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

In re:	)	
Harquahala Generating Project	)	PSD Appeal No. 01-04
Permit No. V99-015	)	

ORDER DENYING PETITION FOR REVIEW

On March 16, 2001, Don't Waste Arizona ("DWA"), a citizens' group, filed a petition for review of a federal Clean Air Act ("CAA") Prevention of Significant Deterioration ("PSD") permit determination made by Maricopa County Environmental Services Department ("MCESD").[1] *See* CAA § 165, 42 U.S.C. § 7475. The permit determination ("Final Permit") approved the issuance of a

[1]On December 13, 1993, the U.S. Environmental Protection Agency ("EPA") delegated authority to the MCESD to administer the federal PSD program. Because MCESD acts as EPA's delegate in implementing the federal PSD program, the permit is considered an EPA-issued permit for purposes of federal law, and is subject to review by the Board pursuant to 40 C.F.R. § 124.19. *See In re Zion Energy, L.L.C.*, PSD Appeal No. 01-01, slip op. at 2 n.1 (EAB, Mar. 27, 2001), 9 E.A.D. ___; *In re Knauf Fiber Glass, GmbH,* PSD Appeal Nos. 98-3 through 98-20, slip op. at 3 (EAB, Feb. 4, 1999), 8 E.A.D. ___; *In re West Suburban Recycling and Energy Ctr., L.P.,* 6 E.A.D. 692, 695 n.4 (EAB 1996) ("For purposes of part 124, a delegate State stands in the shoes of the Regional Administrator [and must] follow the procedural requirements of part 124. * * * A permit issued by a delegate is still an 'EPA-issued permit;' * * * .")(quoting 45 Fed. Reg. 33,413 (May 19, 1980)).

permit to Harquahala Generating Company ("HGC") for the construction and operation of the Harquahala Generating Project (the "Project"), an electric generating plant to be located near Tonapah, in Maricopa County, Arizona. The Project constitutes a "major stationary source" of pollutants within the meaning of the PSD program regulations, and is therefore subject to the PSD permitting process.[2] *See* 40 C.F.R. § 52.21(b)(1)(i).

I. *BACKGROUND*

MCESD issued its Final Permit on February 15, 2001. The proposed project, which would produce 1,040 megawatts of electricity, consists of natural gas-fired combustion turbines, heat recovery steam generators, steam turbines, and two cooling towers, with the gas turbines contributing the majority of

[2]Congress enacted the PSD provisions of the CAA in 1977 for the purpose of, among other things, "insur[ing] that economic growth will occur in a manner consistent with the preservation of existing clean air resources." CAA § 160(3), 42 U.S.C. § 7470(3). To that end, parties must obtain preconstruction approval (i.e., PSD permits) to build new major stationary sources, or to make major modifications to existing sources, in areas of the country deemed to be in "attainment" or "unclassifiable" with respect to federal air quality standards called "national ambient air quality standards." *See* CAA §§ 107, 160-169B, 42 U.S.C. §§ 7407, 7470-7492.

emissions. Permittee Harquahala Generating Company's Motion to Dismiss Petition for Review ("HGC Motion to Dismiss") at 2.

As frequently occurs in the context of PSD permits crafted by state permit authorities, the permit issued by MCESD consolidated conditions based upon federal PSD requirements, as well as the approved State Implementation Plan ("SIP") (Arizona), and local (Maricopa County) laws.[3] *See* Harquahala Generating Company, LLC, *Harquahala Generating Project, Permit Number V99-015* (Feb. 8, 2001) ("General Permit").[4]

Of relevance to the current proceeding, MCESD, pursuant to federal PSD requirements, established emissions limits in the General Permit purportedly representing the use of Best Available

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[3]*See Knauf Fiber Glass,* slip op. at 54 (describing common practice of permitting authorities to issue PSD permits that consolidate "all relevant [state and federal] requirements in one document," thus "obviat[ing] the need for separate federal, state, and local permits."

[4]In this order, the term "General Permit" refers to the permit issued by MCESD consolidating conditions based on federal PSD requirements, the Arizona SIP, and local laws. The term "Final Permit" refers only to MCESD's determination that the Project complied with federal PSD requirements at 40 C.F.R. § 52.21, and thus may receive a PSD permit. The latter determination is the issue within the scope of the Board's review authority in this proceeding. *See* 40 C.F.R. §§ 124.1, 124.19, and 124.41.

