

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

In re:)	
Indeck-Niles Energy Center)	
PSD Permit No. 364-00A)	PSD Appeal No. 04-01
)	

ORDER DENYING REVIEW

On April 21, 2004, the Michigan Department of Environmental Quality (“MDEQ” or “Department”) issued a federal Prevention of Significant Deterioration (“PSD”) permit to Indeck-Niles, L.L.C. (“Indeck”), pursuant to Clean Air Act (“CAA”) § 165, 42 U.S.C. § 7475. The permit authorizes Indeck’s construction of a new 1,076-megawatt (“MW”) electric power generating facility in Niles, Michigan, to be called the “Indeck-Niles Energy Center.” MDEQ is authorized to make PSD permitting decisions for new and modified stationary sources of air pollution in the State of Michigan pursuant to a delegation agreement with Region V of the U.S. Environmental Protection Agency (“EPA”). *See* 40 C.F.R. § 52.21(u); 45 Fed. Reg. 8348 (Feb. 7, 1980). Because MDEQ acts as EPA’s delegate under the PSD program, the Department’s PSD permits are considered EPA-issued permits, and appeals of the permit decisions are adjudicated by the Environmental Appeals Board (“Board”) pursuant to 40 C.F.R. § 124.19. *See In re Hillman Power Co.*, 10 E.A.D. 673, 675 (EAB 2002); *In re Tondu Energy Co.*, 9 E.A.D. 710, 711-12 n.1 (EAB 2001); *In re Indeck-Niles, L.L.C.*, Order Denying Review, PSD Appeal No. 02-03, slip op. at 1 n.1 (EAB Mar. 11, 2002).

In this case, Mr. Douglas Meeusen, a mathematician and software engineer who resides to the northeast of the proposed facility site, filed a *pro se* appeal of MDEQ's permit decision for the Indeck-Niles Energy Center. Mr. Meeusen requests that the permit be remanded to the Department for further consideration of certain combustion turbine startup/shutdown emissions issues. For the reasons set forth below, the petition for review is denied.

I. BACKGROUND

A. Statutory and Regulatory Background

In 1977, Congress enacted the PSD provisions of the 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 (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” (“NAAQS”). *See* CAA §§ 107, 160-169B, 42 U.S.C. §§ 7407, 7470-7492.

NAAQS are established on a pollutant-by-pollutant basis and are currently in effect for six air contaminants: sulfur oxides (measured as sulfur dioxide (“SO₂”)), particulate matter, carbon monoxide (“CO”), ozone, nitrogen dioxide (“NO₂”), and lead. 40 C.F.R. § 50.4-.12. In

areas deemed to be in “attainment” for any of these pollutants, air quality meets or is cleaner than the NAAQS for that pollutant. CAA § 107(d)(1)(A)(i), 42 U.S.C. § 7407(d)(1)(A)(i); *In re Maui Elec. Co.*, 8 E.A.D. 1, 4 (EAB 1998). In “unclassifiable” areas, air quality cannot be classified on the basis of available information as meeting or not meeting the NAAQS.¹ CAA § 107(d)(1)(A)(iii), 42 U.S.C. § 7407(d)(1)(A)(iii).

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 exceedence of any applicable NAAQS or air quality “increment.”² CAA § 165(a)(3), 42 U.S.C. § 7475(a)(3); 40 C.F.R. § 52.21(k)-(m). In addition, applicants for PSD permits must achieve emissions limits that reflect the “best available control technology,” or “BACT,”³ for pollutants that may be produced by the new or modified source in amounts

¹ Areas may also be designated as “nonattainment,” meaning that the concentration of a pollutant in the ambient air exceeds the NAAQS for that pollutant. CAA § 107(d)(1)(A)(ii), 42 U.S.C. § 7407(d)(1)(A)(ii). The PSD program is not applicable, however, in nonattainment areas. *See* CAA § 161, 42 U.S.C. § 7471.

² 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).

³ BACT is defined 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 [the] 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

(continued...)

greater than applicable levels of significance established by the PSD regulations.⁴ CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 52.21(j)(2). As the Board has consistently noted, “[t]he 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 Encogen Cogeneration Facility*, 8 E.A.D. 244, 247 (EAB 1999); *accord In re Hillman Power Co.*, 10 E.A.D. 673, 677 (EAB 2002); *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 73 (EAB 1998); *see also* U.S. EPA, Office of Air Quality Planning & Standards, *New Source Review Workshop Manual 5* (draft Oct. 1990).

