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

In re:	)	
Sumas Energy 2 Generation Facility	)	PSD Appeal No. 05-03
PSD Permit No. EFSEC/2001-02, Amendment 1	)	

ORDER DENYING REVIEW

I. *INTRODUCTION*

The Province of British Columbia (the "Province") seeks review of a Prevention of Significant Deterioration ("PSD") permit amendment (the "Permit") that the State of Washington's Energy Facility Site Evaluation Council ("EFSEC")[1] and U.S. EPA Region 10 (the "Region")[2] issued to Sumas Energy 2, Inc. ("SE2") on February 2, 2005. The original permit,

[1] The EFSEC has provided the Board with relevant portions of the administrative record. Exhibits contained in this record will be cited as follows: "EFSEC Record, Exh. ___."

[2] EFSEC and the Region share responsibility for implementing the federal PSD regulations in the State of Washington pursuant to a delegation agreement. Under the delegation agreement, the State has primary responsibility for implementing the federal PSD program. Since the State acts as EPA's delegate, the permit is considered an EPA-issued permit and this Board may review it. *See In re Cardinal FG Co.*, PSD Appeal No. 04-04, slip op. at 4 n.1 (EAB, March 22, 2005), 12 E.A.D. ___; *In re W. Suburban Recycling & 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)). However, under the delegation agreement, the Region has retained authority over the nitrogen dioxide ("NO_2") increment. Thus, when PSD permits are issued for major sources of nitrogen oxides ("NO_X"), EFSEC and the Region issue PSD permits jointly. *See* Agreement for Partial Delegation of the Federal PSD Program by the United States

(continued...)

issued on September 6, 2002, authorized the construction and operation of an electrical generating facility (the "Facility") in Sumas, Washington, near the Canadian border. The Permit decision at issue in this matter grants an 18-month extension of the time period for SE2 to begin construction of the Facility. For the reasons stated below, we deny review of the permit decision.

II. BACKGROUND

A. *Statutory and Regulatory Background*

In 1977, Congress enacted the PSD provisions of the Clean Air Act ("CAA") 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 to build new major stationary sources, or to make major modifications to existing sources, in areas of the country EPA deems to be in "attainment" or "unclassifiable" with respect to federal air quality standards referred to as "national ambient air quality standards" ("NAAQS").[3] CAA §§ 107, 160-169B, 42 U.S.C. §§ 7407, 7470-7492. The statutory PSD provisions are carried out through a regulatory

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[2](...continued)
Environmental Protection Agency (EPA) to the Energy Facility Site Evaluation Council (EFSEC) (Jan. 25, 1993), EFSEC Record, Exh. D-3.

[3] The NAAQS are "maximum concentration 'ceilings'" for particular pollutants, "measured in terms of the total concentration of a pollutant in the atmosphere." U.S. EPA Office of Air Quality Planning & Standards, New Source Review Workshop Manual (1990) at C.3. NAAQS have been set for six criteria pollutants: sulfur oxides, particulate matter, NO_2, carbon monoxide ("CO"), ozone, and lead. 40 C.F.R. §§ 50.4-.12.

process that requires preconstruction permits for new major stationary sources, such as the proposed facility in Sumas, Washington. *See* 40 C.F.R. § 52.21.

Applicants for PSD permits must demonstrate, through analyses of the anticipated air quality impacts associated with their proposed facilities, that their facilities' emissions will not cause or contribute to an exceedance of any applicable NAAQS or air quality "increment." CAA § 165(a)(3), 42 U.S.C. § 7475(a)(3); 40 C.F.R. § 52.21(k)-(m).[4] In addition, the CAA and the PSD regulations require, among other things, that major new stationary sources employ the "best available control technology" ("BACT") to limit emissions of certain pollutants. CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 52.21(j)(2). BACT is defined in the PSD regulations as follows:

> [BACT] means an emissions limitation * * * based on the maximum degree of reduction for each pollutant subject to regulation under [the] Act which would be emitted from any proposed major stationary source * * * 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 * * * through application of production processes or available methods, systems, and techniques * * * for control of such pollutant.

40 C.F.R. § 52.21(b)(12.). As the Board has noted on prior occasions, "the requirements of preventing violations of the NAAQS and the applicable PSD increments, and the required use of BACT to minimize emissions of air pollutants, are the core of the PSD regulations." *In re Hillman Power Co.*, 10 E.A.D. 673, 677 (EAB 2002) (quoting *In re Encogen Cogeneration*

[4] Air quality increments represent the maximum allowable increase in a particular pollutant's concentration that may occur above a baseline ambient air concentration for that pollutant. *See* 40 C.F.R. § 52.21(c) (increments for six regulated air pollutants).

Facility, 8 E.A.D. 244, 247 (EAB 1999)); *see also* U.S. EPA Office of Air Quality Planning & Standards, *New Source Review Workshop Manual* 5 (draft Oct. 1990) ("NSR Manual").