Control Technology ("BACT") for HGP.[5,6] The BACT limits were established for HGP's projected emissions of particulate matter ("PM_{10}"), nitrogen oxides ("NO_X"), carbon monoxide ("CO"), volatile organic compounds ("VOCs"), and sulfur dioxide ("SO_2").[7] In making its BACT determination for these pollutants, MCESD

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[5]The CAA implementing regulations define BACT as follows:

> [BACT] means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under [sic] Act which would be emitted from any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant.

40 C.F.R. § 52.21(b)(12).

[6]The PSD regulations require that new major stationary sources and major modifications of such sources employ BACT to minimize emissions of regulated pollutants that the source would have the potential to emit in significant amounts. 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 52.21(j)(2)-(3). Under the rules governing the PSD permitting process, the permit applicant is responsible for proposing an emissions limitation that constitutes BACT based on an analysis of pollution control technology alternatives. 40 C.F.R. § 52.21(n)(1)(iii). The ultimate BACT decision is made by the permit-issuing authority.

[7]These pollutants constitute five of the six criteria pollutants regulated by the PSD program. The remaining pollutant is lead. 40 C.F.R. §§ 50.4-50.12.

first analyzed alternative pollution control technologies in light of criteria such as pollution control effectiveness, costs, and environmental impacts, and then, based on this analysis, selected what it deemed were appropriate technologies for the Project that formed the basis of the BACT limits in the General Permit.

The BACT emissions limits in the General Permit, *see* General Permit Condition No. 18, were based on the Project's use of the following control technologies: (1) natural gas, combustion air filters, good combustion controls, and good maintenance for the Project's emissions of PM_{10}; (2) dry low-NO_x burners and Selective Catalytic Reduction for NO_x; (3) good combustion practice, advanced combustion control, and the addition of an oxidation catalyst for CO and VOCs; and (4) exclusive reliance on natural gas combustion for SO_2. *See* Harquahala Generating Company, *PSD/Title V Permit Application, Harquahala Generating Project, Maricopa County, AZ,* pp. 4-1 through 4-19 (Aug. 19, 2000).

Following issuance of a draft permit on October 25, 2000, MCESD established a public comment period during which a public hearing was held, and members of the public were invited to submit written comments on the draft permit. On November 13,

2000, DWA filed timely written comments on the draft permit. *See* Letter from Stephen M. Brittle, President, Don't Waste Arizona, Inc. (Regarding: Comments on Proposed Air Permit Number V99-015, Harquahala Generating Station) (Nov. 13, 2000) ("DWA's Comments").

When it issued the Final Permit, MCESD included a response to-comments document that addressed written and oral comments regarding the General Permit that were received during the public comment period. *See* MCESD, *Response to Comments on Proposed Air Permit Number V99-015, Harquahala Generating Company, LLC, Harquahala Generating Project* (Jan. 22, 2001) ("Responsiveness Summary").

On March 16, 2001, DWA timely filed a petition for review of the Final Permit. *See* Appeal of Air Permit Number V99-015, Harquahala Generating Station, Issued by Maricopa County Environmental Services Department (MCESD), Arizona ("Petition"). In its Petition, DWA alleges that the General Permit contains "conditions that subvert or bypass federal regulations, policies, and agreements between the MCESD and EPA." Petition at 1. On April 5, 2001, the Maricopa County Air Pollution Control Officer and MCESD filed a motion to dismiss the Petition. *See* Control

Officer's Request for Summary Disposition. ("MCESD/Control Officer's Motion to Dismiss"). On the same date, with leave of the Board, HGC, the permittee, also filed a motion to dismiss the Petition. *See* HGC's Motion to Dismiss. On April 19, 2001, EPA's Region 9 and the EPA's Office of Air and Radiation filed a motion for leave to file a memorandum in support of summary dismissal of DWA's Petition, which motion we grant by this order. *See* Motion for Leave to File and Memorandum of Region 9 in Support of Motion for Dismissal of Petition for Review ("Amicus Brief").

II. *DISCUSSION*

A. *Standard of Review*

The EPA procedures for issuing or modifying a PSD permit provide that "any person who filed comments on [a] draft permit or participated in the public hearing [on that permit] may petition the Environmental Appeals Board to review any condition of the permit decision." 40 C.F.R. § 124.19(a)(2000). A petitioner must clearly demonstrate that each issue raised in the petition was previously raised during the public comment period or was not readily ascertainable at that time. *In re Sutter Power Plant,* PSD Appeal Nos. 99-6 & 99-73, slip op. at 9 & n.8. (EAB, Dec. 2, 1999), 8 E.A.D. ___.