B. Factual and Procedural Background

On November 2, 2000, Indeck-Niles, L.L.C. applied to MDEQ for permission to construct a new 656-MW simple-cycle natural gas-fired electrical generating facility, to be transformed into a 1,076-MW combined-cycle facility approximately twelve to eighteen months

³(...continued)

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); *accord* CAA § 169(3), 42 U.S.C. § 7479(3).

⁴ The level of significance is, for example, 40 tons per year (“tpy”) for nitrogen oxides (“NO_x”), 40 tpy for SO₂, 100 tpy for CO, and 40 tpy for ozone. 40 C.F.R. § 52.21(b)(23) (listing various air pollutants and level of emissions deemed “significant”).

after startup of the simple-cycle facility.⁵ See MDEQ Resp. to Petition for Review Ex. 3 (Epsilon Assocs., Inc., Permit to Install Application for Indeck-Niles Energy Center § 2.2, at 2-1 to -4 (Nov. 2, 2000)) [hereinafter Permit App.]. Indeck proposed to site the new facility in the southwestern corner of the State of Michigan, in Cass County, just to the northeast of the City of Niles, Michigan, and not far from South Bend, Indiana. That portion of the State is designated as attainment or unclassifiable for CO, NO₂, SO₂, ozone (measured as volatile organic compounds (“VOCs”)), and particulate matter. 40 C.F.R. § 81.323 (Michigan air quality status). Indeck indicated that it planned to operate the new facility on a “merchant power” basis, see Permit App. § 2.1, at 2-1, which means the company will sell electric power on the retail or wholesale spot markets, where electricity prices are determined by supply and demand, rather than entering into traditional long-term electric power purchase agreements. *E.g.*, Thomas R. Fileti & Carl R. Steen, *Synthetic Lease Financing for the Acquisition and Construction of Power Generation Facilities in a Changing U.S. Energy Environment*, 24 Fordham Int’l L.J. 1083, 1121 n.13 (Apr. 2001).

⁵ Facilities that use combustion turbines to generate electricity, such as the proposed Indeck-Niles facility, may be operated in various modes, including “simple-cycle” and “combined-cycle” modes. These modes differ in the way they handle the hot exhaust gases generated by the combustion turbines. In simple-cycle mode, the exhaust gases from the turbines are piped directly to a stack (or stacks) and emitted into the atmosphere. In combined-cycle mode, by contrast, the hot exhaust gases are ducted through a waste heat recovery boiler and used to generate steam prior to being emitted through the stack. The steam so produced may then be fed into a steam turbine generator, which produces further electricity. As a general matter, because combined-cycle operation employs technology to recapture energy from the high temperatures of the exhaust gases, it is more energy efficient than single-cycle operation. See *In re Kendall New Century Dev.*, PSD Appeal No. 03-01, slip op. at 15-16 (EAB Apr. 29, 2003), 11 E.A.D. ___ (citations omitted); *In re Maui Elec. Co.*, 8 E.A.D. 1, 16-17 (EAB 1998) (citations omitted).

In the first phase of the project, Indeck proposed to install four natural gas-fired combustion turbines for operation in simple-cycle mode. In the second phase, Indeck proposed to convert the four simple-cycle turbines into combined-cycle units through the addition of heat recovery steam generators and natural gas-fired duct burners to increase steam output. As just mentioned, the conversion would take place within twelve to eighteen months after operation of the simple-cycle turbines commences. The steam so produced would be piped to two steam condensing turbines to produce additional power. Permit App. § 2.2, at 2-1 to -4. In this configuration, the proposed facility has the potential to emit NO_x, CO, VOCs, and particulate matter in quantities sufficient to trigger the requirement for emissions limitations reflecting BACT. *Id.* § 3.2 & tbl. 3.2-1, at 3-3; *see also* 40 C.F.R. § 52.21(b)(23) (PSD significance levels). Accordingly, as part of the permit application process, Indeck conducted BACT analyses for the relevant pollutants and proposed BACT emissions limits for the pollutants of concern. *See* Permit App. §§ 4.1-.8, at 4-1 to -23.