The NSR Manual sets forth a "top down" process for determining BACT for a particular regulated pollutant. The process includes five steps: (1) identifying all "available"[5] control options for a particular regulated pollutant; (2) analyzing the control options' technical feasibility and eliminating "technically infeasible" options;[6] (3) ranking feasible options in order of effectiveness for the pollutant under review; (4) evaluating the energy, environmental, and economic impacts; and (5) selecting as BACT the most effective control alternative not eliminated in step four. NSR Manual at B.5-.9; *see In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 129-31 (EAB 1999) (expounding on steps in top-down analysis).[7]

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[5] Here the term "available" is defined to mean "those air pollution control technologies or techniques with a practical potential for application to the emissions unit and the regulated pollutant under evaluation." NSR Manual at B.5.

[6] This step involves first determining for each technology whether it is "demonstrated," that is, installed and operated successfully elsewhere. NSR Manual at B.17-.18. A control technology that is "demonstrated" for a given type or class of sources is assumed to be technically feasible unless source-specific factors exist and are documented to justify technical infeasibility. *Id*. at B.21. If a technology is not "demonstrated," then it will be deemed technically feasible only if it is "available" and "applicable" to the equipment under consideration. *Id*. The term "available" in this context is used to refer to whether the technology is commercially available. *Id*. at B.17. An available technology is considered "applicable" if it can be installed and operated on the source type under consideration. *Id*.

[7] The NSR manual has been used as a guidance document in conjunction with new source review workshops and training, and as a guide for state and federal permitting officials with respect to PSD requirements and policy. Although it is not a binding Agency regulation, this Board has looked to the NSR Manual as a statement of the Agency's thinking on certain PSD issues. *See, e.g., In re Kendall New Century Development*, PSD Appeal No. 03-01, slip op. at 4 n.3 (EAB, April 29, 2003), 11 E.A.D. ___.

The PSD regulations require a permittee to commence construction of a permitted project within 18-months of receipt of final approval to construct. 40 C.F.R. § 52.21(r)(2). If construction is not commenced within that time frame, the approval to construct becomes invalid. *Id.* The 18-month time limit in 40 C.F.R. § 52.21(r) is one means of ensuring that BACT requirements consist of reasonably current pollution controls.[8] *See In re West Suburban Recycling and Energy Ctr.*, 8 E.A.D. 192, 195 (EAB 1999). That is, if a facility fails to commence construction within the 18-month regulatory time frame, it is possible that the BACT determination for the facility might be outdated by the time construction actually begins. *Id.* The permitting authority, however, may provide an extension of the 18-month period "upon a satisfactory showing that an extension is justified." 40 C.F.R. § 52.21(r)(2).

B. *Factual Background*

As stated above, the permitting authorities issued the original permit for the Facility on September 6, 2002, and authorized the construction and operation of a 660-megawatt electric generating facility. Shortly thereafter, the Board received two petitions seeking review of the permit.[9] In an unpublished order dated March 25, 2003, the Board denied the petitions for review in part and remanded in part so that a technical error could be corrected in a reissued permit. *See Sumas Energy 2 Generation Facility*, PSD Appeal Nos. 02-10 & 02-11 (Mar. 25,

[8] The 18-month limit does not apply to "the time period between construction of the approved phases of a phased construction project * * *." 40 C.F.R. 52.21(r)(2).

[9] The Province and Environment Canada filed the petitions for review.

2003) (Order Remanding in Part and Denying Review in Part) ("March 23 Order"). The Permit became final after completion of the proceedings on remand.[10]

On June 1, 2004, SE2 applied to the EFSEC for an extension of the existing PSD permit beyond its October 17, 2004 expiration date. *See* Letter from David N. Eaden, VP Construction & Engineering, SE2, to Irina Makarow, EFSEC (May 28, 2004), EFSEC Record, Exh. A-4. On September 17, 2004, EFSEC preliminarily approved the request, authorizing an 18-month extension of the construction-initiation deadline (until April 17, 2006). *See* Draft Approval of the Prevention of Significant Deterioration and Notice of Construction, EFSEC Record, Exh. B-2. After providing public notice of the draft approval, EFSEC held a public hearing on October 28, 2004, and conducted a public comment period that extended from September 17 through November 1, 2004, during which numerous parties, including the Province, participated. *See* EFSEC Record, Exhs. B-6, B-11, B-12. EFSEC issued a response to comments document on January 5, 2005. *See* Responsiveness Summary, EFSEC Record, Exh. F-1. On February 2, 2005, EFSEC and the Region issued the final permit amendment extending the Permit's expiration date to April 17, 2006. *See* Final Approval of the Prevention of Significant Deterioration and Notice of Construction, EFSEC Record, Exh. F-2; EFSEC Record, Exhs. F-3 through F-8. The Province's Petition for Review followed. Petition for Review (Mar. 3, 2005) ("Petition").

[10] The Board's March 23 Order stated that, upon completion of proceedings on remand, further Board review was unnecessary in order for petitioners to exhaust administrative remedies. March 23 Order at 27 n.25.

