IN RE MILFORD POWER PLANT

PSD Appeal No. 99–2

ORDER DENYING REVIEW

Decided October 18, 1999

Syllabus

Goal Line Environmental Technologies, L.L.C. ("Goal Line") filed a petition for review of two Prevention of Significant Deterioration ("PSD") permits issued by the Connecticut Department of Environmental Protection ("CT–DEP") to PDC–El Paso, Milford L.L.C. ("PDC") for the construction of a new power plant in Milford, Connecticut. The permits authorize PDC's emissions of certain air pollutants from two combustion turbines that will be installed at the power plant. Goal Line claims that CT–DEP failed properly to conduct a Best Available Control Technology ("BACT") analysis for the control of nitrogen oxide ("NO_x") emissions from the turbines, as required by the Clean Air Act, 42 U.S.C. §§ 7401–7671q, and asks that the permits be remanded to CT–DEP for reconsideration.

CT–DEP filed an expedited motion to dismiss the case on the ground that the Environmental Appeals Board ("Board") lacks jurisdiction to adjudicate it. According to CT–DEP, the permits at issue are state, not federal, permits and as such are not subject to review by the Board. The U.S. Environmental Protection Agency ("EPA") Region I and EPA's Office of Air and Radiation filed a brief in support of CT–DEP's motion, as did PDC, the permittee. Goal Line filed briefs opposing the motion.

Held: The petition for review is dismissed. CT–DEP's determination of NO_x BACT is performed pursuant to its status as a state with an EPA-approved BACT program that has been incorporated into Connecticut's State Implementation Plan; the relevant provisions of the permits at issue are thus creatures of state law that the Board lacks jurisdiction to review.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Fulton:

On May 17, 1999, Goal Line Environmental Technologies, L.L.C. ("Goal Line") filed a petition for review of two Prevention of Significant Deterioration ("PSD") permits issued by the Connecticut Department of Environmental Protection ("CT–DEP") to PDC–El Paso, Milford L.L.C. ("PDC") for the construction of a new power plant in Milford, Connecticut. The permits authorize PDC's emissions of certain air pollutants from two

combustion turbines that will be installed at the power plant. In its petition for review of these permits, Goal Line claims that CT–DEP failed properly to conduct a Best Available Control Technology ("BACT") analysis for the control of nitrogen oxide ("NO_x") emissions from the turbines, as required by the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401–7671q. Petition for Review of a Final Permit Issued by the State of Connecticut, Department of Environmental Protection at 7–15, 28 ("Petition"). Goal Line seeks a remand of the permits to CT–DEP for reconsideration of the NO_x BACT analysis. *Id.* at 28.

In response to Goal Line's petition, CT–DEP filed an expedited motion to dismiss the case on June 23, 1999. *See* Expedited Motion for Dismissal ("Exp. Mot."). CT–DEP argues that the Environmental Appeals Board ("Board") has no jurisdiction to adjudicate this case because the permits at issue are state, not federal, permits. CT–DEP claims that it operates the federal CAA PSD program as a state program approved by the U.S. Environmental Protection Agency ("EPA" or "the Agency") and that permits issued pursuant to this program are state permits. *Id.* at 3–4. In particular, CT–DEP argues:

> The [petition] should be dismissed because the portions of the PSD permits that are at issue here were not issued under a delegation of authority from U.S. EPA Region I, but rather were issued under Connecticut PSD permit authority. Therefore, the permits are not subject to review by the Environmental Appeals Board.

Id. at 1.

The Board accepted in this case briefs from several other interested parties as well. EPA Region I and EPA's Office of Air and Radiation (collectively, "Region I" or "Region") jointly filed a brief in support of CT–DEP's motion, as did PDC, the permittee. *See* Memorandum of EPA Region I and EPA Office of Air and Radiation in Support of CT–DEP's Expedited Motion for Dismissal ("EPA Br."); PDC–El Paso, Milford LLC's Response in Support of CT–DEP's Expedited Motion for Dismissal ("PDC Br. I"). Goal Line, for its part, filed an opposition to the Expedited Motion for Dismissal, which includes arguments in opposition to EPA's brief, as well as a response to PDC's brief. *See* Opposition to Expedited Motion for Dismissal ("Opp. Br. I"); Opposition to PDC–El Paso, Milford LLC's Memorandum in Support of Motion for Dismissal ("Opp. Br. II"). Finally, PDC filed a reply to Goal Line's opposition ("PDC Br. II"). For the reasons expressed below, we grant CT–DEP's motion and dismiss the petition for review.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