In December 2001, MDEQ approved Indeck's analyses and issued a PSD permit to the company for the proposed Indeck-Niles Energy Center facility. *See* MDEQ, New Source Review Permit to Install No. 364-00, Niles Energy Center (Dec. 2001). However, a number of individuals timely petitioned the Board for review of that permit, which prevented the permit from going into effect at that time. *See* 40 C.F.R. § 124.15(b)(2). On March 11, 2002, the Board issued an order denying the individuals' petition for review (which they had filed collectively), and the permit therefore became final on that date. *See In re Indeck-Niles, L.L.C., Order Denying Review, PSD Appeal No. 02-03, slip op. at 10-20 (EAB Mar. 11, 2002); 40 C.F.R.*

§ 124.19(c), (f)(1)(i). Notably, however, Indeck failed to commence construction of its new facility within eighteen months of issuance of the final PSD permit. Under the State of Michigan's air pollution control regulations (which are based on the federal PSD rules), such a lack of action within the prescribed time frame renders the permit void. Mich. Admin. Code r. 336.1201(4); *see* 40 C.F.R. § 52.21(r)(2) (“[a]pproval to construct shall become invalid if construction is not commenced within 18 months after receipt of such approval”).

A year and a half later, in June 2003, Indeck requested that MDEQ reissue the PSD permit for the proposed Indeck-Niles Energy Center, largely as originally conceived. Indeck apparently did not revise or supplement its initial BACT analyses, performed in November 2000, but instead relied on the information contained therein as the best available information for the permit review. *See* MDEQ Resp. to Petition for Review Ex. 3 (MDEQ, Response to Comments Document for PSD Permit No. 364-00A, Indeck-Niles, L.L.C. 2 (Apr. 15, 2004)) [hereinafter RTC Doc.]. One difference exists, however, between the original permit and the present one; it relates to NO_x control technology. In its original permit application, Indeck had proposed to equip each of the four natural gas-fired combustion turbines with dry low-NO_x burners and a selective catalytic reduction system to achieve a NO_x BACT emissions limit, during combined-cycle operations, of 3.5 parts per million dry volume at 15% oxygen averaged over a twenty-four-hour rolling time period. Permit App. § 4.2.2, at 4-15. Those proposals became part of the original permit. In the new permit, those air pollution control measures are still included; however, Indeck has now also agreed to install a catalytic oxidation system on each of the four combustion turbine/dry low-NO_x burner pairs -- which is a more stringent technology option

than previously proposed -- in order to achieve the BACT limits for CO and VOCs emissions.⁶ MDEQ Resp. to Petition for Review Ex. 2 (MDEQ, PSD Permit No. 364-00A Fact Sheet 1-2 (Jan. 8, 2004)). MDEQ subsequently reviewed and approved Indeck's BACT analyses. *See, e.g., id.* at 3 ("Indeck performed a BACT analysis on NO_x, CO, VOC[s], and [particulate matter]. * * * Staff has reviewed Indeck's analyses and concurs that the proposed equipment⁷ represents BACT * * *").

Accordingly, MDEQ issued a draft PSD permit to Indeck in January 2004, containing proposed terms and conditions to regulate the proposed power plant. The Department also published a notice inviting public comment on the draft permit and establishing a month-long comment period. MDEQ subsequently held a public hearing on the draft permit on February 25, 2004, at the Niles High School Auditorium in Niles, Michigan. RTC Doc. at 1. The Department received approximately sixty written and twelve oral comments on the draft permit from interested parties, including Mr. Meeusen. *Id.*

⁶ *Cf.* Permit App. §§ 4.3.2-.3, 4.4.2-.3, at 4-16 to -19 (rejecting catalytic oxidation system in original BACT analysis for economic and environmental reasons).

⁷ BACT is an emissions limit, not a technology. *See* CAA § 169(3), 42 U.S.C. § 7479(3) ("[BACT] means an emission limitation"); *In re Three Mountain Power, L.L.C.*, PSD Appeal No. 01-05, slip op. at 23 (EAB May 30, 2001), 10 E.A.D. ___ (BACT means an emission limitation rather than a particular pollution control technology); *In re Metcalf Energy Ctr.*, Order Denying Review, PSD Appeal Nos. 01-07 & 01-08, at 13-14 (EAB Aug. 10, 2001) (same), *aff'd*, No. 01-71611 (9th Cir. Nov. 21, 2002). To be more precise, MDEQ should have stated (if true) that "*the proposed emissions limits* [not the proposed equipment] represent BACT."

