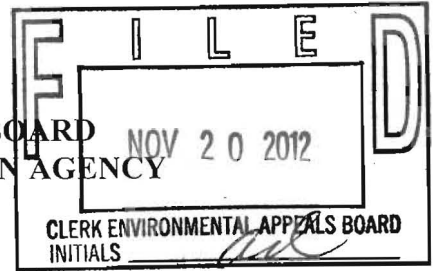


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re: Hess Newark Energy Center

PSD Appeal No. 12-02

PSD Permit No. BOP110001

ORDER DISMISSING PETITION

I. STATEMENT OF THE CASE

On October 13, 2012, the Ironbound Community Corporation and the New Jersey Environmental Justice Alliance (collectively "Petitioners") filed a petition under 40 C.F.R. § 124.19 seeking review of certain aspects of an integrated "Air Pollution Control Operating Permit, Prevention of Significant Deterioration Permit and Initial Operating Permit" that the New Jersey Department of Environmental Protection ("NJDEP") issued to Hess Newark Energy Center ("Hess"). The integrated permit authorizes the construction and operation of a 655-megawatt natural gas fired combined cycle power plant in Newark, New Jersey. Specifically, relying on section 173 of the Clean Air Act ("CAA"), 42 U.S.C. § 7503(a)(5), and section 7:27-18.3(c)(2) of the New Jersey Administrative Code, N.J. Admin. Code § 7:27-18.3(c)(2), Petitioners claim that NJDEP failed to require Hess to submit "an analysis of alternatives sites, production processes, and environmental control techniques that demonstrate that the benefits of the proposed project outweigh its environmental and social costs." Petition for Review at 3.

Both NJDEP and Intervenor Hess¹ moved to dismiss the petition for lack of jurisdiction.

NJDEP's Brief in Support of Summary Disposition and Dismissal of the Petition (Nov. 8, 2012) ("NJDEP Motion"); Motion to Dismiss Petition and For Expedited Review (Nov. 7, 2012).

As explained in more detail below, the issue Petitioners raise on appeal concerns requirements that apply to pollutants in "nonattainment" areas,² and the Environmental Appeals Board ("Board") does not have jurisdiction over such issues. The Board therefore dismisses the petition for lack of jurisdiction.

¹ On October 24, 2012, the Environmental Appeals Board ("Board") received a motion from Hess requesting leave to intervene in the proceedings of this case, which the Board granted on November 2, 2012. *In re Hess Newark, Energy Ctr.*, PSD Appeal No. 12-02, (EAB Nov. 2, 2012) (Order Granting Permittee Leave to Intervene).

² The CAA requires the Environmental Protection Agency ("EPA") to designate geographic areas within states, on a pollutant-by-pollutant basis, as being in either "attainment" or "nonattainment" with the National Ambient Air Quality Standard ("NAAQS"), or as being "unclassifiable." CAA § 107(d), 42 U.S.C. § 7407(d). For areas designated nonattainment, "states must develop a State Implementation Plan ('SIP') and tribes may develop a Tribal Implementation Plan that provides for attainment of the NAAQS as expeditiously as practicable, in accordance with the requirements of the CAA and applicable EPA regulations." Air Quality Designations for the 2006 24-Hour Fine Particle (PM) NAAQS, 74 Fed. Reg. 58,688, 58,689 (Nov. 13, 2009); *see* CAA § 172, 42 U.S.C. § 7502 (nonattainment plan provisions in general). In comparison, "[f]or those areas designated unclassifiable or attainment, states must meet other statutory and regulatory requirements to prevent significant deterioration of air quality in those areas." 74 Fed. Reg. at 58,689. Although a single geographic area may be designated as attainment or unclassifiable for one or more of the six criteria pollutants that comprise the NAAQS, and as nonattainment for the others, the PSD permitting requirements will only apply to the attainment/unclassifiable pollutants in that geographic area. *In re Sutter Power Plant*, 8 E.A.D. 680, 682 n.2 (EAB 1999).

II. ANALYSIS

As noted above, NJDEP issued Hess an integrated permit combining conditions from different CAA programs including: (1) Prevention of Significant Deterioration (“PSD”), which requires that certain sources of air pollutants located in areas designated “unclassifiable” or “attainment” obtain a permit prior to beginning construction; (2) Nonattainment (“NAA”) New Source Review (“NSR”), which requires that certain sources located in areas designated as nonattainment for certain pollutants obtain a preconstruction permit; and (3) Title V, which requires that certain air pollution sources obtain an operating permit.³ NJDEP issued the PSD portion of the permit pursuant to a delegation agreement with the U.S. Environmental Protection Agency (“EPA”), in which EPA delegated to New Jersey the federal government’s authority to issue PSD permits in New Jersey.⁴ PSD permits issued by “delegated states” are considered federal permits.⁵ Unlike the PSD portion of the combined permit, NJDEP issued the NAA NSR approval under state law pursuant to New Jersey Administrative Code Title 7, Chapter 27, Subchapter 18, N.J. Admin. Code § 7:27-18. Similarly, NJDEP issued the portion of the permit pertaining to the Title V operating permit program pursuant to state law, New Jersey

³ See Air Pollution Control Operating Permit, PSD Permit and Initial Operating Permit for a PSD Affected Facility; see also NJDEP’s Motion at 2.