Congress established the PSD program to regulate air pollution in areas of the country designated as "attainment" or "unclassifiable" with respect to federal air quality standards called "national ambient air quality standards" ("NAAQS"). *See* CAA §§ 160–169B, 42 U.S.C. §§ 7470–7492. NAAQS are established on a pollutant-by-pollutant basis and currently exist for six air pollutants: sulfur oxides, particulate matter, nitrogen dioxide ("NO_2"), carbon monoxide, ozone, and lead. 40 C.F.R. § 50.4–.12. NAAQS are "maximum concentration 'ceilings' 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* C.3 (draft Oct. 1990) ("*Draft NSR Manual*").[1] All areas within the State of Connecticut are designated as attainment or unclassifiable with respect to the NAAQS for NO_2, the pollutant at issue in this case. *See* 40 C.F.R. § 52.374.

Under the CAA, applicants for PSD permits must demonstrate, through analyses of the air quality impacts associated with the construction and operation of proposed new sources,[2] that emissions from their facilities will not cause or contribute to a violation of any applicable NAAQS or PSD "increment." CAA § 165(a)(3), 42 U.S.C. § 7475(a)(3); 40 C.F.R. § 52.21(k)–(m); *see Draft NSR Manual* ch. C. PSD increments represent the "maximum allowable *increase* in concentration" that may occur above a baseline ambient air concentration for a pollutant. *Draft NSR Manual* at C.3; *see* 40 C.F.R. § 52.21(c) (increments for six regulated air pollutants). In addition, applicants for PSD permits must employ the "best available control technology," or "BACT," to minimize emissions of pollutants that may be emitted by the new source in amounts greater than applicable "significant" levels established by the PSD regulations. CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 52.21(j)(2). As the Board

[1] EPA issued the *Draft NSR Manual* for use as guidance in conducting new source review training sessions and to assist permitting officials in analyzing PSD requirements and policy. While the *Draft NSR Manual* is not accorded the same weight as EPA regulations, it is considered by this Board to be a statement of the Agency's thinking on certain PSD issues. *See,* e.g.*, In re Hawaii Elec. Light Co.,* 8 E.A.D. 66, 72 n.7 (EAB 1998); *In re Masonite Corp.,* 5 E.A.D. 551, 558 & n.8 (EAB 1994).

[2] The PSD regulations apply to new major stationary sources and major modifications of existing stationary sources. *See,* e.g.*,* CAA §§ 165(a), 169, 42 U.S.C. §§ 7475(a), 7479; 40 C.F.R. § 52.21(b), (i)–(k).

has noted on prior occasions, "[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 Hawaii Elec. Light Co.,* 8 E.A.D. 66, 73 (EAB 1998).

B. *Administration of PSD Program*

Under the CAA and its implementing regulations, a PSD program (or portions thereof) may be administered within a state in one of three ways. First, the program can be run by EPA pursuant to a Federal Implementation Plan ("FIP"). *See,* e.g., CAA §§ 109–110, 165, 168, 42 U.S.C. §§ 7409–7410, 7475, 7478; 40 C.F.R. pt. 52. Second, EPA can delegate its authority to operate the PSD program to a state, in which case the state issues PSD permits as federal permits on behalf of EPA. 40 C.F.R. § 52.21(u); *see Encogen,* 8 E.A.D. at 245 n.1 (PSD permit issued by delegated state is federal permit). Third, EPA can approve a state PSD program if it meets the applicable requirements of federal law, in which case the program is incorporated into the state's "State Implementation Plan" ("SIP"). *See,* e.g., CAA §§ 110, 116, 161, 42 U.S.C. §§ 7410, 7416, 7471. In this last instance, the state would conduct PSD permitting under its own authority.

C. *Board Jurisdiction to Review PSD Permits*

The Board's authority to review PSD permits is set forth in EPA's regulations establishing procedures for the issuance, modification, revocation, reissuance, and termination of such permits (among other types of permits). *See* 40 C.F.R. pt. 124. Interested parties are allowed to petition the Board for review of permit conditions, as follows:

> Within 30 days after a * * * PSD final permit decision * * * has been issued under § 124.15, any person who filed comments on that draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision.