At the Board's request, EFSEC filed a response to the Petition.[11] Response of Washington State Energy Facility Site Evaluation Council (April 1, 2005) ("EFSEC Response"). The Region has also responded to the Petition. EPA Region 10's Response Brief (April 1, 2005) ("Region's Response"). With the Board's permission, SE2 responded to the Petition. Summas Energy 2's Response to Petition for Review (April 4, 2005) ("SE2 Response"). Finally, on April 25, 2005, the Province filed a motion for leave to file a reply brief concerning the alleged failure of SE2 to submit a revised construction schedule with its permit extension request. *See* Motion for Leave to File a Reply Brief (Apr. 25, 2005). The Province attached its brief to the Motion. *See* Petitioner's Reply Brief (Apr. 25, 2005). In response, SE2 has submitted a sur-reply as well as an opposition to the Province's Motion. *See* Sumas Energy 2's Sur-Reply Brief (Apr. 28, 2005); SE2's Opposition to Province's Motion to File Reply Brief (Apr. 28, 2005). Upon consideration, the Board accepts the Province's reply brief as well as SE2's sur-reply as part of the record before the Board.

III. *DISCUSSION*

A. *Standard of Review*

The Board's review of PSD permitting decisions is governed by 40 C.F.R. part 124, which "provides the yardstick against which the Board must measure" petitions for review of PSD and other permit decisions. *In re Maui Elec. Co.*, 8 E.A.D. 1, 7 (EAB 1998). In order to succeed on the merits, a petitioner must demonstrate that the actions of the permitting authority were based on: (1) a finding of fact or conclusion of law that is clearly erroneous; or (2) an

[11] Documents are "filed" with the Board on the date they are *received*.

exercise of discretion or an important policy consideration that the Board should, in its discretion, review. 40 C.F.R. § 124.19(a); *In re Amerada Hess Corp.*, PSD Appeal No. 04-03, slip op. at 11 (EAB, Feb. 1, 2005), 12 E.A.D. ___; *In re Steel Dynamics, Inc.*, 9 E.A.D. 740, 743-44 (EAB 2001). As the Board has repeatedly noted, the "power of review should be only sparingly exercised" and "most permit conditions should be finally determined at the [permitting authority] level." *See, e.g., Knauf Fiberglass, GmbH*, 8 E.A.D. 121, 127 (EAB 1999) (quoting 45 Fed. Reg. 33,290, 33,412 (May 19, 1980) (preamble to the rule making that established 40 C.F.R. pt.124)).

In addition, before evaluating whether an issue is appropriate for Board review, this Board has repeatedly stated that the issue must have been *specifically* raised during the comment period.[12] *In re New England Plating Co.*, 9 E.A.D. 726, 732 (EAB 2001); *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 230-31 (EAB 2000). On this basis, we have often denied review of issues raised on appeal that were not raised with the requisite specificity during the public comment period. *See In re Westborough and Westborough Treatment Plant Bd.*, 10 E.A.D. 297, 304

[12] Pursuant to 40 C.F.R. § 124.13:

> All persons * * * who believe any condition of a draft permit is inappropriate * * * must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing) * * *.

In order to justify review by the Board, a petitioner must demonstrate "that any issues being raised in an appeal were raised during the public comment period (including any public hearing) to the extent required by these regulations * * *." 40 C.F.R. § 124.19(a).

(EAB 2002)*; New England Plating*, 9 E.A.D. at 733-34; *In re Maui Elec. Co.*, 8 E.A.D. at 9; *In re Fla. Pulp & Paper Ass'n*, 6 E.A.D. 49, 54-55 (EAB 1995).

For each issue raised in a petition, the petitioner bears the burden of demonstrating that review is warranted. 40 C.F.R. 124.19(a); *Kendall New Century Development*, PSD Appeal No. 03-01, slip op. at 9 (EAB, April 29, 2003), 11 E.A.D. ___. We have explained that in order to establish that review of a permit is warranted, the regulations require that a petitioner both state the objections to the permit that are being raised for review and explain why the permit decision maker's previous response to those objections (i.e., the decision maker's basis for the decision) is clearly erroneous or otherwise warrants review. *See Amerada Hess*, slip op. at 11; *In re Steel Dynamics, Inc.*, 9 E.A.D. 740, 744 (EAB 2001).

B. *Petition*

The Province raises five arguments in support of its Petition. These are: (1) SE2's application for a permit extension was not filed in a timely manner; (2) SE2's extension application was incomplete because it failed to provide adequate assurances that construction would begin within the extension period; (3) EFSEC failed to conduct an adequate BACT re-analysis of the Facility's emissions during startup and shutdown; (4) the extended permit should have required the use of EM_x technology for the control of nitrogen oxide ("NO_x") emissions;[13] and (5) EFSEC erred in allowing an 18-month rather than a 12-month extension of the permit.