To obtain review on the merits, a petitioner must demonstrate that the permit condition for which review is being sought is based on:

> (1) A finding of fact or conclusion of law [that] is clearly erroneous; or
> (2) An exercise of discretion or an important policy consideration [that] the Environmental Appeals Board should, in its discretion, review.

40 C.F.R. § 124.19(a). The burden of demonstrating that review is warranted rests with the petitioner challenging the permit condition. 40 C.F.R. § 124.19(a); *accord, In re AES Puerto Rico, L.P.,* PSD Appeal Nos. 98-29 through 98-31, slip op. at 7 (EAB, May 27, 1999), 8 E.A.D. __; *In re Hawaii Elec. Light Co.*, PSD Appeal Nos. 98-29 through 98-31, slip op. at 8 (EAB, Nov. 25, 1998); *In re Ecoeléctrica, L.P.,* 7 E.A.D. 56, 61 (EAB 1997).

To satisfy these requirements, a petitioner must include specific information supporting the allegations in the petition. *Sutter*, slip op. at 10. Moreover, as we have stated on numerous occasions, it is not enough simply to repeat objections made during the comment period. Rather, in addition to stating its objections to the permit, a petitioner must explain why the permit issuer's previous response to those objections is clearly erroneous or otherwise warrants review. *In re Zion Energy,*

L.L.C., PSD Appeal No. 01-01, slip op. at 7 (EAB, March 27, 2001), 9 E.A.D. ___; *Hawaii Elec. Light Co.*, slip op. at 8. *In re Kawaihae Cogeneration Project,* 7 E.A.D. 107, 114 (EAB 1997); *In re Puerto Rico Elec. Power Auth.,* 6 E.A.D. 253, 255 (EAB 1995). Failure to do so will result in a denial of review. *See, e.g., Zion Energy,* slip op. at 9; *Hawaii Elec. Light Co.,* slip op. at 32.

The Board has emphasized that while it does not expect petitions filed by persons unrepresented by counsel, such as Petitioner here, to contain sophisticated legal arguments or employ precise legal or technical terms, the petition must provide sufficient specificity to apprise the Board of issues being raised or provide some supporting reason(s) why the permitting authority erred or review is otherwise warranted. *See Sutter,* slip op. at 11.

In its Petition, DWA provides several "examples" allegedly illustrating its claim that the General Permit "subvert[s] or bypass[es] federal regulations, policies, and agreements between the MCESD and EPA." We analyze these "examples" and DWA's Petition below.

B. *Issues Raised on Appeal*

1. *Excess Emissions During Startup and Shutdown*

In its Petition, DWA criticizes a condition in the General Permit that would purportedly allow the Project owner to assert an affirmative defense to emissions that exceed permit limits if the Project can satisfy a list of criteria contained in the permit condition. *See* General Permit Condition No. 10. In particular, DWA challenges one of the criteria for use of the affirmative defense. That criterion provides that where emissions exceedances result from "breakdown" of process equipment or during startup and shutdown, such exceedances must be "unavoidable." Final Permit at 6. DWA avers that this provision would extend the affirmative defense too broadly in contravention of Agency policy by allowing the Project to avert violations even in cases where "unavoidable" exceedances "result from facilities that have not been * * * designed, maintained, and/or constructed properly." Petition at 1. While DWA acknowledges that another criterion for use of the affirmative defense states that any "excess emissions [not be] part of a recurring pattern indicative of inadequate design, operation, or maintenance," DWA nevertheless protests that this language does

not provide sufficient guidance on when such a "recurring pattern" occurs and is too "vague to be enforceable." *Id.* at 2.

At first blush, one might regard this provision as potentially weakening the General Permit's PSD protections by affording the Project an affirmative defense to emission exceedances that otherwise would constitute violations of the Permit. Notably, however, by the terms of the General Permit, the affirmative defense provision in General Permit Condition No. 10 is "only applicable at the local level." *See* General Permit at 6.[8] As explained by HGC in its motion to dismiss, the affirmative defense provision is based on a County rule that is neither part of the PSD program nor part of the SIP. HGC's Motion to Dismiss at 5. Therefore, the affirmative defense provision would not be available to the Project in any Agency enforcement action or a citizen suit brought under the CAA in response to violations of the General Permit's emissions limits.

