

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

In re:)	
)	
Steel Dynamics, Inc.)	PSD Appeal Nos. 99-4
)	and 99-5
PSD Permit No. CP-183-10097-00030)	
)	

**ORDER DENYING IDEM'S MOTION FOR
RECONSIDERATION OR CLARIFICATION AND
SDI'S MOTION FOR RECONSIDERATION**

By motion dated June 30, 2000, the Indiana Department of Environmental Management ("IDEM" or "Department") seeks reconsideration or clarification of one issue decided by the Environmental Appeals Board ("Board") in the above-captioned matter. The one issue involves petitioners' original contention that hourly limits placed on emissions of nitrogen oxides ("NO_x") and carbon monoxide ("CO") from the electric arc furnace ("EAF") are not enforceable because they do not ensure that the best available control technology ("BACT") standard is met continuously and at all levels of operation. IDEM claims that in deciding this issue, the Board misunderstood two tables in the Technical Support Document ("TSD") underlying Steel Dynamics, Inc.'s ("SDI's") permit.

The two tables list "BACT determinations" for NO_x and CO emissions from EAFs at fifteen steel mills across the country.

In each instance, the tables provide emissions limits in pounds per hour and pounds per ton, or in pounds per ton alone. See TSD app. B at 4-5, 10-11. The Board relied on these tables to find that "of fifteen other EAFs at steel mills across the country (which presumably are similar enough to SDI's proposed mill to warrant their use in establishing BACT limits for SDI), none have CO or NO_x emissions limits in pounds per hour only. See TSD app. B at 4-5, 10-11. As the Union points out, the majority of these mills have lbs/hr and lbs/ton limits for these pollutants, and the minority have lbs/ton limits only." *In re Steel Dynamics, Inc.*, PSD Appeal Nos. 99-4 & 99-5, slip op. at 87 (EAB, June 22, 2000), 9 E.A.D. ____.

IDEM now charges that the Board's findings in this regard were mistaken because the two tables "list the 'equivalent' emissions limits in terms of lbs/ton, rather than the mills' actual permit limits, in order to compare the underlying emission limits (which may be lbs/hr or lbs/ton) for steel mills of varying production rates." IDEM Motion for Reconsideration or Clarification at 3 ("IDEM Motion"). In point of fact, IDEM claims, seven of the fifteen mills actually have a NO_x limit in pounds per hour only, and six of the mills have a CO limit in pounds per hour only. *Id.* IDEM submits permits from seven steel mills as support for its contention. See *id.* exs. 1-7.

IDEM's claim regarding "equivalent emissions limits" is new. Insofar as we call tell, there is nothing in the TSD, or even in the larger administrative record for that matter, to indicate that the limits represented in the two tables are anything other than the BACT or permit limits for the fifteen mills. Indeed, the tables are explicitly introduced as containing "previous BACT determinations." See TSD at 4, 10. Moreover, in several instances IDEM itself explained that certain mills were "permitted for" particular pounds-per-ton production limits (and not hourly emissions limits, as IDEM now contends is the case for these particular mills). See *id.* at 12 ("Roanoke Electric Steel in Roanoke, Virginia was permitted for 0.12 lb/ton * * * [and] Beta Steel in Port[age], Indiana was permitted for 0.17 lb/ton"); see also *id.* at 5 ("Roanoke Electric Steel in Roanoke, Virginia was given 1.37 lb/ton").

In addition, based on our review, the seven permits IDEM submitted with its motion do not at this stage of the proceedings set our concerns to rest. For instance, three of the permits contain "BACT determinations" in pounds per ton and "emissions limits" or "rates" in pounds per hour, raising the question of whether these could or should be construed as dual limits, and at least one of the permits contains pounds-per-hour limits that do not match the pounds-per-hour limits

reported in the TSD.¹ Five of the seven IDEM examples are Arkansas permits, raising a question of whether there are anomalies with respect to permits in that state. See also Union's Response to IDEM's Motion for Reconsideration or Clarification & SDI's Motion for Reconsideration at 3-6 ("Union Resp.") (arguing that (1) IDEM itself has issued many permits to steel mills with limits in lbs/ton; (2) supporting information in two Arkansas permits suggests that compliance is determined in lbs/ton, even if permit limits appear to be in lbs/hour; and (3) four of the permits require continuous emissions monitoring of CO and NO_x, which the petitioners advocated for SDI's permit as addressing some of their enforceability concerns).

¹See IDEM Motion ex. 4 at 8, 14 (Arkansas Steel, Newport, Arkansas); *id.* ex. 5 at 11, 26 (Nucor-Yamato Steel, Armorel, Arkansas); *id.* ex. 6 at 10, 25 (Nucor Steel, Hickman, Arkansas); *compare id.* ex. 2 at 7 (Roanoke Electric Steel, Roanoke, Virginia) with TSD app. B at 5, 11.