[13] EM_x technology (formerly referred to as SCONOX) is an emissions control technology for NO_x emissions.

For the reasons stated below, none of the Province's arguments convinces us that review is warranted.

1. *Permit Extension Application*

The Province argues that SE2's request for the permit extension in this matter was untimely. *See* Petition at 6. According to the Province, the extension request was due at least six months before expiration of the permit. As stated above, the extension request was submitted on June 1, 2004, less than five months before the original permit's October 17, 2004 expiration date. In support of its assertion in this regard, the Province cites to a 1991 EPA draft guidance document dated June 11, 1991 ("1991 Draft Guidance") (EFSEC Record, Exh. D-2), as well as to a provision of the State of Washington's Administrative Code (Wash. Admin. Code § 173-401-710) allegedly requiring that extension requests be filed within six months of permit expiration. Petition at 6-7.

a. *1991 Draft Guidance*

According to the Province, the 1991 Draft Guidance requires that a permit renewal request be submitted "at least six months prior to the date on which the permit would become invalid." *Id*. at 6 (quoting 1991 Draft Guidance at 7-12). The Province also argues that because SE2's extension application cited and relied on other portions of the 1991 Draft Guidance, SE2 should not be permitted to ignore those parts of the 1991 Draft Guidance like the purported six-month requirement that are "inconvenient." *Id*. at 7-8.

In response, both the Region and EFSEC state that the 1991 Draft Guidance is clearly labeled as a draft document and has not been finalized. *See* Region's Response at 6; EFSEC Response at 7; *see also* SE2 Response at 7-8. According to the Region, the 1991 Draft Guidance "does not represent official EPA policy on the issue of PSD permit extensions and it has never been used by EPA to determine whether to issue a PSD permit modification extension." Region's Response at 6. Moreover, the Region states that even if the 1991 Draft Guidance were applicable in this case, it does not support the Province's assertion that SE2 was precluded from submitting an extension application less than six months before expiration of the permit.

We are unpersuaded by the Province's arguments on this point. In the first instance, the Province offers no support for the proposition that a *draft* guidance document of the sort at issue here could have the kind of preclusive procedural effect that the Province advocates. Moreover, we agree with the Region that, even if the 1991 Draft Guidance could somehow be read as legally binding, it still would not require that PSD permit extension requests be submitted six months before permit expiration. First, the portion of the Draft Guidance the Province cites is included in a discussion under the heading: "Phased Multi-Unit Projects." *See* 1991 Draft Guidance at 7-6. The focus of this discussion is a petition the Utilities Air Regulation Group ("UARG") filed with EPA seeking to delete the portion of 40 C.F.R. § 52.21(r)(2) "limiting extensions of permitted construction intervals between phases at phased construction projects." *Id*. at 7-7. Although UARG expressed "concern regarding the time taken by review agencies to decide whether to grant construction date extensions," that concern related to permits for multi-phased projects. *See id.* at 7-11. As the Facility at issue in this case is not a phased multi-unit

project, and the Province does not argue otherwise, that portion of the 1991 Draft Guidance does not apply in this context.

Second, the section of the 1991 Draft Guidance the Province cites states, in relevant part, that "[a] source has an obligation to provide sufficient time for an agency to review requests for extension of a commencement date. Therefore, such requests (including adequate documentation) *should* be submitted to the review agency at least six months prior to the date on which the permit would become invalid." 1991 Draft Guidance at 7-12 (emphasis added). Because this language is not mandatory, and because the extension request in this matter was submitted far enough in advance to allow the reviewing agencies to conduct a meaningful review, we would not find the timing of SE2's extension request in this matter inconsistent with this provision even if it were applicable.

Finally, we note that an earlier section of the 1991 Draft Guidance contains a general discussion of extension requests under 40 C.F.R. § 52.21(r)(2). That section states, in relevant part, that a permit "is automatically invalid if construction does not commence or a request for extension is not received *before its expiration date*." *Id*. at 7-3 (emphasis added). This provision does not require that extension applications be filed six months before expiration of the permit. Indeed, the statement that a permit is "automatically invalid" if the extension request is not received before the permit's expiration date suggests that permitting agencies have discretion in

how they address extension requests filed before permit expiration. Under these circumstances, the Province has failed to convince us that review is warranted.[14]

b. *Washington Administrative Code*

The Province also argues that SE2's application was untimely because it failed to comply with a provision of the Washington Administrative Code requiring that permit renewal applications be filed within six months of a permit's expiration date. Petition at 8 (citing Wash. Admin. Code § 173-401-710 (2005)). The Province also argues that EFSEC's response to comments document failed to respond to the Province's comment on this issue. For the two reasons stated below, we deny review of this issue.