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[8]As the General Permit provides:

> This condition is based on a County rule which has not been adopted into the [SIP] and is therefore only applicable at the County level.

General Permit Condition 10, General Permit at 6.

As amici EPA Region 9 and the EPA's Office of Air and Radiation explain, "the affirmative defense set forth in [] General Condition 10 would not apply in an action in federal court to enforce compliance with the PSD Permit." Amicus Brief at 4 n.3.

In our view, because of its exclusively local nature, this affirmative defense provision does not appear to conflict with or detract from federal PSD enforceability. As such, it does not bear a sufficient nexus to the federal PSD program to merit Board review. *See In re Knauf Fiber Glass, GmbH,* PSD Appeal Nos. 98-3 through 98-20, slip op. at 10, 62-63 (EAB, Feb. 4, 1999), 8 E.A.D. ___ (holding that emissions offset conditions in PSD permit that were based on local rules and not required by PSD regulations did not bear sufficient nexus to federal PSD program to warrant Board review).

For the foregoing reasons, review of the Final Permit is denied on this basis.[9]

2. *BACT Emissions Limitations for VOCs, NO_X, CO, and PM_{10}*

In a statement reproduced verbatim from its earlier written comments, DWA challenges MCESD's BACT determination with regard to the Project's emissions of VOCs, NO_x, CO, and PM_{10}. In particular, DWA challenges the emission limits the MCESD determined constituted BACT for the following time frames: (1) twelve-month rolling average emissions limits for PM_{10}, NO_x, VOCs and CO; (2) hourly emissions limits for CO and VOCs outside startup and shutdown periods; (3) hourly emissions limits for

[9]In connection with this argument, DWA alleges in its Petition that the affirmative defense provision conflicts with Agency policy on SIPs and requests that the Board "require a modification" to the permit language so that it conforms to this policy. *See* Petition at 2. We have previously held that in PSD appeals, the Board's review authority extends to those issues directly relating to federal PSD requirements, but absent a nexus to the PSD program, the Board may not review in such appeals decisions of a state agency made pursuant to non-PSD parts of the CAA. *See*, e.g., *Sutter*, slip op. at 11, 14; *Knauf Fiber Glass,* slip op. at 53. In this regard, DWA does not demonstrate how an alleged conflict between federal SIP policy and the General Permit's affirmative defense provision in any way implicates the federal PSD program or impedes its operation. Thus, we see no reason to grant review on this issue.

NO_x, CO, and VOCs during startup and shutdown periods (4) hourly limits for PM_{10} during startup and shutdown periods; and (5) short-term limits for CO, NO_x, VOCs, and PM_{10} during startup and shutdown periods. *Compare* Petition at 3-5 *with* DWA's Comments.

In its Petition, DWA charges in blanket fashion that the BACT-based limitations "are too high," "not protective of the environment," and "should be revised downward." Petition at 2-4. In addition, DWA specifically challenges the rolling twelve-month average emissions for PM_{10}, NO_x, CO, and VOCs (sub-issue 1 above) as allowing greater emissions of these pollutants "than other comparable proposed power plants in the same area." Petition at 2. It also faults the MCESD for imposing less stringent emissions limits for PM_{10} in the General Permit than in the permit application. *Id.*

In its Petition, DWA supplements its restated written comments with new objections to MCESD's BACT determination. For example, DWA states that in its BACT determination process, MCESD "failed to examine additional control technologies, equipment, or operational changes to reduce emissions" and that MCESD improperly relied upon manufacturers' estimates of emission rates for different control equipment without independently verifying those emission rates. *Id.* at 3-4.

DWA also uses its Petition to introduce new proposals for correcting the MCESD's allegedly defective BACT determination. For example, DWA requests that the Board require MCESD to "substantiate its calculations and examination of BACT" and to "change the permit language to be more consistent with federal environmental policy and regulations." Petition at 3. DWA further recommends that the MCESD insert new language in the permit that will obligate the agency, upon renewing the permit, to revise downward the Project's BACT determinations for NO_x, CO, and VOCs during startup and shutdown periods "whenever monitoring required by the Final Permit during startup and shutdown, or the performance testing required" demonstrates "that the maximum hourly emissions for CO, NO_x, VOCs, and PM_{10} * * * can be lowered and still achieve continual compliance." *Id.* Finally, DWA asks the Board to "review MCESD's methodology and calculations to determine the accuracy of those calculations and find that lower limits for PM10 are needed for startup and shutdown." Petition at 4.