⁴ See Letter from Judith A. Enck, Regional Administrator U.S. EPA Region 2, to Bob Martin, Commissioner NJDEP, *Final Revisions to the Federal Prevention of Significant Deterioration of Air Quality (PSD) Permit Program Delegation to New Jersey* (July 15, 2011).

⁵ “Delegated states” are states that have not adopted an EPA-approved PSD program as part of their CAA SIP, but have been delegated the authority to issue permits on behalf of the EPA, relying on EPA’s PSD program. In contrast, an “approved state” is a state that administers an “approved program.” 40 C.F.R. § 124.41. An “approved program,” for its part, is a SIP that contains procedures for the issuance of PSD permits and that has been approved by EPA in accordance with the CAA and its implementing regulations. *Id.* Part 124 does not apply to PSD permits issued by states or eligible Indian tribes under an EPA-approved implementation plan. See 40 C.F.R. § 124.1(e).

Administrative Code Title 7, Chapter 27, Subchapter 22, N.J. Admin. Code § 7:27-22. EPA previously had approved the latter two state programs as the State's NAA NSR⁶ and Title V operating permit⁷ programs, respectively.

The statutory and regulatory provisions Petitioners claim NJDEP failed to satisfy apply exclusively to the NAA NSR approval process of the integrated permit. Section 173 of the CAA, cited by Petitioners, falls under Part D of the CAA, which sets forth requirements for nonattainment areas.⁸ Similarly, section 7:27-18.3(c)(2) of the New Jersey Administrative Code falls under New Jersey's approved NAA NSR program. N.J. Admin. Code § 7:27-18.

The Board is a tribunal of limited, not general, jurisdiction, and it cannot assert jurisdiction over a challenged permit condition simply because it possesses jurisdiction over other conditions in the permit. 40 C.F.R. § 124.19 (establishing Board's authority to review permit determinations); *see, e.g., In re DLP Energy*, 9 E.A.D. 695 (EAB 2001) (stating that the Board has limited jurisdiction to hear permit appeals). Under Part 124, the Board has jurisdiction over permits issued under the federal PSD program, but such jurisdiction does not encompass issues that are not governed or implemented by the federal PSD program. *See, e.g., In re Russell*

⁶ *See* 40 C.F.R. §§ 52.1578, .1605; *see also* Approval and Promulgation of Implementation Plans; Carbon Monoxide State Implementation Plan Revisions, State of New Jersey, 59 Fed. Reg. 56,019 (Nov. 10, 1994); Approval and Promulgation of Implementation Plans; Revision to the New Jersey State Implementation Plan for Carbon Monoxide, 61 Fed. Reg. 38,591 (July 25, 1996).

⁷ Approval of New Jersey's Title V Operating Permit Program Revision, 72 Fed. Reg. 41,025 (July 26, 2007).

⁸ *See* 42 U.S.C. §§ 7501-7515.

City Energy Ctr., PSD Appeal No. 08-1, slip op. at 40 (July 29, 2008), 14 E.A.D. ____ (“*Russell City I*”) (quoting *In re Sutter Power Plant*, 8 E.A.D. 680, 688 (EAB 1999) (“The Board will deny review of issues that are not governed by the PSD regulations because it lacks jurisdiction over them.”)); *In re Dominion Energy Brayton Point, LLC*, PSD Appeal No. 09-01, slip op. at 2-3 (May 13, 2009) (Order Denying Petition for Review) (“The Board’s jurisdiction to review PSD permits extends only to those issues relating to permit conditions that implement the federal PSD program”). For that reason, the Board routinely denies review of non-PSD issues brought in the context of a PSD appeal. See, e.g., *Dominion*, slip op. at 4 (noting that non-PSD issues brought in context of PSD appeal were outside of the scope of Board jurisdiction over PSD permit decisions); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 135 (EAB 1997) (denying review of permit condition related to Title V operating permit because portion of the permit was a state permit); *In re W. Suburban Recycling and Energy Ctr.*, 6 E.A.D. 692, 704 (EAB 1996) (“[W]here a permit proceeding involves requirements under both state and federal law, the scope of the Board’s review is limited to issues relating to the federal PSD program and the Board will not assume jurisdiction over permit issues unrelated to the federal PSD program.”); *In re Am. Ref-Fuel Co. of Essex County*, 2 E.A.D. 280, 281 (Adm’r 1986) (only that portion of a state-issued combined permit relating to the federally delegated PSD authority is reviewable under 40 C.F.R. § 124.19). Cf. *In re Knauf Fiber Glass*, 8 E.A.D. 121, 126-27 (EAB 1999) (“The PSD review process is not an open forum for consideration of every environmental aspect of a proposed project, or even every issue that bears on air quality.”).

