation from the Administrator of EPA to the Board of her authority to decide appeals of federal PSD permits, including PSD permits issued by delegated States such as Illinois. *See* 57 Fed. Reg. 5,320-21.

EPA's authority to issue federal PSD permits is limited to situations where the state or tribal PSD program has not been approved as part of the SIP. 45 Fed. Reg. 52,676 (Aug. 7, 1980). The consolidated permitting regulations at 40 C.F.R. pt. 124 are correspondingly limited in scope. 40 C.F.R. § 124.1(e) ("Part 124 does not apply to PSD permits issued by an approved State."). More generally, permit appeals under 40 C.F.R. pt. 124 are limited to the federal permitting pro-

grams listed therein, including appeals of permits issued under the federal PSD program. *See* 40 C.F.R. § 124.1. The requirements of 40 C.F.R. pt. 124 do not apply to permits issued under the approved minor source NSR program of Illinois or of any other State. 40 C.F.R. § 124.1 (This part applies to RCRA, UIC, PSD and NPDES permits). It follows that the Board's jurisdiction to hear PSD permit appeals under 40 C.F.R. pt. 124 does not extend to appeals of state-issued minor NSR permits in approved States.

Such permits are regarded as creatures of state law that can be challenged only under the state system of review. *See In re Sutter Power Plant*, 8 E.A.D. 630, 690 (EAB 1999) ("The Board may not review, in a PSD appeal, the decisions of a state agency made pursuant to non-PSD portions of the CAA or to state or local initiatives * * *."); *In re Milford Power Plant*, 8 E.A.D. 670, 673 (EAB 1999) ("The Board's authority to review PSD permits is not all-encompassing * * * [t]he regulations specifically restrict the Board's scope of review to federal requirements * * *."); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 161-62 (EAD 1999) (denying review of issues not within the purview of the federal PSD program); *In re Great Lakes Chem. Corp.*, 5 E.A.D. 395, 396-97 (EAB 1994) (denying review of issues related to permit conditions imposed by Arkansas pursuant to its authorized program).

Illinois does not have a PSD program approved as part of its SIP and, as such, the PSD program in Illinois is a federal program. As stated above, however, the Permit in this case was not issued under the PSD program. Rather, the Permit was issued pursuant to Illinois' minor source NSR program — a program that was approved as part of Illinois' SIP. *See* 37 Fed. Reg. 10,862 (May 31, 1972). Accordingly, the Permit falls outside the body of federal permits subject to Board review.

Significantly, the Board's jurisdiction is limited to federal PSD permits that are *actually issued*; it does not extend to state decisions reflected in state-issued permits, even when those decisions lead to the conclusion not to require a PSD permit at all. Review of decisions of this kind is reserved to other fora. To the extent that Petitioners argue that the State erred in the calculations that led it to its minor source conclusion, they presumably have a right to challenge those calculations under the state system of review.⁴ Moreover, since Petitioners essentially are alleging that the construction project contemplated by the Permit will violate the CAA requirement that major sources obtain PSD permits, there are options in the enforcement arena for addressing their concern, including exercising the right to bring a citizen suit under CAA § 304(a)(3), 42 U.S.C. § 7604(a)(3), or requesting the Region to bring an action to enforce the CAA requirement to obtain a PSD permit. *See, e.g.,* CAA §§ 113(a)(5), 167, 42 U.S.C. §§ 7413(a)(5), 7477. The

⁴ It is unclear from the record before us whether Petitioners have, in fact, pursued this path.

Environmental Appeals Board is simply not the right forum for testing Petitioners' arguments.

III. CONCLUSION

For the foregoing reasons, Verena Owen and the Lake County Conservation Alliance's Petition must be denied.

So ordered.