This latter example, in which the TSD and permit figures conflict, pertains to Roanoke Electric Steel Corporation in Roanoke, Virginia. The Union provides a potential explanation for the discrepancy. According to the Union, the Roanoke permit IDEM submitted as exhibit 2 to its motion "covers a modification that increased steel throughput of the EAF from 70 ton/yr to 100 ton/yr," whereas the BACT summary tables in the TSD "are based on the earlier 70 ton/yr version of the permit, indicating that IDEM did not use this permit [in exhibit 2] to prepare its [TSD] summary table[s]." See Union's Response to IDEM's Motion for Reconsideration or Clarification & SDI's Motion for Reconsideration at 3; TSD app. B at 5, 11.

As the Board has explained, "[r]econsideration is generally reserved for cases in which the Board is shown to have made a demonstrable error, such as a mistake of law or fact." *In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 99-8 to -72, Order on Motions for Reconsideration at 3 (EAB, Feb. 4, 2000). A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider. *See, e.g., Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985) ("Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during the pendency of the [original] motion.") (quoting *Keene Corp. v. International Fidelity Ins. Co.*, 561 F. Supp. 656, 665-66 (N.D. Ill. 1982), *aff'd*, 736 F.2d 388 (7th Cir. 1984)).

Neither the Board nor petitioners should be faulted in this case for relying on information introduced into the administrative record by the permitting authority. That the information IDEM placed in the record may, with the benefit of hindsight, be incomplete or incorrect is not a ground upon which to short-circuit the remand process envisioned by the Board here. Rather, it provides even further support for the proposition that these permit provisions should be remanded for further evaluation and/or explanation by IDEM, as

originally ordered by the Board. See Union Resp. at 2 (IDEM's new explanation of "equivalent" emissions limits is "precisely the type of information the Board envisioned IDEM would provide on remand to justify its limits. * * * However, it is inappropriate for IDEM to attempt to use this explanation prior to remand to argue against remand and for reconsideration."). This is consistent with the Board's statements that "we have found no adequate explanation in the record explaining why the forms of the limits deviate from those of the other mills," and that differences between SDI's mill and the comparative mills "must be clearly documented in the record to a greater degree than heretofore." *Steel Dynamics*, slip op. at 87.

It bears repeating to note that, in reviewing a permit on appeal, our task is to examine the decision of the decisionmaker at the time the decision was made. If material information was not set forth in the record at the time the decision was made, the Board has no assurance that the decision itself was appropriately informed. Accordingly, we are disinclined to entertain after-the-fact elaborations of the rationale for a decision. See, e.g., *In re Beckman Prod. Servs.*, UIC Appeal No. 98-4, slip op. at 14-15 (EAB, May 14, 1999); *In re Austin Powder Co.*, 6 E.A.D. 713, 719 (EAB 1997); *In re GSX Servs. of S.C., Inc.*, 4 E.A.D. 451, 454 (EAB 1992).

Here, our principal concern on this issue grew out of the fact that the Union and Amici presented "several plausible scenarios describing ways in which SDI could potentially conduct its operations to comply with an hourly emissions, but not a production, limit." *Steel Dynamics*, slip op. at 84. We described several of these scenarios at pages 84-85 of our decision. We then noted that IDEM does not dispute that under the PSD program, BACT limits must be established to ensure compliance on a continuous basis at all levels of operation, and we noted the language of section 302(k) of the Clean Air Act, 42 U.S.C. § 7602(k). *Id.* at 86. We found, therefore, as Amici have recognized, that the pounds-per-hour limits for NO_x and CO emissions from the EAF are inadequate to ensure continuous compliance, and that IDEM therefore must either: (1) adopt dual limits for these pollutants; or (2) clearly explain any differences between SDI's mill and the fifteen mills that would justify a sole pounds-per-hour limit, and then incorporate other provisions in the permit that would fully protect against the types of potential permit abuses described by the Union and Amici. *Id.* at 87-88; see EPA Region V and EPA Office of Air & Radiation Response to IDEM's Motion for Reconsideration or Clarification at 4.

In our view, Amici capture the situation accurately when they state:

The Board found persuasive the fact that other steel mill permits included both lbs/hr and lbs/ton limits. While arguing that not all steel mill permits include dual limits, IDEM concedes, as Petitioners and Amici have argued, that the majority of similar steel mill permits do contain dual limits. The Board's conclusion is still clearly supported that, should IDEM decide not to adopt dual limits, IDEM should explain the differences between this permit and the majority of the steel mill permits, which include dual limits.

