IN RE TONDU ENERGY COMPANY

PSD Appeal Nos. 00-5 & 00-7

ORDER DENYING REVIEW

Decided March 28, 2001

Syllabus

Petitioners Dana Schindler and T.T. (Tex) Collins, Jr. seek Board review of a Clean Air Act prevention of significant deterioration ("PSD") permit decision ("Final Permit") issued by the Michigan Department of Environmental Quality ("MDEQ") to Tondu Energy Company ("Tondu"). The Final Permit authorizes Tondu to burn tire-derived fuel ("TDF") as a supplemental fuel source at its Filer City, Michigan electric cogeneration facility ("Facility"). In issuing the Final Permit, the MDEQ determined that the supplemental burning of TDF would cause a significant increase in the Facility's emissions of particulate matter, thus necessitating a PSD permit, but that those emissions would not cause a violation of the National Ambient Air Quality standards for particulate matter (PM_{10}). In addition, MDEQ determined that the Facility's current air control technology, consisting of a baghouse/dry scrubber combination, would represent the Best Available Control Technology ("BACT") for the Facility.

Together, the two petitions allege that the MDEQ erroneously failed to address the following six topics in issuing the Final Permit: (1) adverse health impacts associated with emissions of fine particulate matter with an aerodynamic diameter equal to or less than 2.5 micrometers; (2) the Michigan Constitution and nuisance law, which allegedly support a moratorium on the issuance of new permits that would allow increased emissions of particulate matter; (3) the Facility's location in an industrialized area, as well as meteorological and topographical factors that contribute to adverse health impacts in the local population; (4) elevated rates of heart disease and stroke in the vicinity of the Facility; (5) the Facility's handling of solid waste and other chemical pollutants; and (6) the requirement to install BACT for the Facility.

Held: The Environmental Appeals Board denies review with respect to all the issues raised by petitioners for the reasons summarized below:

- The contention that MDEQ failed to address the health impacts attributable to the Facility's emissions of fine particulate matter is in essence a challenge of the adequacy of the current National Ambient Air Quality Standard ("NAAQS") for particulate matter — PM_{10} — to protect public health. The Board has repeatedly held that permit proceedings are not appropriate fora for challenging Agency regulations.

- State law claims allegedly supporting denial of the issuance of the Final Permit are beyond the Board's jurisdiction.

- The MDEQ adequately addressed the Facility's location in an industrial area, as well as the influence of topographical and meteorological factors, as part of its ambient air quality modeling analysis showing that the Facility's projected emissions would not violate the NAAQS for PM_{10}.

- The argument that the MDEQ failed to address allegedly elevated rates of disease in the vicinity of the Facility and their possible connection to local emissions of particulate matter is a reassertion of the challenge to the current NAAQS for PM_{10} and as such does not merit review (see above). Moreover, there is no requirement that the MDEQ prepare an Environmental Impact Statement ("EIS") to study these alleged health connections since actions under the PSD permitting process of the Clean Air Act do not require preparation of an EIS.

- The Facility's handling of solid wastes and other chemical pollutants is an issue that is generally outside the ambit of the PSD program and is beyond the Board's review authority in this case.

- In challenging the MDEQ's determination that a baghouse/dry scrubber combination would represent BACT for the Facility, the Petitioners failed to respond to the content of MDEQ's BACT review or challenge any of the specific premises underlying the analysis of emissions control alternatives upon which MDEQ relied. By merely asserting their opinion that an alternative control technology would be preferable, unsubstantiated by any data, the Petitioners have failed to meet their burden of proof in seeking review of the Final Permit.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge Reich:

I. *BACKGROUND*

On September 6, 2000, and September 14, 2000, respectively, T.T. (Tex) Collins, Jr. (PSD Appeal No. 00-5) and Dana Schindler (PSD Appeal No. 00-7), residents of Manistee, Michigan, filed petitions for review of a federal Prevention of Significant Deterioration ("PSD") permit decision ("Final Permit") issued to Tondu Energy Company ("Tondu") by the Michigan Department of Environmental Quality ("MDEQ").[1] The Final Permit would provide preconstruction authori-

[1] On September 10, 1979, the Regional Administrator of U.S. EPA Region V delegated authority to the State of Michigan to implement and enforce the federal PSD program. *See* 45 Fed. Reg. 8348 (Feb. 7, 1980). The permits MDEQ issues in accordance with that program are considered federal permits. *See* 40 C.F.R. § 124.41 (terms "EPA" and "Regional Administrator" mean the delegate agency when a state exercises delegated authority to administer PSD permit program); 45 Fed. Reg. 33,290, 33,413 (May 19, 1980)("For the purposes of Part 124, a delegate State stands in the shoes of the Regional Administrator. Like the Regional Administrator, the delegate must follow the procedural requirements of part 124. A permit issued by a delegate is still an 'EPA-issued permit.'"). *See In re*
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zation under the federal PSD program, *see* Clean Air Act ("CAA") § 165, 42 U.S.C. § 7475; 40 C.F.R. § 52.21, for certain major modifications to Tondu's TES Filer City Station (the "Facility"), an electric cogeneration facility located in Filer City, Michigan.