In responding to DWA's written comments in its response to comments document, MCESD asserted that it had met all BACT requirements. MCESD explained that it had conducted a thorough

BACT analysis of alternative control technologies in accordance with the EPA's top-down analysis,[10] "taking into account energy, environmental, economic impacts, and other costs." Responsiveness Summary at 3. MCESD also disputed DWA's contention that the BACT emissions limits were set "too high," maintaining that BACT emission limits for VOCs, CO, NO_x, and PM_{10} were predicated upon the most stringent available control technologies, and that the limits were based on manufacturer's data on expected emissions from these control technologies. Responsiveness Summary at 2-5.

In response to DWA's concerns regarding MCESD's setting 12-month rolling average emission limits for PM_{10}, NO_x, CO, and VOCs, *see supra,* MCESD stated that these limits were "in line with other power plant air quality permits that have been either

[10]The "top-down" process is an EPA-recommended method for conducting a BACT analysis commonly used by permitting agencies. *See* U.S. EPA, *New Source Review Workshop Manual* at B.5-B.9 (Oct. 1990). The top-down method provides that all available control technologies be ranked in descending order of control effectiveness. The PSD applicant first examines the most stringent – or "top" – alternative. That alternative is established as BACT unless the applicant demonstrates, and the permitting authority in its informed judgment agrees, that technical considerations, or energy, environmental, or economic impacts justify a conclusion that the most stringent technology is not "achievable" in that case. *Id.*

issued or proposed by the [MCESD]." Responsiveness Summary at 3. Contradicting DWA, the MCESD also stated that the General Permit limits for PM_{10} during startup and shutdown periods were the same as those in the Project's permit application. *Id.* at 4. In its Petition, as noted above, DWA for the most part repeats its earlier written comments in addressing MCESD's responses to comments. By not further showing how MCESD's responses to comments were clearly erroneous, DWA has failed to meet its burden of showing that review of MCESD's BACT determination is warranted. *See Zion Energy,* slip op. at 7 & 9, 9 E.A.B. ___; *Knauf Fiber Glass,* slip op. at 9, 8 E.A.D. ___.

Moreover, the new objections that DWA levels against the BACT determination in its Petition -– that MCESD failed to consider additional alternative control technologies, and that it improperly relied upon manufacturer's estimates of emissions -- are untimely, and thus do not warrant review. DWA failed to preserve these issues or arguments for review in accordance with the regulations at 40 C.F.R. §§ 124.13, 124.19(a) because they were not raised during the public comment period and DWA has not

demonstrated the objections were not reasonably ascertainable at that time. *See* 40 C.F.R. §§ 124.13, 124.19(a).

Shorn of untimely issues, DWA's Petition amounts to mere allegations that MCESD erred in its BACT determination (i.e., that the emissions limits are "too high," "should be revised downward," and are not "protective of the environment."). As we have previously held, simply alleging that a permitting agency has erred in its BACT determination, without providing any substantiating information, does not justify Board review. *See In re Tondu Energy Co.,* PSD Appeal Nos. 00-5 & 00-7, slip op. at 21 (EAB, Mar. 28, 2001), 9 E.A.D. ___; *In re Inter-Power of New York,* 5 E.A.D. 130, 152 (EAB 1994). Moreover, since DWA's requests that the Board institute corrective changes in the General Permit rest on mere unsupported allegations of error, these requests also do not merit Board review.

For the foregoing reasons, we deny review of the Final Permit on this basis.

3. *Calculation of Startup and Shutdown Emissions*

In its Petition, DWA challenges as contrary to federal law a condition in the General Permit that mandates a substitute method

of measuring the Project's startup and shutdown emissions of NO_x and CO in the event that the Project's regular "analyzer" measuring such emissions "is not operational or cannot reliably document emissions." *See* DWA's Petition at 2; General Permit Condition 18(A)(2) note (h). In case of such an event, this condition would allow the Project to calculate startup and shutdown emissions by multiplying the hourly BACT emission limits for the above pollutants during startup and shutdown periods by the elapsed startup or shutdown time. See DWA's Petition at 2; General Permit Condition 18(A)(2), tbl. 3. This condition would also allow "an alternative emission rate" to be used "if such rate is demonstrated to the satisfaction of the Control Officer to be more representative of startup emissions." General Permit Condition 18(A)(2).