40 C.F.R. § 124.19(a).

Significantly for purposes of this case, the Board's authority to review PSD permits is not all-encompassing. The regulations specifically restrict the Board's scope of review to federal requirements, stating, "Part 124 does *not* apply to PSD permits issued by an approved State." *Id.*

§ 124.1(e) (emphasis added); *accord* Environmental Appeals Board, *Practice Manual* 3 (Nov. 1994) (citing *In re Great Lakes Chem. Corp.,* 5 E.A.D. 395, 396–97 (EAB 1994)). An "approved state" is defined in the regulations as 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.*

D. *Brief History of PSD Program in Connecticut*

The State of Connecticut has long been issuing PSD permits. On June 19, 1978, EPA promulgated a FIP implementing the PSD program in Connecticut. 43 Fed. Reg. 26,388, 26,410 (June 19, 1978). For a decade beginning in 1982, Connecticut issued PSD permits in accordance with the FIP pursuant to a partial delegation of authority from EPA. *See* Letter from Harley F. Laing, Acting Director, Air Management Division, EPA Region I, to Leonard Bruckman, Director, Air Compliance Unit, CT–DEP (Sept. 29, 1982). In 1993, however, Region I approved Connecticut's own PSD regulations as a SIP revision and thus terminated the federal PSD program for Connecticut—with one exception, which is critical to this case. *See* 58 Fed. Reg. 10,957 (Feb. 23, 1993) (codified at 40 C.F.R. §§ 52.370(c)(56), .382); Conn. Agencies Regs. § 22a–174–3(k) (Connecticut PSD regulations approved by EPA). In the preamble to the regulations comprising EPA's approval, Region I stated:

> Upon the effective date of this final action, the State will have the authority to implement and enforce the PSD program through its SIP. This final action removes the [FIP] for PSD at 40 CFR 52.382 with the exception of the NO_2 increments and related requirements. Since Connecticut has not adopted the NO_2 increments into its regulations, EPA will retain these provisions in the FIP until such time as the State adopts them. In addition, except for the NO_2 increments, this action terminates the delegation agreement between EPA and the Connecticut DEP.

58 Fed. Reg. at 10,958. Further, in the regulations themselves, the Region specified:

> The [federal] increments for [NO_2] and related requirements promulgated on October 17, 1988 (53 FR 40671) to

> 40 CFR 52.21(b) through (w)[3] are hereby incorporated and made part of the applicable [SIP] for the State of Connecticut.

Id. at 10,964 (codified at 40 C.F.R. § 52.382(b)).

II. *DISCUSSION*

A. *Goal Line's Arguments*

Goal Line interprets the above-quoted regulatory provisions as meaning that EPA retained authority to implement all components of the PSD program in Connecticut relating to NO_2. Opp. Br. II at 2. In arguing that CT–DEP therefore determined NO_X BACT in this case as a delegatee of EPA, and not as a state *qua* state, Goal Line raises two primary arguments. First, Goal Line contends on the basis of the regulatory language that neither the NO_2 increment nor the NO_X BACT provisions are federally approved state PSD requirements. Second, Goal Line asserts that the air quality and technology review components of the PSD program are integrated parts of a unified whole, and therefore Board jurisdiction to review one necessarily constitutes Board jurisdiction to review the other. These arguments are addressed below.

1. *Regulatory Language*

Goal Line begins with a simple argument based on the language of EPA's approval regulation. In quoting the regulation for benefit of the Board, Goal Line highlights words and phrases that it deems significant, as follows:

> "The increments for [NO_2] and *related requirements* promulgated on October 17, 1988 (53 FR 40671) to *40 C.F.R. 52.21(b) through (w)* are hereby incorporated and made part of the [Connecticut SIP]."

Opp. Br. I at 4 (quoting 58 Fed. Reg. at 10,964, codified at 40 C.F.R. 52.382(b)) (emphasis supplied by Goal Line). Goal Line does this to stress its point that the BACT provision, which is found at 40 C.F.R. § 52.21(j), falls within the range of subsections specified in the regulation cited (i.e., 40 C.F.R. § 52.21(b)–(w)) and thus must be one of the "related requirements"

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[3] The regulations at 40 C.F.R. § 52.21(b)–(w) comprise the core of the federal PSD regulations.

referenced therein. *Id.* If correct, this would mean, as Goal Line urges, that the NO_2 BACT requirement is a federal requirement reviewable by the Board. It would also mean, by logical extension, that all PSD requirements relating to NO_X/NO_2 that fall within the (b)–(w) range are also federal requirements, not EPA-approved state provisions.