Specifically, Tondu seeks permission to use tire chips as a supplemental fuel source (tire derived fuel ("TDF")) for the Facility's two boilers, which are currently coal and wood-fired. Because MDEQ projected that the Facility, employing its current air pollution controls, would emit an additional 43 tons per year of fine particulate matter ("PM_{10}")[2], thereby exceeding the applicable 15 tons per year "significant net emissions increase" threshold,[3] the MDEQ determined that the final permit was subject to PSD review as a major modification of an existing major stationary source.[4] MDEQ, Air Quality Division, *Staff Activity Report* ("*SAR*") at 2.[5] The Facility's current air pollution control system consists of a combination of dry scrubbers and baghouses.

Furthermore, MDEQ determined, based upon an air quality analysis submitted by Tondu pursuant to PSD requirements, *see* 40 C.F.R. § 52.21(m), that the

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Steel Dynamics, Inc., 9 E.A.D. 168, 169; *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 109 n.1 (EAB 1998).

[2] Particulate matter is one of the six "criteria" pollutants regulated by the CAA, for which pollutants the CAA has established National Ambient Air Quality Standards ("NAAQS"), *see infra* n.6. Of relevance to the instant proceeding, particulate matter compliance with its applicable NAAQS is determined by measuring particulate matter in the ambient air with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM_{10}). *See* 40 C.F.R. § 50.6(c).

[3] The federal PSD program establishes "significant net emissions increase" thresholds for selected air pollutants. A physical change or change in the method of operation at an existing major stationary source of air pollution that would result in a net increase in emissions of a pollutant that meets or exceeds an applicable threshold constitutes a "major modification," subjecting the source to PSD review with respect to that pollutant. 40 C.F.R. §§ 52.21(b)(2)(i); 52.21(b)(23)(i).

[4] PSD review only applies to major stationary sources of air pollution in areas designated as "attainment" or "unclassifiable" for "criteria" air pollutants, for which the U.S. EPA has set National Ambient Air Quality Standards. CAA § 107, 42 U.S.C. § 7407; CAA § 109, 42 U.S.C. § 109; CAA § 161, 42 U.S.C. § 7470. The criteria determining "major stationary source" status are set forth at 40 C.F.R. § 52.21(b)(1)(i)(a). Presumably, the Facility is a major stationary source of air pollution, since the MDEQ reports that the Facility is already subject to an existing permit, No. 519-87C, that underwent PSD review. *See* MDEQ, *Staff Activity Report* ("*SAR*") at 2. The MDEQ also states that the Facility is located in an area "[that] is designated as attainment for all pollutants subject to regulations under the Clean Air Act (CAA)." *Id.* at 2. The Facility's status as a major stationary source of air pollutants and its location in an attainment area are not disputed by the parties.

[5] The MDEQ also determined that PSD review would not apply to the Facility's emissions of other air pollutants regulated by the federal PSD program because emissions of these pollutants would not exceed applicable significant net emissions increase thresholds. *SAR* at 2; *see* 40 C.F.R. § 52.21(b)(23)(i).

Facility's increased emissions would not violate the applicable National Ambient Air Quality Standards ("NAAQS") for PM_{10}.[6]

MDEQ also specified an emissions limitation for PM_{10} of 0.03 lb/MM Btu as representing "best available control technology"[7] or "BACT" for the Facility, and approved Tondu's proposal to achieve this rate via the Facility's current air pollution control technology of a dry scrubber and baghouse system on each boiler.[8] The MDEQ derived the BACT emissions rate from a trial burn of TDF using dry scrubber and baghouse controls. *See SAR* at 3; NTH Consultants, Ltd., *Permit to Install Application to allow the combustion of Tire-Derived Fuel in Boilers #1 and #2*, pp. 13-14 (Mar. 31, 2000). The Facility's air quality analysis, which indicated that the applicable NAAQS for PM_{10} would not be violated (see above), was predicated upon the above PM_{10} emissions rate.

As outlined below, petitioner Schindler seeks review of six aspects of the Final Permit. *See* Letter from Dana Schindler to Environmental Appeals Board (Sept. 11, 2000) ("Schindler Petition"). Petitioner Collins seeks review on one of those grounds. *See* Letter from T.T. (Tex) Collins, Jr. to Environmental Appeals Board (undated, but received on Sept. 6, 2000) ("Collins Petition").