First, the Province did not raise this issue with sufficient specificity during the comment period and, therefore, did not preserve the issue for review by this Board. *See In re New England Plating Co.*, 9 E.A.D. 726, 732 (EAB 2001). The Province's comments make only one reference to the Washington Administrative Code section at issue. That reference is contained in a one-sentence "*see also*" citation in support of the Province's argument that the 1991 Draft Guidance requires that requests for permit extension be filed six months before the permit expires. *See* Letter from David A. Bricklin, Bricklin, Newman, Dold, LLP, to Allen Fiksdal, EFSEC (Nov. 1, 2004) at 3, EFSEC Record, Exh. C-40. In particular, after quoting and citing

[14] Because we conclude that the 1991 Draft Guidance does not support the Province's arguments, we find it unnecessary to decide whether or not the Draft Guidance is applicable in the present context. Further, we note that neither the Clean Air Act nor the applicable regulatory provision at 40 C.F.R. § 52.21(r)(2) contains the six-month deadline advocated by the Province.

the section of the 1991 Draft Guidance discussed above, the Province's comments contain the following citation: "*See also* WAC 173-401-710 (requiring extension requests for operating permits six months in advance of expiration)." The Province then continues to assert that SE2 failed to comply with the 1991 Draft Guidance by submitting its application less than six months before the expiration of the permit. Under these circumstances, we cannot fault the EFSEC for failing to recognize that this brief *see also* citation – ordinarily understood to reference authority not directly supportive of the point for which it is cited – as raising a new issue warranting a separate response from EFSEC. The Province's reference to the Washington Administrative Code in this manner simply was insufficient to preserve the issue for review with the Board. *See In re Westborough and Westborough Treatment Plant Bd.*, 10 E.A.D. 297, 304 (EAB 2002) (objections raised only in a general manner during the comment period are insufficient to support review of more specific objections in a petition for review); *In re Steel Dynamics, Inc.* 9 E.A.D. 165, 230-31 (EAB 2001) (denying review because the permit issuer was not presented with the issue raised on appeal during the public comment period with sufficient clarity to enable a meaningful response); *In re Pollution Control Indus. of Ind., Inc.*, 4 E.A.D. 162, 166-69 (EAB 1992).

Second, as EFSEC points out (*see* EFSEC Response at 9), and as the Province's deployment of a *see also* citation essentially concedes, the provision of the Washington Administrative Code the Province cites does not directly apply in the present context. In particular, section 173-401-710 applies to permit renewal applications under the State's Title V air operating permitting program. *See* Wash. Admin. Code § 173-401-100 (2005) ("The

provisions in this chapter establish elements of a comprehensive Washington state air operating permit program consistent with the requirements of Title V of the Federal Clean Air Act."). PSD permits, on the other hand, issue pursuant to a separate section of the Washington Administrative Code to which section 173-401-710 is simply inapplicable. *See* Wash. Admin. Code § 173-400 (2005). For this reason, we would deny review on this issue even if it had been properly raised during the comment period.

c. *Policy Argument*

Finally, the Province argues that there are important policy reasons warranting Board review of this issue. In particular, the Province argues that requiring a PSD permit extension application to be filed within 6 months of the permit's expiration "ensures that reviewing agencies have ample time to review the application, draft a permit, solicit public comment, and issue a final decision. It also enables the public to thoroughly review the application and draft permit, and make informed comments about the proposal." Petition at 9. The Province does not assert, however, and the record in this case does not reflect, that EFSEC or the Region lacked sufficient time to review the application. Similarly, nothing in this record suggests that the public did not have the time or the opportunity to review and provide informed comments on the proposed extension. On the contrary, the record shows that prior to issuing the permit extension, EFSEC: (1) issued a preliminary approval of SE2's extension request on September 17, 2004, and provided public notice of the approval (*see* Draft Approval of the Prevention of Significant Deterioration and Notice of Construction, EFSEC Record, Exh. B-2); (2) allowed for a six-week public comment period between September 17, 2004 and November 1, 2004 (*see* EFSEC

Record, Exhs. B-6, B-11, B-12); (3) issued a technical support document (*See id.* at B-3); (4) held a public hearing on October 28, 2000 (*see id.* at B-1); and (5) issued a response to comments document on January 5, 2005 (*see* Responsiveness Summary, EFSEC Record, Exh. F-1). Thus, we find no merit to the Province's suggestion that submission of the extension application less than six months before expiration of the original permit short-circuited or in some way compromised the permitting process in this case.

The Province also asserts that "[a]llowing a permittee to submit a renewal application at anytime before its original permit expires unjustly extends the permit until the renewal is granted or denied, without proper review and public comment process." Petition at 9. It is not clear from the Petition why the Province believes that the permit is "unjustly extended" when a permit application is submitted less than six months before expiration of the original permit. To the extent that the Province believes that some injustice results because of a lack of adequate time for proper review of the extension request, this assertion is rejected for the same reason stated above. That is, the Province has not demonstrated any deficiencies in the permitting process in this case relating to either the EFSEC's review of the extension request or to the public comment process, nor does the record reflect that any such deficiencies existed.