After reviewing the public comments on the draft permit, MDEQ issued a final PSD permit on April 21, 2004, for Indeck's construction of the Niles Energy Center, along with a document responding to the comments on the draft permit. *See generally* MDEQ, New Source Review Permit to Install No. 364-00A, Niles Energy Center (Apr. 24, 2004) ("Permit"); RTC Doc. On May 20, 2004, Mr. Douglas Meeusen ("Petitioner") filed PSD Appeal No. 04-01 with this Board. *See* Petition for Review ("Pet'n"). At the request of the Board, MDEQ submitted a response to the merits of the petition for review on June 25, 2004. *See* MDEQ Resp. to Petition for Review ("MDEQ Resp."). The case now stands ready for decision by the Board.

II. DISCUSSION

Under the rules governing this proceeding, a PSD permit ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law or involves an important matter of policy or exercise of discretion that warrants review. *See* 40 C.F.R. § 124.19(a); 45 Fed. Reg. 33,290, 33,412 (May 19, 1980). The Board's analysis of PSD permits is guided by the preamble to section 124.19, which states that the Board's power of review "should be only sparingly exercised" and that "most permit conditions should be finally determined at the [permit issuer's] level." 45 Fed. Reg. at 33,412; *see In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 174 (EAB 2000). The burden of demonstrating that review is warranted rests with the petitioner, who must state his/her objections to the permit and explain why the permit issuer's previous response to those objections is clearly erroneous, an abuse of discretion, or

otherwise warrants review. *Steel Dynamics*, 9 E.A.D. at 174; *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 71-72 (EAB 1998); *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 60-61 (EAB 1997).

In his appeal to this Board, Petitioner raises concerns about the startup and shutdown frequency of the proposed facility's combustion turbines. *See* Pet'n at VI. Under Indeck's PSD permit, each turbine is allowed to operate in startup/shutdown mode a maximum of 500 hours per twelve-month rolling time period, as determined at the end of each calendar month, or a total of 2,000 hours for the four turbines annually. *See* Permit spec. cond. 1.1, at 6. Petitioner notes that under special condition 5.8 of the permit, Indeck must prepare a plan to minimize air pollutant emissions during startup and shutdown periods, as well as malfunction periods, and obtain MDEQ's approval of this plan prior to initiating operation of the combustion turbines and duct burners.⁸ Pet'n at VI. Petitioner specifically states that it is this permit condition that he is challenging. *Id.* at III. Petitioner points out that, in his comments on the draft version of the permit, he had asked MDEQ to provide for public scrutiny of the emissions minimization plan and to follow all the directives given to MDEQ by the Environmental Appeals Board in *In re*

⁸ Special condition 5.8 provides:

The permittee shall not operate [the combustion turbines and duct burners] unless the [MDEQ Air Quality Division] District Supervisor has approved a plan that describes how emissions will be minimized during startup(s), shutdown(s) and malfunction(s). The plan shall incorporate procedures recommended by the equipment manufacturer as well as incorporating standard industry practices. A copy of this plan must also be maintained at the facility.

Permit spec. cond. 5.8, at 13 (citations omitted).

Tallmadge Energy Center, Order Denying Review in Part and Remanding in Part, PSD Appeal No. 02-12 (EAB May 21, 2003), regarding a similar emissions minimization plan. Pet'n at VIII. Petitioner now argues that MDEQ ignored the *Tallmadge* requirements and, as a consequence, the plan called for in Indeck's PSD permit lacks the requisite degree of specificity to allow for meaningful comment by Petitioner and other members of the public. As articulated by Petitioner,

It is clear in this order [referring to *Tallmadge*] involving a very similar gas fired power plant that the EPA requires a plan to be created showing exactly how emissions are to be minimized during turbine startup/shutdown. It is clearly stated that this plan must be open to public comment.

Id. at VIII. Petitioner then summarizes his reasons for seeking review of MDEQ's permit determination by reiterating his concern for lack of opportunity for public comment, as follows:

I ask that you [EAB] grant review of this permit based on * * * MDEQ's refusal to provide a plan, subject to public scrutiny, where detail is presented on how emissions will be minimized during turbine startup/shutdown.

* * * *

* * * The EPA has clearly mandated that developing this plan after the permit is issued where the public has no input is not to be tolerated. * * *

Id. at IX-X.