Significantly, the PSD program does not apply in nonattainment areas; it only applies in areas deemed to be in attainment or unclassifiable. See CAA § 161, 42 U.S.C. § 7471; *Sutter*,

8 E.A.D. at 681-82; *see also In re Prairie State Generating Co.*, 13 E.A.D. 1, 5-6 (EAB 2006). In nonattainment areas, the NAA NSR requirements of the CAA and implementing regulations apply in lieu of the PSD requirements. *See* CAA §§ 171-193, 42 U.S.C. §§ 7501-7515; 40 C.F.R. §§ 51.160-.165; *Sutter*, 8 E.A.D. at 682 n.2. The EPA has granted New Jersey authority to administer the nonattainment provisions pursuant to its approved Part D state implementation plan.⁹ Therefore, with respect to new sources in nonattainment areas, New Jersey is fully authorized to issue permits under its own regulations, and such permits are not subject to administrative review by EPA on appeal under 40 C.F.R. §124.19. *Am. Ref-Fuel Co.*, 2 E.A.D. at 281 (declining to review a combined air permit issued by NJDEP where the permit condition in question directly related to emissions offsets and the SIP-approved NAA NSR permit, not to the federally delegated PSD permit.) As noted above, 40 C.F.R. § 124.19 limits the Board's scope of review (under the CAA) to EPA-issued PSD permits, and therefore does not embrace permits for new sources in nonattainment areas. *Id.*; *see, e.g., In re Russell City Energy Ctr., LLC*, PSD Appeal Nos. 10-02 through 10-05, slip op. at 119-127 (Nov. 18, 2010), 15 E.A.D. ____ ("*Russell City II*") (finding certain challenges brought in the context of a PSD permit appeal to be moot because of redesignation of area where permit was issued as nonattainment for pollutants under scrutiny before final permit was issued).

In this case, nothing in the petition challenges any of the provisions of the PSD permit. Rather, the only challenge Petitioners raise pertain to statutory and regulatory requirements

⁹ *See supra* note 6 and accompanying text.

applicable in nonattainment areas.¹⁰ Because the issue Petitioners raise on appeal falls beyond the scope of Board jurisdiction, and Petitioners do not raise any challenges to the conditions in the PSD permit, the Board dismisses the petition for lack of jurisdiction.

So ordered.¹¹

ENVIRONMENTAL APPEALS BOARD

Dated: November 20, 2012

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

¹⁰ As NJDEP notes in its motion, NJDEP's Motion at 7 n.1, Petitioners claim that Hess' environmental justice analysis "highlights the problem" of the alleged inadequate cost-benefit analysis required under N.J. Admin. Code § 7:27-18.3. Petition at 8-9. Petitioner's principal argument is that "Hess failed to fulfill its obligation to demonstrate that the benefits of its Project and Site significantly outweighs its environmental and social costs in comparison with other sites. 42 U.S.C. § 7503(a)(5); N.J.A.C. § 7:27-18-3(c)(2)." *Id.* at 10. Petitioners further state, "[h]ad Hess fulfilled its obligation to analyze alternative sites, NJDEP and the public would have had an opportunity to assess whether, for example, such other sites are in locations that have more or less adverse environmental burdens on their surrounding communities than the proffered Site." *Id.* at 9.

The Board does not read the petition to assert an independent environmental justice claim that is separate from its underlying argument that NJDEP failed to evaluate alternative sites and whether the "benefits of the proposed project outweigh its environmental and social costs" as called for by the New Jersey NAA NSR law. *See* Petition at 8. Rather, Petitioners refer to NJDEP's environmental justice analysis as support for Petitioner's principal cost-benefit argument over which the Board has no jurisdiction. To the extent Petitioners are purporting to assert an independent environmental justice claim, as in *Russell City II*, the Board denies any such challenge to the environmental justice analysis where the challenge is premised on a claim over which the Board lacks jurisdiction. *Russell City II* at 127, n.116. *Cf.* Office of Environmental Justice, U.S. EPA, *Plan EJ 2014 Legal Tools*, at 11-12 (Dec. 2011), *available at* <http://www.epa.gov/compliance/ej/plan-ej/index.html>, (noting the difference in the role EPA plays in permitting decisions depending on whether the permit is issued by a "delegated state" or by the state acting under state law.).

¹¹ The three-member panel deciding this matter is composed of Environmental Appeals Judges Leslye M. Fraser, Catherine R. McCabe, and Kathie A. Stein. *See* 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *Order Dismissing Petition* in the matter of *Hess Newark Energy Center*, PSD Appeal No. 12-02, were sent to the following persons in the manner indicated:

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