In a verbatim recitation of its earlier written comments, DWA objects to the substitute method of calculating startup and shutdown emissions of VOCs and CO as "inappropriate" and maintains that if the Project's analyzer is not operational or cannot reliably document emissions, "then either that equipment must be replaced immediately, or another reliable, operational method of analyzing and documenting these emissions must be

immediately permitted and installed." *Compare* Petition at 3 *with* DWA's Comments at 2. DWA further asserts that allowing the Control Officer to select a more representative "alternative emission rate" after the permit is issued would be "an end-run around the public participation required by federal law, and would constitute a significant permit modification." *Compare* Petition at 3 *with* DWA's Comments at 2.

In response to DWA's written comments, MCESD stated that the substitute method for measuring startup emissions of VOCs and CO is the method approved by federal regulations for filling in missing data during startup and shutdown times. Responsiveness Summary at 4. MCESD also noted that the Control Officer's selection of a more representative alternative emissions rate "does not change the permitted or actual facility emissions" and would not constitute a significant permit modification. *Id.*

By merely repeating its earlier written comments in its Petition, DWA has failed to demonstrate how MCESD clearly erred in any of the above responses to comments. Consequently, DWA has not demonstrated that any of the concerns it raised during the public comment period warrant review of the Final Permit. Accordingly, we deny review of the Final Permit on this basis.

See Zion Energy, slip op. at 7 & 9, 9 E.A.B. ___; *Knauf Fiber Glass,* slip op. at 9, 8 E.A.D. ___.

4. *Opacity Limits*

In its Petition, DWA challenges certain unspecified opacity limits in the General Permit applicable to the Project's emissions during "startup, shutdown, soot blowing and unavoidable combustion irregularities" as not being in accordance with federal policies. Petition at 4. Repeating verbatim its earlier written comments, DWA contends that a General Permit allowing the Project to exceed opacity limits for up to three minutes during the above events, without such exceedances constituting a permit violation, contravenes federal law because it would violate Agency policy on State Implementation Plans. *Compare* Petition at 4 *with* DWA's Comments at 2. DWA also contends that the General Permit would not mandate monitoring of opacity limits with sufficient frequency because the General Permit would only require that such opacity readings be taken within three days of a "suspected violation," thereby "allowing the Permittee to have opacity violations every two days out of three." *Compare* Petition at 4 *with* DWA's Comments at 3. DWA further states that

an “immediate Method 9 opacity reading should be taken” when a suspected violation occurs. *Id.*

In addition to its earlier written comments, DWA includes in its Petition an assertion that the 40% opacity limit in the General Permit violates federal law, and a request that the Board lower the opacity limit in the Arizona SIP from 40% to 20%. Petition at 4-5.

In responding to DWA’s argument in its response to comments, MCESD explained that the provision allowing emissions limit exceedances of up to 3 minutes was a local requirement that was not part of Arizona’s EPA-approved SIP. Also, MCESD explained that the General Permit would require opacity readings within three days of the *detection of visible emissions,* which, according to MCESD, would not necessarily constitute *a violation* of opacity limits in the General Permit. MCESD further explained that the fact that the General Permit did not require more frequent opacity monitoring was a function of the design and operating conditions of modern, natural gas-firing equipment, which “make it unlikely that any visible emissions will ever be present let alone be present at a level that would cause a

violation of permit opacity limits." Responsiveness Summary at 6.

By merely repeating its earlier written comments in its Petition, DWA has not demonstrated how MCESD clearly erred in any of the above responses to comments. Consequently, DWA has not demonstrated that any of the concerns it raised during the public comment period warrant review of the Final Permit. *See Zion Energy,* slip op. at 7 & 9, 9 E.A.B. ___; *Knauf Fiber Glass,* slip op. at 9, 8 E.A.D.____. The new issues DWA raises regarding the alleged illegal nature of the opacity limit and its request that EAB lower the opacity limit in Arizona's SIP also do not warrant review because these were not raised below and DWA has not demonstrated that these issues were not reasonably ascertainable during the public comment period. 40 C.F.R. § 124.19(a).[11] For the foregoing reasons, we deny review of the Final Permit decision on this basis.