In response, MDEQ distinguishes the factual circumstances of this case from those in *Tallmadge Energy Center*. First, MDEQ notes that the *Tallmadge* permit explicitly exempted that facility from complying with all BACT emission limits during startup, shutdown, and malfunction periods and instead made the facility's operations contingent on the permittee's submittal of a plan describing how it would minimize emissions during those periods. MDEQ Resp. at 5 (citing *Tallmadge*, slip op. at 22, 24). Indeck's permit, MDEQ notes, contains no such explicit exemption from all BACT limits. To the contrary, MDEQ observes, Indeck's permit incorporates annual BACT emission limitations (expressed in terms of tons per year) that must be met at all times, including during startup, shutdown, and malfunction periods, and it also contains restrictions on the amount of time the turbines can be in startup/shutdown mode and sets forth a minimum load requirement of ninety percent that defines when startup is completed. *Id.* at 6. MDEQ contends that "by establishing annual BACT limits for all periods of operation," Indeck's permit "does not run afoul of the [CAA's] prohibition on exemptions that allow emission[s] in excess of BACT limits during startup and shutdown." *Id.* (citing *Tallmadge*, slip op. at 25; *In re RockGen Energy Ctr.*, 8 E.A.D. 536, 553-55 (EAB 1999)).

Second, MDEQ responds to any latent concerns that might exist about the Indeck permit's exclusions of the facility from short-term (i.e., hourly, daily) BACT concentration limits during startup and shutdown periods, which exclusions are explicitly set forth in the permit.⁹ See Permit spec. conds. 5.1a, 5.1c, 5.1d, 5.1f, 5.1h, at 11-12 (parts per million limits for NO_x and CO emissions; pounds per hour limits for VOCs and particulate matter emissions). Specifically, MDEQ notes that in its response to comments, it had explained that due to the nature of operations during startup and shutdown, involving lower and inconsistent combustion temperatures, the proposed facility will not be capable of always meeting the short-term concentration limits in those periods. MDEQ Resp. at 6 (citing RTC Doc. at 7). For example, MDEQ explains, "selective catalytic reduction is not as effective at the lower combustion temperatures generated during the limited transition periods of startup and shutdown." *Id.* (referencing Permit App. § 4.2.1.1, at 4-7). Indeed, the Department asserts, "[d]uring unsteady state conditions [such as startup and shutdown,] there could be spikes on an interim basis making it difficult for such a low short-term [BACT] limit to be met. However, the annual [BACT] limits include all operating scenarios. Therefore, startup and shutdown emissions must be included in the tons per year calculations." *Id.* (quoting RTC Doc. at 7).

⁹ Notably, Petitioner did not raise in his appeal an issue directly related to the potential applicability of the permit's short-term BACT concentrations limits during periods of turbine startup and shutdown. See Pet'n at V-X. MDEQ's decision to exempt the Indeck-Niles Energy Center from any concentration limits during startup and shutdown is potentially a much more serious concern than the issue of public review of the emissions minimization plan that is before us now. See, e.g., *MDEQ v. Browner*, 230 F.3d 181, 183-86 (6th Cir. 2000) (affirming EPA rejection of Michigan CAA rules as not meeting CAA requirements because of improper exclusions from emission limits during startup/shutdown). However, as the issue has not been presented on appeal, we will not reach it on our own volition. In so doing, we in no way are to be understood as expressing approval for or otherwise sanctioning a permit issuer's decision to exempt a facility from all short-term BACT concentration limits during startup and shutdown.

Finally, MDEQ contends that unlike the situation in *Tallmadge*, Indeck's permit does not "rely on a startup, shutdown and malfunction plan to establish permitting requirements in lieu of emission limits that satisfy BACT." *Id.* at 6-7. In MDEQ's view, the permit requires Indeck to submit a plan to minimize emissions during these periods but "[t]hat plan is not, however, a substitute for the BACT limits contained in the permit." *Id.* at 7 n.4. MDEQ concludes by urging the Board to reject Petitioner's arguments and deny his petition for review, as, in the Department's view, Petitioner has not carried his burden of establishing clear error or abuse of discretion or other grounds for Board review of this permit. *Id.* at 7.