Upon receipt of the petitions for review, the Environmental Appeals Board (the "Board") requested responses from MDEQ, which it filed on December 28, 2000. *See* Response to Petition of T.T. (Tex) Collins, Jr. ("Response to Collins

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[6] 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, New Source Review Workshop Manual at C.3. NAAQS have been set for six criteria pollutants: sulfur oxides, particulate matter, nitrogen dioxide (NO_2), carbon monoxide (CO), ozone, and lead. 40 C.F.R. §§ 50.4-50.12.

[7] The CAA implementing regulations define the BACT requirement 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 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).

[8] CAA implementing regulations require that each major modification apply BACT for each pollutant whose emissions result in a significant net emissions increase, *see supra* note 3; 40 C.F.R. § 52.21(j)(3). The BACT requirement in the instant case only applies to PM_{10} because the MDEQ determined that the Facility would not cause significant net emissions increases of other PSD regulated pollutants. *See supra* note 5.

Petition") and Response to Petition of Dana Schindler ("Response to Schindler Petition").

II. *DISCUSSION*

A. *Standard of Review*

To obtain Board review of a PSD permit decision, a petitioner must, as a threshold matter, have standing to challenge the permit, and must appeal issues that have been properly preserved for review or were not reasonably ascertainable. 40 C.F.R. § 124.19(a). The Petitioners clearly have standing to appeal the permit decision in this case because they both participated in the public hearing held during the public comment period. *See* July 5, 2000 Hearing Transcript ("Hearing Transcript"). Regarding the preservation of issues for review, based on the record before us, the issues raised in the petitions for review generally appear to have been raised both during the public hearing and in written comments to the MDEQ on the draft PSD permit. *See* MDEQ, *Response to Comments Document* (Aug. 11, 2000) ("*Response to Comments*") (summarizing "significant" comments only and providing responses). Moreover, MDEQ in its responses to the petitions addresses the petitions on their merits and does not contend that the issues the Petitioners raised were not raised during the public comment period.

To obtain review on the merits, a petitioner must demonstrate that the permit condition for which review is being sought is based on:

> (1) A finding of fact or conclusion of law [that] is clearly erroneous; or
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> (2) An exercise of discretion or an important policy consideration [that] the Environmental Appeals Board should, in its discretion, review.

40 C.F.R. § 124.19(a). The burden of demonstrating that review is warranted rests with the petitioner challenging the permit condition. 40 C.F.R. § 124.19(a); *accord, In re AES Puerto Rico, L.P.*, 8 E.A.D. 324, 328 (EAB 1999), *aff'd sub nom. Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000); *Hawaii Elec. Light Co.*, 8 E.A.D. 66, 71 (EAB 1998); *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 61 (EAB 1997). We have explained that in order to establish that review of a permit is warranted, section 124.19(a) requires that a petitioner both state the objections to the permit that are being raised for review and explain why the permit issuer's previous response to those objections (*i.e.*, the decision maker's basis for the decision) is clearly erroneous or otherwise warrants review. *See In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 114 (EAB 1997); *see also In re*

Puerto Rico Elec. Power Auth., 6 E.A.D. 253, 255 (EAB 1995); *In re Genesee Power Station, L.P.*, 4 E.A.D. 832, 866 (EAB 1993).

Together, the two petitions allege that the MDEQ erroneously failed to address six topics in issuing the Final Permit. For the reasons discussed below, we deny review on each of these issues.

B. *Issues Raised on Appeal*

1. *Alleged Failure to Address Evidence of Adverse Health Impacts from Fine Particulate Matter*

Petitioner Schindler states that the MDEQ failed to address evidence purportedly showing that "emissions of fine PM [particulate matter] less than 2.5 micrometers in diameter are increasingly recognized as a health-related problem particularly among the elderly and sensitive populations and particularly in relation to heart disease and respiratory ailments." Schindler Petition at 2.[9]

More particularly, Ms. Schindler asserts that even moderate increases of fine particulate matter of less than 2.5 micrometers can result in increased death, heart fatalities and hospitalization as indicated by scientific studies. Schindler Petition at 3. For example, her petition includes an attached article stating that "studies show statistical associations between air-borne particulate matter (PM) and increased mortality and sickness, even at levels well within current national air quality standards." Schindler Petition Ex. A (Tony Reichhardt, *Weighing the Health Risks of Airborne Particulates*, Environmental Science & Technology, Vol. 29, Nov. 8, 1995, at 360).

Ms. Schindler does not argue (except as it may be inferred from the other issues she raises on appeal) that MDEQ improperly determined that the NAAQS for particulate matter would not be violated by this project. Rather, her argument is that, without added protection against fine particulate matter with an aerodynamic diameter less than 2.5 micrometers, the permit fails to adequately protect public health. In essence, what Ms. Schindler is contesting is the adequacy of the current NAAQS for particulate matter — PM_{10} — to protect human health.