Id. (citation omitted). Of particular interest in this regard are four Indiana mills in the fifteen-mill sample set, of which three (i.e., SDI's purportedly similar Butler, Indiana, facility; Qualitech Steel; and Nucor Steel) have emissions limits in pounds per ton and the fourth, Beta Steel, is the subject of considerable dispute between the parties in part due to alleged discrepancies between that permit and others IDEM has issued to similar facilities.²

²IDEM reports in the TSD that Beta Steel was "permitted for" 0.17 lbs/ton of NO_x emissions "but has requested for 0.3 lbs/ton based on 146 heats worth of stack tests performed on the mill's EAF." TSD app. B at 12 (Beta's EAF NO_x BACT limit is 0.17 lb/ton). However, in its motion, IDEM contends that Beta's NO_x limit is in lbs/hour alone. See IDEM Motion at 3 & ex. 1 at 5 (Beta's meltshop baghouse (not clear whether same as or different than EAF baghouse) NO_x BACT limit is 22.2 lb/hr). The Union, for its part, argues that:

IDEM has failed to show that the Board made a demonstrable error that would warrant reconsideration of the Board's original treatment of this case. Instead, IDEM's information is the kind of information that could and should be put into the record and examined on remand along with the other requested information. The Board clearly directed IDEM on how to proceed on remand, so further clarification is not necessary. Accordingly, IDEM's motion is denied.³

The Beta Steel permit in Exhibit 1 was issued in 1992, and the Union understands that Beta Steel has petitioned to revise its permit limits, requesting new limits in lb/ton. "Beta Steel's emission limits for both pollutants [NO_x and SO₂] are well below the allowed emission rates (in pounds of pollutant per ton of liquid steel produced), as reported in the BACT/LAER Clearinghouse Database, for the other three [EAF] steelmaking plants in Indiana that are similar to the Beta Steel plant. Beta Steel hereby requests a revision to its current permit, substituting emission limits for SO₂ and NO_x that more nearly approximate those approved for the other three similar plants." [Letter from Toli Fliakos, Vice President, Beta Steel Corp., to Felicia R. George, IDEM, Re: Proposed Adjustments of Emissions Limitations, Meltshop Baghouse Stack, Beta Steel Corp., April 1, 1998.]

Union Resp. at 3-4 & n.1.

³SDI's Motion for Reconsideration, dated July 5, 2000, is also denied.

So ordered.⁴

ENVIRONMENTAL APPEALS BOARD

Dated: 7/13/00

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

⁴We clarify on our own motion a question raised orally by IDEM to the Board in a telephone call on July 6, 2000. To the extent there is any ambiguity on this point, if there is no prior opportunity for the public to participate in the remand process on one or more of the issues within the scope of the remand, the Board will consider a timely appeal on such issue to constitute "participat[ion] in the remand process," as specified in the Board's June 22, 2000 decision. See *Steel Dynamics*, slip op. at 112.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying IDEM's Motion for Reconsideration or Clarification and SDI's Motion for Reconsideration in the matter of Steel Dynamics, Inc., PSD Appeal Nos. 99-4 and 99-5, were sent to the following persons in the manner indicated:

By Facsimilie and First Class U.S. Mail:

Rosemary G. Spalding, Esq.
330 South Downey Avenue
Indianapolis, Indiana 46219
telephone: (317) 375-0448
facsimilie: (317) 352-9340

Charles L. Berger, Esq.
Berger & Berger
313 Main Street
Evansville, Indiana 47708-1485
telephone: (812) 425-8101
facsimilie: (812) 421-5909

Anne Slaughter Andrew, Esq.
David L. Hatchett, Esq.
Baker & Daniels
300 Meridian Street, Suite 2700
Indianapolis, Indiana 46204
telephone: (317) 237-0300
facsimilie: (317) 237-1000

Solomon L. Lowenstein, Jr.
503 West Wayne Street
Fort Wayne, Indiana 46802
facsimilie: (219) 422-4815

Lorraine L. Seyfried, Esq.
Elizabeth Zlatos, Esq.
Office of Legal Counsel
Indiana Department of Environmental Management
100 North Senate Avenue
Indianapolis, Indiana 46202-6105
telephone: (317) 232-8603
facsimilie: (317) 233-5517

By Facsimilie and EPA Pouch Mail:

Paul R. Cort, Esq.
Air & Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
401 M Street, S.W.
Mail Code 2344A
Washington, D.C. 20460
telephone: (202) 564-5573
facsimilie: (202) 564-5603

Diane L. Embil, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency
Region V
Chicago, Illinois 60604-3590
telephone: (312) 886-7889
facsimilie: (312) 886-0747

Date: 7/13/00

_____/s/_____
Annette Duncan
Secretary