We note further that, contrary to the Province's suggestion, the applicable regulations do not provide for automatic extensions of PSD permits. By its terms, the original permit expired on October 17, 2004. The permit extension in this case added eighteen months to that date (i.e., until April 17, 2006). However, no such extension was granted merely by filing of the request

for extension. In other words, affirmative action on the part of the permitting authorities was necessary in order for the extension to be authorized.

Finally, the Province suggests that processing an extension application filed less than six months before expiration of the original permit would undermine the Congressional intent of the PSD program by allowing a facility to be built without "assur[ing] that the latest technology is employed." *Id*. at 9. Although not entirely clear from the Petition, the Province is apparently suggesting that the BACT analysis conducted for issuance of the original permit is now out of date and should be revisited.[15] Again, however, the Province has failed to demonstrate any deficiency in the permitting process in this case. Notably, the record reflects that the EFSEC conducted an analysis to determine whether more effective pollutant control technologies had been imposed in permits subsequent to issuance of the original permit. *See* Technical Support Document for PSD and Notice of Construction Approval Permit (Sept. 17, 2004) at 3, EFSEC Record, Exh. B-3. EFSEC concluded that the BACT determination and related permit terms and conditions under the original Permit remained valid. *Id*. at 5. At bottom, the Province's argument hangs on a seemingly implausible and ultimately unsupported premise – that the less than two-month differential between when the Province maintains the extension application should have been filed and when it was actually filed was material from a BACT analysis standpoint. In short, the Province has failed to demonstrate that EFSEC's analysis or conclusions in this regard were erroneous or otherwise warrant Board review.

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[15] *See In re West Suburban Recycling*, 8 E.A.D. 192, 195 (EAB 1999) (18-month time limit in 40 C.F.R. § 52.21(r) is a means of assuring that BACT requirements contain reasonably current pollution controls).

2. *Construction Schedule*

The Province argues that EFSEC should have denied SE2's application for a permit extension in this matter because the extension request allegedly did not include a construction schedule for the Facility. Petition at 10. The Province does not cite to any statutory or regulatory provision requiring that such a schedule be submitted with an extension request. Rather, the Province cites to a U.S. EPA Region IX guidance document issued in 1988.[16] *See* EPA Region IX Policy on PSD Permit Extensions ("Region IX Policy") (Mar. 23, 1988, revised July 6, 1988), EFSEC Record, Exh. D-1. The Region IX Policy states, in relevant part, that the extension request must "include a revised construction schedule which assures that construction will be initiated during the extension period * * *." *Id*. at 1.

The Province raised the identical issue during its comments on the draft permit extension. *See* Letter from David A. Bricklin, Bricklin, Newman, Dold, LLP, to Allen Fiksdal, EFSEC (Nov. 1, 2004) ("Province's Comments") at 3-4, EFSEC Record, Exh. C-40. In its response to comments, EFSEC stated that it "believes that SE2 did provide an adequately revised construction schedule in its permit extension request." EFSEC states further that:

> In its original permit application, SE2 expressed its construction schedule as an intent to initiate construction once all necessary permits had been acquired. Similarly, in the permit extension request, SE2 has repeated this intention after explaining the delays that occurred in attempting to obtain all the necessary permits. This is not a situation where SE2 is simply waiting until the business climate or market improves before it decides to begin construction of the [Facility]. Instead, this is a situation where SE2 has not obtained required

[16] The Petition states that during the comment period the Province also cited to the 1991 Draft Guidance discussed above. Petition at 10. In its Petition before this Board, however, the Province relies only on the Region IX Policy.

> approvals for a key component of its project. There is no evidence contradicting SE2s belief that it will be able to [obtain the necessary approvals][17] and its statement that it will begin construction during the permit extension period. EFSEC is satisfied that the information provided by SE2 constitutes an adequate revision of [SE2's] intended construction schedule and that SE2 has provided a satisfactory showing to justify the extension.

Responsiveness Summary at 13, EFSEC Record, Exh. F-1. While the Province disagrees with this conclusion, it has failed to demonstrate that the EFSEC's response is erroneous or otherwise warrants review. Review is therefore denied on this issue. *See In re Amerada Hess Corp.*, PSD Appeal No. 04-03, slip op. at 11 (EAB, Feb. 1, 2005), 12 E.A.D. ___ (Petitioners may not simply repeat objections made during the comment period but must demonstrate why the response to the objections is clearly erroneous or otherwise warrants review).[18]

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[17] In its permit extension application, SE2 explained that the Canadian National Energy Board had denied SE2's request to construct transmission lines from the Facility to a substation located in Abbotsford, British Columbia. *See* Sumas 2 Generating Facility Notice of Construction/Prevention of Significant Deterioration Permit Extension Request (May 27, 2004) at 1, EFSEC Record, Exh. A-3. The extension request states that SE2 is in the process of appealing that decision, "and remains optimistic that it will ultimately obtain required transmission permits, and that it will be able to begin construction of the [Facility] before mid-April 2006." Letter from David N. Eaden, VP Construction & Engineering, SE2, to Irina Makarow, EFSEC (May 28, 2004), EFSEC Record, Exh. A-4.