[11]Even if DWA had properly preserved for review its request that the Board lower the opacity limits in Arizona's Agency-approved SIP, we still would have denied review because opacity limits are not required by the PSD program, and DWA does not otherwise demonstrate how this issue implicates the federal PSD program. *See supra* note 9; *see also Knauf Fiber Glass,* slip op. at 67-68 (holding that issue of opacity limits did not merit Board review because opacity limits are not a requirement of the federal PSD program). In any case, the Board lacks jurisdiction to alter, or require a State to alter, the terms of a SIP.

5. *Operational Requirements for the Selective Catalytic Reduction Emissions System.*

In its Petition, DWA asserts that the General Permit contravenes Agency policy by not requiring that an "Operations and Maintenance Plan" for HGP's use of Selective Catalytic Reduction ("SCR") pollution control technology (*see supra* Part II) be submitted and approved before the General Permit is issued or "at least * * * before equipment is used." Petition at 5. In a restatement of its written comments, DWA asserts that this omission precludes the development of specific and enforceable standards of performance of the SCR technology before the General Permit is issued, thereby rendering the General Permit "null and void." *Id.;* DWA's Comments at 3.

In its Petition, DWA also raises the additional argument that the lack of a requirement in the General Permit for pre-issuance approval of an O&M Plan for SCR violates Agency policy on SIPs. DWA's Petition at 5.

In responding to DWA's written comments, MCESD explained that the General Permit's provisions regarding an O&M Plan for the Project's SCR technology is based upon a Maricopa County Rule that does not specify time frames. Responsiveness Summary at 6.

MCESD also stated that requiring the preparation of an O&M plan prior to design and installation of the SCR control technology would "needlessly hinder the ability of the manufacturer and operator to design a system that is appropriate for the specific application." *Id.* MCESD also stated that given the fact that the Project's SCR equipment has not yet been selected, it would be "premature to require equipment-specific O&M plans" at this time. *Id.*

MCESD also explained that the requirement in the General Permit to submit a O&M plan 30 days *after* startup would confer important benefits in operating the SCR equipment and that the timing of this requirement reflects common industry practice. *Id.* In this regard, MCESD noted that the General Permit requires the submission of an O&M Plan for approval *before* installation, certification and operation of monitoring equipment and *before* performance testing on the equipment, ensuring that "there are specific, objective criteria which can be used to determine if the facility properly operates and maintains the SCR system." *Id.* MCESD also noted that the above sequence of events is "consistent with permits for similar facilities across the nation" and allows for "a period of time for the operator and

equipment supplier to adjust equipment and establish optimal operational parameters to be included in the O&M Plan." *Id.*

By merely restating its previous written comments in its Petition, DWA has not demonstrated clear error in MCESD's above responses. Thus, DWA has not demonstrated that the concerns it expressed during the public comment period on this subject merit Final Permit review. *See Zion Energy,* slip op. at 7 & 9, 9 E.A.B. ___; *Knauf Fiber Glass,* slip op. at 9, 8 E.A.D.____. Furthermore, DWA has failed to preserve for review the issue of an alleged conflict between the General Permit's O&M Plan for the Project's SCR technology and Agency policy on SIPs. This issue was not raised during the public comment period, and DWA has failed to demonstrate that it was not reasonably ascertainable at that time. *See* 40 C.F.R. § 124.19(a).

For the foregoing reasons, we deny review of the Final Permit on this basis.

6. *PSD Delegation Agreement*

In its Petition, DWA generally alleges that MCESD violated the 1993 Delegation Agreement delegating authority to Maricopa County to implement and enforce the federal PSD program. *See*

supra note 1; Petition at 6. Repeating its previous written comments, DWA asserts that "no further permits should be issued until MCESD meets the minimum requirements of this PSD delegation agreement." Petition at 6; DWA's Comments at 3. DWA also charges that MCESD does not treat all Title V air permit applicants equally because "[s]ome applicants are required to provide information required by the PSD delegation agreement, while others are not." *Id.*

In its Petition, DWA also raises the objection that MCESD violated specific language in the Delegation Agreement by not reviewing the Project's projected emissions of ammonium sulfate, a pollutant not regulated by the PSD program, as part of its BACT analysis. Petition at 6. In support of this contention, DWA quotes a section of the Delegation Agreement that states in relevant part that "all delegated agencies must now consider pollutants not subject to the Clean Air Act in their Best Available Control Technology (BACT) determinations." *Id.* (citing Agreement for Delegation of Authority of the Regulations for Prevention of Significant Deterioration Of Air Quality (40 C.F.R. 52.21) Between U.S. EPA and [Maricopa County], Section III.B.2.). Finally, DWA contends that MCESD violated the Delegation

