

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

In re:)
)
)
Nucor Steel) PSD Appeal No. 02-09
)
Permit No. 107-14297-00038)
)

ORDER DISMISSING PETITION FOR REVIEW

Before the Environmental Appeals Board ("EAB" or "Board") is a petition seeking review of certain conditions of a "Part 70 Significant Source and Major Modification Under Prevention of Significant Deterioration" permit decision, Permit No. 107-14297-00038 (the "Permit"), issued by the Indiana Department of Environmental Management ("IDEM").¹ The Permit was issued to

¹ IDEM administers the PSD program in Indiana pursuant to a delegation of authority from U.S. EPA Region V (the "Region"). See *In re Conagra Soybean Processing Co.*, PSD Appeal Nos. 98-27 & 98-28, slip op. at 1 n.1 (EAB, Sept. 8, 1998) (citing 46 Fed. Reg. 9580 (Jan. 21, 1981)). Because IDEM acts as EPA's delegate in implementing the federal PSD program within the State of Indiana, PSD permits issued by IDEM are considered EPA-issued permits for purposes of federal law, and are subject to review by the Board pursuant to 40 C.F.R. § 124.19. See *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 109 n.1 (EAB 1997); *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 765 n.1 (EAB 1997); *In re West Suburban Recycling and Energy Ctr., L.P.*, 6 E.A.D. 692, 695 n.4 (EAB 1996).

Nucor Steel, a division of Nucor Corporation ("Nucor"). The petition for review ("Petition") was filed by the permittee, Nucor. As explained below, the Petition is dismissed as untimely.

I. BACKGROUND

A. Factual and Procedural Background

Nucor operates a steel plant located at County Road 400 East in Crawfordsville, Indiana. On January 6, 2000, Nucor notified IDEM of 20 unpermitted burners in the preheat section of its galvanizing line. Petition at 4. IDEM and Nucor entered into Agreed Order 2000-8861-A which provided that Nucor would submit a PSD permit application for the unpermitted burners, as well as a permit modification request for certain other permitted burners. *Id.* Furthermore, Nucor would install a Selective Catalytic Reduction/Selective Non-Catalytic Reduction ("SCR/SNCR") system as a supplemental environmental project ("SEP"). *Id.*

The Permit, in pertinent part, would authorize Nucor to modify its existing plant by constructing and operating:

1. 36 natural gas-fired main burners and three auxiliary natural gas-fired burners in the preheat furnace section of its galvanizing line, with NO_x emissions controlled by [SCR/SNCR] systems; and

2. 44 burners in the radiant tube section with NOx emissions controlled by an SCR system.

See Permit at ¶ A.2 (Emission Units and Pollution Control Equipment Summary).

The Permit also contains a condition that requires Nucor to install a continuous emissions monitoring system ("CEMS") to ensure compliance with NOx emissions standards. *Id.* at ¶ D.1.10 (Continuous Emission Monitoring).

After providing public notice of a draft permit and a period of public comment, IDEM issued the Permit to Nucor on June 6, 2002. See IDEM's Response Seeking Summary Disposition at 1, 2 n.1 (filed Sept. 26, 2002). On the same date, IDEM also issued to Nucor, under state law, an Administrative Amendment to a Part 70 Minor Source Permit ("Minor Source Permit"). *Id.* at 4. The cover letter to the Permit provided instructions for filing an appeal with this Board, and the cover letter to the Minor Source Permit provided instructions for filing an appeal with Indiana's Office of Environmental Adjudication ("OEA"). See Response Exs. B, C.

On June 24, 2002, Nucor's attorneys filed a petition for review of the Permit with the OEA, following the instructions for

filing the Minor Source Permit appeal. See Response at 2; Petition at 2. Nucor's attorneys subsequently filed its Petition for review of the Permit with the Board on September 10, 2002.

B. *Issues Raised in the Petition*

In this case, Nucor has raised the following issues. First, that a continuous emissions monitoring system should not be required. Second, that the use of a 24-hour NO_x average is unreasonable and unsupported by Federal or Indiana law. Third, that the SCR/SNCR systems are incorrectly identified as Best Available Control Technology. Finally, that the Permit's optimum temperature requirements are unnecessary and duplicative.

In filing its Petition with the Board, Nucor indicated that it does not believe that these are PSD-related issues, and disputes IDEM's alleged interpretation that they are. It characterizes its filing with the Board as "a protective measure." See Petition at 2-3.

As discussed below, Nucor's Petition is untimely, and is dismissed on those grounds.

II. 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 Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 769 (EAB 1997) (quoting *In re Envotech, L.P.*, 6 E.A.D. 260, 265 (EAB 1996)). Pursuant to this regulation, the Board "begins its analysis by assessing the petitioner's compliance with a number of important threshold procedural requirements." *In re Sutter Power Plant*, 8 E.A.D. 680, 685 (EAB 1999).

Interested parties may petition the Board for review of a PSD permit condition within thirty days after issuance of the final permit decision. 40 C.F.R. § 124.19(a). In accordance with this regulation, petitions filed more than thirty days after permit issuance are untimely. *See Sutter Power Plant* at 695; *In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 328 (EAB 1999).

In this case, IDEM informed Nucor by letter dated June 6, 2002, and mailed on June 7, 2002, that it had thirty days from the date of service of the Permit to file a petition for review with the Board. *See Response Att. B (Notice of Decision - PSD*

Permit). In this case, Nucor's deadline for filing a petition for review was July 12, 2002 (30 days + 5 additional days since service was by mail). However, Nucor did not file its appeal with the Board until September 10, 2002 -- two months late.

Nucor's Petition implies that it had been misled as to where to file an appeal, see Petition at 2-3, and that it had been advised to file its appeal with the OEA only. But, after submission by IDEM of a copy of the "Notice of Decision - PSD Permit" which clearly states that PSD appeals are to be filed with the Board, Nucor concedes in its Reply Brief that IDEM did indeed send it the appropriate instructions for filing with the Board. Reply at 1 ("A search of Nucor's records upon receipt of IDEM's Response found a June 6, 2002 letter giving the procedure for appeal to the EAB.").

Nucor also argues that Board review is appropriate because IDEM has now taken a position that the issues raised in the Petition are PSD-related issues and therefore are not reviewable in the OEA adjudication. Nucor states that this represents a change of position and that the change occurred after the period for filing with this Board had run. Reply at 2. However, Nucor concedes that it received IDEM's "Notice of Decision - PSD Permit" which informed it of its right to file an appeal with the

Board and Nucor has not argued that IDEM affirmatively misled it into not filing with the Board. Rather, it is perfectly clear from Nucor's filings that it did not file with the Board within the requisite time period because it believed, and still believes, that the issues raised in the Petition are not PSD issues and that the Board thus has no jurisdiction to hear them. Reply at 2-3.

To the extent that Nucor may have a dispute with IDEM over the latter's assertion that the OEA lacks jurisdiction to entertain Nucor's appeal, see Petition at 3, that dispute does not provide an appropriate foundation for granting review. See *In re West Suburban Recycling and Energy Center*, 6 E.A.D. 692, 704 (EAB 1996) (" * * * 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.").

III. CONCLUSION

Because Nucor was properly notified of the filing requirements, and there is no good cause for its failure to file its petition within the thirty days allowed by regulation, we dismiss the petition for review as untimely.

So ordered.²

Dated: 10/11/02

ENVIRONMENTAL APPEALS BOARD

By: _____/s/_____
Edward E. Reich
Environmental Appeals Judge

²The three-member panel deciding this matter is comprised of Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich. See 40 C.F.R. § 1.25(e)(1) (2001).