[18] On March 29, 2005, the Province filed a motion seeking leave to supplement the administrative record with new evidence "addressing whether the permit applicant * * * is capable of, or intends to, commence construction of the energy facility by April 2006, as the permit extension requires." Motion to Supplement the Record with New Evidence ("Motion") at 1 (Mar. 29, 2005). According to the Province, this new evidence shows that SE2 does not expect to commence construction within the extension period. The "new evidence" consists of (1) a portion of a transcript from a Canadian National Energy Board ("NEB") Hearing held on September 23, 2003, concerning approval of SE2's construction of an international power line ("IPL"); and (2) a portion of NEB's draft certificate of approval for construction of the IPL, dated September 22, 2003. Motion at 3 and exhs. C-D. However, the Province does not allege, and the record does not reflect, that these documents were not reasonably ascertainable during the comment period. *See* 40 C.F.R. § 124.13 (all reasonably ascertainable issues and arguments must be raised by the close of the comment period). Moreover, the Province has failed to

(continued...)

Moreover, as EFSEC states in its response, SE2 submitted a detailed construction schedule in April of 2000 as part of its original application for site certification from EFSEC. *See* EFSEC Record, Exh G-1 (construction schedule and milestones); EFSEC Response at 14. According to EFSEC, in SE2's request for a permit extension, "SE2 did not indicate to EFSEC, and EFSEC had no reason to believe, that that schedule would change in any way." EFSEC Response at 14. Further, SE2 states before this Board that, except for adjustments reflecting the change in the start date, the detailed construction schedule remains in effect. *See* Sumas Energy 2's Sur-Reply Brief at 2 (April 28, 2005). The Province's assertions regarding the absence of an adequate construction schedule are therefore rejected as a basis for review.[19]

3. *BACT Re-Analysis on Start-up and Shut-down*.

The Province asserts that EFSEC failed to conduct an adequate BACT re-analysis regarding emissions from the facility during start-up and shut-down before issuing the permit extension. Rather, according to the Province, EFSEC blindly adopted the original BACT determination. Petition at 12. On this basis, the Province argues that the Board should grant review and remand the permit for an appropriate BACT re-analysis of start-up and shut-down emissions. *Id*. at 13. We disagree.

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[18](...continued)
establish the relevance of the documents to the question of whether SE2 intends to commence construction by the end of the extension period. Accordingly, the Motion is denied.

[19] We note further that the Province's reliance on the Region IX Policy is questionable in the present case since the facility is located in Region X. However, given the above disposition, we find it unnecessary to reach this issue.

As we stated in the Board's denial of review of the original permit, EFSEC gave serious consideration to the Province's concerns regarding emissions during start-up and shut-down and made efforts to address those concerns. *See In re Sumas Energy 2 Generation Facility*, PSD Appeal Nos. 02-10 & 02-11 (Order Remanding in Part and Denying Review in Part) at 16-20 (Mar. 25, 2003). Contrary to SE2's assertion, the record does not indicate that EFSEC "blindly" adhered to this earlier conclusion for purposes of the extension decision. Rather, as EFSEC stated in responding to the Province's comment on this issue during the comment period, EFSEC revisited the original BACT analysis when considering the extension request. *See* Responsiveness Summary at 30, EFSEC Record, Exh. F-1. EFSEC states that, as part of its review of the extension request, its permit writer reviewed EPA's RACT/BACT/LAER Clearinghouse[20] and concluded that there was no new information warranting any changes to the original BACT analysis. *See* Technical Support Document for Prevention of Significant Deterioration and Notice of Construction Approval Permit No. EFSEC/2001-02 ("Technical Support Document"), Amendment 1 at 3 (Sept. 17, 2004), EFSEC Record, Exh. B-3. Thus, EFSEC concluded that there had been "no technological changes that would alter the BACT determination as related to startup and shutdown operation." Responsiveness Summary at 30.

[20] "RACT/BACT/LAER" stands for "Reasonably Available Control Technology/Best Available Control Technology/Lowest Achievable Emission Rate." Each of these acronyms refers to technological standards established by different sections of the CAA. As stated above, BACT is the standard from the PSD provisions of the CAA. *See* CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4). The RACT/BACT/LAER ("RBL") Clearinghouse contains information on emission controls and emission limits for industrial facilities across the country. The RBL Clearinghouse is available on the internet at http://cfpub1.epa.gov/rblc/htm/b102.cfm. Each of the facilities listed in the RBL Clearinghouse is assigned an identification number which can be used to locate the different database pages that provide general information regarding the facility and particular limits applicable to the pollutants emitted by the facility.

Under these circumstances, the Province's assertion that EFSEC blindly adopted the original BACT determination is rejected as a basis for review.