We are persuaded that the circumstances of this case are distinguishable in important respects from those in *Tallmadge Generating Station*, as well as from those in *RockGen Energy Center*, an electric power generating case out of the State of Wisconsin (and cited as precedent in *Tallmadge*). The Board remanded the PSD permits in both of those cases because the permits contained blanket exemptions from BACT emissions limits during startup and shutdown periods, contrary to the directives of the CAA, as interpreted by EPA policymakers. *Tallmadge*, slip op. at 24 ("BACT requirements cannot be waived or otherwise ignored during periods of startup and shutdown"); *RockGen*, 8 E.A.D. at 553-55 (holding that PSD permits may not contain blanket exemptions allowing emissions in excess of BACT limits during startup and shutdown). The Board laid out in those cases a series of detailed instructions for the permit issuers to perform on remand, so as to ensure that BACT would be properly accounted for during startup and shutdown. *See Tallmadge*, slip op. at 27-28; *RockGen*, 8 E.A.D. at 554-55.

In the instant case, however, we have a PSD permit that explicitly establishes BACT emissions limits for NO_x, CO, VOCs, and particulate matter, on a tons per twelve-month rolling time period basis (as determined at the end of each calendar month), including all periods of startup, shutdown, and malfunction.¹⁰ Permit spec. cond. 5.1b, 5.1e, 5.1g, 5.1i, at 11-12. We also have a provision limiting total startup/shutdown event time to 2,000 hours per year (500 hours per individual turbine) and defining “startup” as “the period of time from initiation of combustion firing until the unit reaches steady state operation (loads greater than 90 percent).”¹¹ *Id.* spec. cond. 1.1, at 6. In these circumstances, it would be inappropriate to construe *Tallmadge* and *Rockgen* as establishing bright-line rules for each and every case in which the PSD permit contains a startup/shutdown emissions minimization plan. Rather, because those decisions focused on circumstances in which emissions during startup and shutdown were completely exempted from BACT, they have greatest significance in that context or in cases where serious other concerns are raised about the scope of BACT coverage during startup and shutdown.

Since Indeck’s PSD permit does not completely exempt startup/shutdown from BACT limitations, this basis for invoking *Tallmadge* and *Rockgen* must be declined. Also, the petition

¹⁰ In addition, Indeck demonstrated in its air quality analysis that emissions from the proposed power plant will not cause or contribute to an exceedance of the NAAQS, including short-term NAAQS (averaged over one, three, eight, or twenty-four hours) and long-term NAAQS. *See* Permit App. § 6, at 6-1 to -25.

¹¹ “Shutdown” is also defined in this provision, in its case as “that period of time from the initial lowering of the turbine output, with the intent to shut down, until the point at which the combustion process has stopped.” Permit spec. cond. 1.1, at 6.

for review, fairly read,¹² does not raise concerns about the scope of BACT coverage during startup and shutdown.¹³ Rather, the actual grounds raised by Petitioner in seeking review concern his alleged inability to comment in a meaningful manner on special condition 5.8 of Indeck's permit, which governs development of an emissions minimization plan following construction of the facility. For the reasons discussed below, the Board concludes that the threshold for granting review has not been met in this case.

PSD permits, by their very nature, constitute an authorization to construct a major emitting facility whose emissions are subject to the prevention of significant deterioration provisions of the Clean Air Act. *See generally* CAA § 165, 42 U.S.C. § 7475. Although PSD permits contain provisions and limitations governing operation of the facility following

¹² Petitioner is not represented by counsel. Accordingly, as is our practice, we endeavor to construe Petitioner's objections generously so as to identify the substance of the arguments, notwithstanding the informal manner in which those arguments are presented. However, "while the Board does not expect or demand that [*pro se*] petitions will necessarily conform to exacting and technical pleading requirements, a [*pro se*] petitioner must nevertheless comply with the minimal pleading standards and articulate *some* supportable reason why the [permit issuer] erred in its permit decision * * *." *In re Federated Oil & Gas*, 6 E.A.D. 722, 727 n.5 (EAB 1997) (quoting *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 19 (EAB 1994)); *accord In re Sutter Power Plant*, 8 E.A.D. 680, 687-88, 694 (EAB 1999); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 127 (EAB 1999).