Unfortunately for Goal Line, this interpretation does violence to the plain language of the regulation. Put simply, the adjective clause "*promulgated* on October 17, 1988 (53 FR 40671)" in the regulation, *see* 40 C.F.R. § 52.382(b) (emphasis added)—which Goal Line inexplicably ignores—should be read to apply to both noun antecedents (i.e., "increments for NO_2" and "related requirements") in the sentence in which it appears. *See id.; see also* PDC Br. II at 4. As a result, the "related requirements" referred to in this regulation can only be those *promulgated* on October 17, 1988, and printed in Volume 53 of the *Federal Register* beginning at page 40,671. Significantly, and as Goal Line itself acknowledges, *see* Opp. Br. I at 5 n.4, the referenced *Federal Register* notice includes no revisions whatsoever to 40 C.F.R. § 52.21(j), the preexisting BACT provision. *See* 53 Fed. Reg. 40,656, 40,671–72 (Oct. 17, 1988) (revising portions of 40 C.F.R. § 52.21(b), (c), (f), (i), and (p)). This is, in our view, dispositive. Because the *Federal Register* notice in question neither amended nor augmented section 52.21(j), it could not have served to "promulgate" this provision. Accordingly, BACT is not a "related requirement" within the meaning of EPA's approval regulation. Instead, BACT is part of Connecticut's approved PSD program and, as such, is not subject to Board review. 40 C.F.R. § 124.1(e).

2. *Interrelationships Between PSD Provisions*

In its expedited motion for dismissal, CT–DEP notes that Goal Line's petition challenges only the NO_X BACT determination and not the NO_2 increment analysis. Exp. Mot. at 4, 6. CT–DEP contends that "BACT and the NO_2 increments are two entirely distinct components of the PSD permit" and that the Board does not have jurisdiction to review NO_X BACT decisions simply by virtue of the fact that it can review NO_2 increment determinations. *Id.* at 5. As CT–DEP puts it, "BACT involves a determination of the best available emission control technology for sources for each pollutant subject to regulation, such as NO_X," whereas NO_2 increment analysis "involves air quality modeling to determine that the emissions of NO_2 from a proposed major stationary source will not result in deterioration of the air quality." *Id.; accord* EPA Br. at 1–2. CT–DEP concludes by citing several cases in which technology review (i.e., BACT) and air quality (i.e., increment) provisions are held to be independent PSD requirements. Exp. Mot. at 5–6 (citing *In re Brooklyn Navy Yard*

Resource Recovery Facility, 3 E.A.D. 867, 870 (Adm'r 1992); *In re World Color Press, Inc.,* 3 E.A.D. 474, 476, 479 (Adm'r 1990)).

Goal Line takes issue with these claims. The company asserts that the increment and BACT components are integrated parts of a unified whole that cannot properly be separated. Opp. Br. I at 5; Opp. Br. II at 7–9. In Goal Line's view, all of the PSD provisions "listed in § 52.21(b) through (w) are interdependent," with, for example, increment consumption being a function of stack height, fugitive emissions control, and BACT. Opp. Br. I at 5; *see also id.* at 7. Goal Line claims that "[u]nder Connecticut's proposal, federal authority would be limited to the ministerial function of comparing the output of an air quality model with the NO_2 increments." *Id.* Goal Line also attempts to distinguish the two cases cited by CT–DEP for the proposition that the provisions are independent, *see id.* at 6; Opp. Br. II at 8, and asserts that to interpret the regulations as CT–DEP suggests would lead to a waste of judicial resources. Opp. Br. I at 5–6 n.5 ("One would be required to challenge the PSD Pre-construction requirements of CAA § [165] with regard [to a] NO_2 BACT determination in the state courts and to challenge the same § 165 Pre-construction review requirements with regard to the NO_2 increment analysis with the EAB.").