4. *BACT Analysis for NO_x Emissions*

The Province argues that EFSEC failed to conduct a BACT re-analysis for control of NO_x emissions. In particular, the Province asserts that EFSEC failed to reconsider whether the use of EM_x technology was BACT for NO_x. Rather, according to the Province, EFSEC simply relied on the BACT analysis conducted for the original permit. *See* Petition at 13-14.

In responding to this issue during the comment period, EFSEC stated:

> In the Fact sheet to the original permit, EFSEC provided an extensive analysis of the technical feasibility of applying $SCONO_x^{TM}$ technology (now called EM_x^{TM}) to the [Facility]. EFSEC determined that the EM_x^{TM} technology was marginally technically feasible in light of at least a seven-fold scaleup that would be required from the largest EM_x^{TM} installation. EFSEC did not elaborate further on that determination because there is no evidence that the BACT analysis with regard to EM_x^{TM} has changed. In fact, the evidence indicates that the most recent installations of EM_x^{TM} are even smaller than the early ones (only about 1.5% of the size of [the facility's] turbines). Further, EM_x^{TM}'s vendor claims that the technology may be better than selective catalytic (NO_x) reduction only for "*smaller-scale* applications" and that the "relative costs of these technologies * * * cannot be predicted with any certainty at this time." EFSEC believes these shortcommings adequately explain and *continue to confirm* its conclusion that EM_x is not BACT for the [facility].

Responsiveness Summary at 11, EFSEC Record, Exh. F-1; *see also* Technical Support Document at 3-4 (concluding that the original permit's BACT determination remained valid). Because the Province has failed to demonstrate why the EFSEC's response to this issue during the comment period was erroneous or otherwise warrants review, review is denied on this issue. *See Amerada Hess Corp.*, PSD Appeal No. 04-03, slip op. at 11 (EAB, Feb. 1, 2005), 12 E.A.D.

___ (Petitioners may not simply repeat objections made during the comment period but must demonstrate why the response to the objections is clearly erroneous or otherwise warrants review).

5. *Length of Permit Extension*

Finally, the Province argues that the 18-month permit extension in this matter should not have exceeded 12 months and that EFSEC did not adequately respond to the Province's comments on this issue. In support of its argument of a 12-month extension, the Province cites to the Region IX Policy which states, in part:

> Due to concerns of growth rights and public participation, EPA may limit an extension to 12 months, or less, from the initial date the permit was to expire. This allows for an extension, if necessary, while ensuring that impacted States, Districts and the public have control of their own air resources and growth rights and that state-of-the-art BACT will be employed.

Region IX Policy at 2, EFSEC Record, Exh. D-1.

Contrary to the Province's assertion, we find that EFSEC adequately addressed this issue in its response to comments. In particular, EFSEC stated:

> The Region IX Policy indicates that EPA *may* limit an extension to twelve (12) months if there are concerns that growth rights and public participation are impeded, and to ensure that state-of-the-art BACT is employed. Here, limiting the extension to twelve (12) months is not warranted. Approval of the extension would not prevent other growth from occurring in the region; public participation has been provided for by EFSEC as required by state and federal regulation; and EFSEC has verified that the BACT required by the permit is indeed state-of-the-art. EFSEC has, thus, decided to extend the permit for 18 months, starting from the date when the first permit would have expired.

Responsiveness Summary at 30-31 (emphasis in original), EFSEC Record, Exh. F-1. Because the Province has failed to demonstrate that this response was erroneous or otherwise warrants review, review is denied on this issue. *See Amerada Hess*, slip op. at 11.

IV. *CONCLUSION*

For the foregoing reasons, the petition for review of PSD Permit No. EFSEC/2001-02, Amendment 1 is denied in its entirety.

So ordered.[21]

Dated: May 26, 2005 ENVIRONMENTAL APPEALS BOARD

/s/
Kathie A. Stein
Environmental Appeals Judge

[21] The three-member panel deciding this matter is comprised of Environmental Appeals Judges Scott C. Fulton, Kathie A. Stein, and Anna L. Wolgast. *See* 40 C.F.R. § 1.25(e)(1) (2005).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of Sumas Energy 2 Generation Facility, PSD Appeal Nos. 05-03, were sent to the following persons in the manner indicated:

By Certified Mail
Return Receipt Requested:

David A. Bricklin
Devon N. Shannon
Bricklin Newman Dold, LLP
1001 Fourth Avenue, Suite 3303
Seattle, WA 98154

Ann Essko
Assistant Attorney General
Government Operations Division
905 Plum Street., SE, Bldg. #3
P.O. Box 40108
Olympia, WA 98504-0108

Irina Makarow
Energy Facility Site Evaluation Council
P.O. Box 32172
Olympia, WA 98504

Karen M. McGaffey
Perkins Coie, LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

By Pouch Mail:

Courtney J. Hamamoto (ORC-158)
Assistant Regional Counsel
U.S. EPA Region X
1200 Sixth Avenue
Seattle, WA 98101

Date: May 27, 2005

_____/s/_____
Annette Duncan
Secretary