¹³ Petitioner indisputably had notice of and an opportunity to comment on the startup/shutdown BACT provisions. *See, e.g.*, Pet'n attach. ¶ 11 (Douglas Meeusen, Comments on Draft PSD Permit Application No. 364-00A for Indeck-Niles, L.L.C. ¶ 11 (undated)) (commenting on BACT permit provisions, including emissions limits and hours of authorized startup/shutdown time); RTC Doc. at 1 ("[n]o changes to the draft permit conditions as presented for public comment have been made" in the final permit); Permit spec. cond. 1.1, 5.1a-1i, at 6, 11-12. Accordingly, we have no concern here, as we did in *Tallmadge* and *RockGen*, that a vital permitting decision -- i.e., determining BACT for startup and shutdown emissions -- has been improperly consigned to an emissions minimization plan with no provision for public review thereof.

construction, the permit itself and the opportunity to comment on the permit necessarily precede construction of the facility, for construction is barred until the permit is actually issued and effective. *Id.* § 165(a)(1), 42 U.S.C. § 7475(a)(1). Emissions minimization plans, or performance optimization plans, as they are sometimes called, address the post-construction phase of a newly permitted facility. They seek not simply to ensure that emissions units operate within prescribed emissions limitations -- which, in any event, are already mandated by the permit -- but that the emissions units will operate at optimal efficiency. In this way the plans seek to account for the natural variability of actual operating conditions and thereby refine the performance of the equipment based on real world experience. *See, e.g., In re Pennsauken County, N.J. Resource Recovery Facility*, 2 E.A.D. 768, 770-71 (Adm'r 1989) (upholding optimization condition in PSD permit that involved performance of test program, on operating facility, to determine ways to minimize emissions of ammonia and NO_x). Accordingly, when delineating the contours of such a plan during the permit-writing phase, i.e., before construction has commenced, the permit writer's task is circumscribed by the fact that many of the plan's details will not be knowable until the facility is actually constructed and put into an operational mode. Once the facility is constructed, the permittee, in conjunction with the permitting agency, implements the adjustments to the physical components of the facility and/or operational procedures as necessary to optimize performance. The plan does not become fully implemented until those adjustments are made.

Special condition 5.8 of Indeck's permit identified the contours for the contents of Indeck's startup/shutdown emissions minimization plan, and those contours were in fact subject

to public comment. The permit provision states that the plan “shall incorporate procedures recommended by the equipment manufacturer as well as incorporating standard industry practices.” Permit spec. cond. 5.8, at 13. It also forbids operation of the four turbines unless the MDEQ has actively approved the plan (as opposed to passively approving it by passage of time, as was one option in the *Tallmadge* permit),¹⁴ and the approved plan must describe how emissions will be minimized during periods of startup/shutdown (and malfunctions). In its response to Petitioner’s comments on the draft permit challenging these requirements as “meaningless,” MDEQ stated, “Manufacturer recommendations and standard industry practices are reliable means of assuring the equipment is operating properly as designed.” RTC Doc. at 7. Petitioner has not come forward at this juncture with specific information or argument demonstrating why the Department’s response to his objection is clearly erroneous, an abuse of discretion, or otherwise warrants review. Neither has Petitioner suggested measures or additional components that he believes should be included in the emissions minimization plan. We therefore find no basis for review on this point. *See, e.g., In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 236-37 (EAB 2000) (denying review where petitioners failed to provide evidence or argument to contradict permit issuer’s assertion that it could not circulate a proposed preventative maintenance plan for public review prior to permit finalization because the plan would contain maintenance procedures based on vendor specifications and other information that might not be available in preconstruction phase); *see also In re Tondu Energy Co.*, 9 E.A.D. 710, 719-20 (EAB 2001) (denying review where petitioner failed to show how permit issuer’s

¹⁴ As previously discussed, the plan, unlike in *Tallmadge* and *RockGen*, serves as a supplement to, not in lieu of, BACT limits.

response to her concerns was clearly erroneous); *In re P.R. Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995) (absent sufficient specificity as to why permit issuer's decision was erroneous, Board has no basis on which to grant review).

III. CONCLUSION

For the foregoing reasons, the petition for review of PSD Permit No. 364-00A is denied.

So ordered.

ENVIRONMENTAL APPEALS BOARD¹⁵

Date: Sept. 30, 2004

/s/
Ronald L. McCallum
Environmental Appeals Judge

¹⁵The three-member panel deciding this matter consisted of Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, 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 Denying Review in the matter of Indeck-Niles Energy Center, PSD Appeal No. 04-01, were sent to the following persons in the manner indicated:

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Date: Sept. 30, 2004

/s/
Annette Duncan
Secretary