What Goal Line fails to acknowledge is that Congress contemplated a shared role between the states and EPA in implementing the CAA. *See,* e.g., CAA §§ 107–110, 113, 165, 42 U.S.C. §§ 7407–7410, 7413, 7475; *see also* 40 C.F.R. pt. 52. The division of PSD responsibilities in Connecticut is, while perhaps somewhat unusual, wholly consistent with congressional design. Moreover, as a general proposition, there is not the kind of identity of issues between the BACT and increment analyses that would render separate appeal tracks duplicative or inherently inefficient. As the permit proponents maintain, the role of a BACT analysis is to establish a technology requirement for anticipated emissions, whereas the role of increment analysis is to ensure that emissions will not cause significant deterioration of air quality. Exp. Mot. at 5; EPA Br. at 1–2; PDC Br. I at 3–5. These are related but separate determinations. For example, a challenge to an increment analysis does not necessarily entail review of the BACT determination; rather, BACT is taken as a given in projecting anticipated emissions. *See,* e.g., *Draft NSR Manual* at C.45 ("applicant should base the emissions rates on the results of the BACT analysis"). Likewise, a BACT challenge does not necessarily entail a review of the increment analysis. A successful challenge to a BACT determination may, in the event that it results in a different technology requirement that in turn changes the anticipated emissions, give rise to the need for a new increment analysis, but review of an increment analysis is neither

inherent in nor essential to the review of a BACT determination. The separation of these two issues is particularly apparent where, as here, a petitioner has neither questioned the increment analysis for a pollutant (here, NO_2) nor even suggested that its preferred BACT would result in decreased emissions of that pollutant from the permitted source.

Goal Line's attempts to distinguish the two cases cited by CT–DEP in support of its position also fail to persuade us that Goal Line's position has merit. For example, in *In re Brooklyn Navy Yard Resource Recovery Facility,* 3 E.A.D. 867 (Adm'r 1992), the EPA Administrator declined to grant review of a PSD petition that raised air quality modeling issues. An earlier public comment period on such issues had expired, and the only matters at issue at the time the petition was filed involved pollutant control technology. *Id.* at 869–70. Goal Line contends that the case does not hold, as CT–DEP argues, that BACT and increments are separable PSD elements because the case's "reasoning was based on the principle of *res judicata:* the increment arguments had been dealt with in a prior appeal." Opp. Br. I at 6.

Our review of the case reveals no evidence that a prior challenge to the air quality modeling had ever been filed (although certainly one could have been filed). Instead, the thirty-day period for filing such an appeal (prescribed by regulation, *see* 40 C.F.R. § 124.19(a)) appears simply to have expired. Thus, we find no evidence that the case turned on res judicata considerations and no basis for the distinction that Goal Line is attempting to draw.[4]

Goal Line's reading of *In re World Color Press, Inc.,* 3 E.A.D. 474 (Adm'r 1990), is similarly unpersuasive. Goal Line quotes a sentence from the opinion that states the obvious proposition that parties must comply with all elements of the CAA. *See* Opp. Br. I at 6. Goal Line, however, fails to quote the immediately preceding sentence, which states, "This air quality requirement is independent from the technology (i.e., BACT) requirement." *World Color Press,* 3 E.A.D. at 476. In sum, these cases support the position that air quality increments analysis and BACT review are separate provisions of the CAA that may be reviewed independently, as argued by CT–DEP (as well as by Region I and PDC). *See* Exp. Mot. at 5; EPA Br. at 5–7; PDC Br. I at 5–7; *see also In re Columbia Gulf Transmission Co.,* 2 E.A.D. 824, 828 (Adm'r 1989) (statutory scheme of CAA "separates issues of overall air quality from issues of technology").

[4] Notably, this case highlights the fact that the time frame for review of air quality determinations can be different from the time frame for review of technology determinations. This fact tends to support rather than undercut CT–DEP's position that the two provisions are distinct and separately reviewable. *See Brooklyn Navy Yard,* 3 E.A.D. at 869–70.

B. *Other Arguments*

Two other arguments made by the parties warrant brief attention. First, PDC contends that Region I approved Connecticut's NO_2 increment provisions into the SIP in 1997 and that, as a consequence, the Board has no jurisdiction over any PSD permitting decisions made by CT–DEP. PDC Br. I at 9–11; PDC Br. II at 5–7; *see* Exp. Mot. at 2 n.1 (raising but not relying on same argument). Given our holding above that the Board lacks jurisdiction to review NO_X BACT determinations in Connecticut—the sole issue raised on appeal—there is no need for us to address this argument.

Second, Region I claims Goal Line is precluded from asserting that Board jurisdiction exists on the basis of the federal NO_2 increments requirement because Goal Line purportedly did not raise NO_2-increment issues during the public comment period. EPA Br. at 10; *accord* PDC Br. I at 4 n.3. Again, because we have disposed of the case on the grounds discussed above, we need not consider this issue.

III. *CONCLUSION*

For the foregoing reasons, Goal Line's petition for review of Connecticut PSD Permit Numbers 105–0068 and 105–0069 is hereby dismissed.

So ordered.