Agreement by failing to adequately respond to public comments and by not "incorporat[ing] comments made by the public into permit changes * * *." *Id.*

We agree with MCESD that DWA's previous written comments, repeated in its Petition, fail to "identify any clear error of fact or law, or any policy determination, for which Board review under [40 C.F.R. § 124.19] can be justified." MCESD/Control Officer's Motion to Dismiss at 7. Significantly, DWA's comments do not specify, in any manner, how any of the terms of the General Permit violate the Delegation Agreement. As such, they do not warrant permit review under our standards. *See In re Commonwealth Chesapeake Corp.,* 6 E.A.D. 764, 772 (EAB 1997) (holding that in order to meet their burden of proof in obtaining review of a final permit, persons must clearly identify the permit conditions for which they seek review); *accord In re LCP Chemicals-New York*, 4 E.A.D. 661, 664 (EAB 1993). We also agree with MCESD that DWA's concerns regarding MCESD's implementation of the Title V program[12] are beyond the Board's scope of

[12]Title V of the CAA requires each state to develop and implement a comprehensive operating permit program providing for the permitting of most sources of air pollution in the state. *See* CAA §§ 501-507, 42 U.S.C. § 7661. Pursuant to implementing regulations at 40 C.F.R. pt. 70, which establish minimum requirements for state permitting programs, most states have developed Title V operating permit programs and have submitted these programs to EPA for approval.

jurisdiction. As HGC explains in its motion to dismiss, the MCESD's Title V permit program has been granted interim approval by EPA,[13] and is thus governed by state law. *See In re Kawaihae Cogeneration Project,* 7 E.A.D. 107, 110 n.5 (EAB 1997) (stating that Board jurisdiction did not extend to Hawaii's EPA-approved CAA Title V permitting program, because program requirements were issued pursuant to State law). As in *Kawaihae Cogeneration Project,* the Board's jurisdiction with respect to the review of this permit extends only to review of the PSD component of the permit, not to its implementation of Title V.

In addition, DWA has failed to preserve for review its allegation that MCESD violated the Delegation Agreement by not considering the impact of ammonium sulfate emissions from the Project. This issue was not raised during the public comment period, and DWA has not demonstrated that it was not reasonably ascertainable at that time. *See* 40 C.F.R. §§ 124.13; 124.19(a).

[13]The MCESD's CAA Title V operating permit program was granted interim approval by the EPA on November 29, 1996. *See* 40 C.F.R. pt. 70 App. A.

In our view, DWA's allegation that MCESD violated the Delegation Agreement by not adequately responding to public comments and by not incorporating those comments into permit changes is too vague to merit Board review. In this regard, DWA fails to identify any shortcomings in MCESD's responses to public comments, and thus fails to meet its burden of demonstrating a reviewable error or abuse of discretion by MCESD. *See Puerto Rico Elec. Power Auth.* 6 E.A.D. 253, 255 (EAB 1995) (finding that petition was too "lacking in specificity" as to why Region's PSD permit determination was erroneous to provide a basis for Board review).[14]

For the above reasons, we deny review of the Final Permit on this basis.

[14]The regulations in 40 C.F.R. pt. 124 that govern this proceeding require permitting authorities in PSD and other types of permit cases to "briefly describe and respond to all significant public comments * * * raised during the public comment period * * * ." 40 C.F.R. § 124.17(a). While these regulations require permitting authorities to *consider* all such significant comments, they do not require authorities to institute permit changes in response to particular public comments. *See, e.g., In re N.E. Hub,* 7 E.A.D. 561, 583 (EAB 1998). Accordingly, the fact that a permitting authority "adopts none of [a] [petitioner's] comments on [a] permit[] is not in itself indicative of error." *Id.* Thus, DWA's bald statement that MCESD failed to incorporate public comments into permit changes does not warrant Board review.

III. *CONCLUSION*

For the reasons discussed above, the Board denies review of all issues DWA has raised in its Petition.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 05/14/01

By: /s/
Kathie A. Stein
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Petition for Review in the Matter of Harquahala Generating Project, PSD Appeal No. 01-04, were sent to the following persons in the manner indicated:

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