As we have repeatedly stated, permit appeals are not appropriate fora for challenging Agency regulations. *See In re City of Port St. Joe and Florida Coast*

[9] While Ms. Schindler's petition states that MDEQ erred by failing to consider the issue of health impacts specifically posed by particulate matter with an aerodynamic diameter of *between* 2.5 and 10.0 micrometers, *see* Schindler Petition at 6, we note her discussion of this issue in the petition is framed in terms of the health impacts of particulate matter with an aerodynamic diameter *below* 2.5 micrometers.

Paper Co., 7 E.A.D. 275, 286 (EAB 1997) ("A permit appeal proceeding is not the appropriate forum in which to challenge either the validity of Agency regulations or the policy judgments that underlie them."); *accord In re Woodkiln Inc.*, 7 E.A.D. 254, 269 (EAB 1997); *In re Suckla Farms, Inc.*, 4 E.A.D. 686, 699 (EAB 1993); *In re Ford Motor Co.*, 3 E.A.D. 677, 688 n.2 (Adm'r 1991).[10] Since the Board interprets Ms. Schindler's argument as essentially a challenge to the current NAAQs for particulate matter, the Board will not review the Final Permit on these grounds.

2. *Alleged Disregard of State Law*

Petitioner Schindler states that the MDEQ issued the Final Permit in disregard of language in the Michigan State Constitution "which provides [that] the 'public health and general welfare of the state are hereby declared to be matters of primary public concern.'" Schindler Petition at 3.[11]

Stating that the current regulatory standards for particulate matter are insufficiently protective of public health, Ms. Schindler asserts that the above language from the State Constitution makes it advisable to impose a moratorium on the issuance of new permits allowing for increased emissions of particulate matter until such time as the current standards "catch up with medical studies." *Id.* at 4. As an additional argument against permitting the Facility, Ms. Schindler maintains that the Facility would pose a "threat of nuisance" as interpreted by Michigan State law, presumably because the Facility could constitute "a dangerous, offensive or hazardous condition" or "endanger[] or render[] insecure life and health." *Id.*

As the Board and its predecessors have held, state law claims — such as Ms. Schindler's under the Michigan State Constitution and State nuisance law — are beyond the purview of this proceeding under 40 C.F.R. § 124.19, "the purpose of which is to determine [Tondu's] compliance with the *federal Clean Air*

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[10] In keeping with our frequent admonition against using the appeals process to challenge Agency regulations, the MDEQ correctly observes that "PSD regulations at 40 C.F.R. § 52.21 require MDEQ compliance with NAAQS and do not require the MDEQ to further assess whether current NAAQS criteria are inadequate." *See* Response to Schindler Petition at 3.

[11] In connection with this argument, Ms. Schindler also states that the MDEQ disregarded its obligation under the CAA to "include a margin of safety that would protect sensitive populations against adverse health effects" when it refused to examine whether the NAAQS for particulate matter was protective of health. Schindler Petition at 3. Ms. Schindler is here referring to language in the CAA requiring the Agency to establish NAAQS "which in the judgment of the [Agency], based on [air quality] criteria and allowing an adequate margin of safety, are requisite to protect the public health." CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). As we stated in Part II.B.1., above, Ms. Schindler's arguments challenging the adequacy of the NAAQS to protect public health are not grounds for review of the Final Permit.

Act and applicable regulations." *See In re Spokane Regional Waste-To-Energy Project*, 3 E.A.D. 68, 70 (Adm'r 1990) (emphasis added); *accord In re West Suburban Recycling and Energy Center, L.P.*, 6 E.A.D. 692, 698 (EAB 1996). Being outside our jurisdiction, these State law claims are not grounds for review of the Final Permit.

3. *Failure to Address Facility's Location in an Industrialized Area As Well As Meteorological and Topographical Factors*

Ms. Schindler's petition asserts that the MDEQ failed to address the Facility's location in a "heavy industrial area of Manistee" county and other topographical and meteorological characteristics that she argues contribute to numerous health complaints by the nearby population. For example, Ms. Schindler states that the Facility lies in a "low area between Lake Michigan and Manistee Lake" and "harbors a predominance of heavy, wet fogs, mists and thermal inversions." Schindler Petition at 3. She explains that during the numerous "heavy inversion, windless days, dense air filled with pollutants" from "Martin Marietta, Packaging Corporation of American, West Bay Separating and Sweetening Facility, Tondu, and the landfill permeate the air causing headaches and nausea up to three miles away." Schindler Petition at 5. Ms. Schindler also cites two "Mich Con Gate Station[s] that necessitated more than a dozen emergency runs this year alone," the "Lakeland complex of gas wells," the "sweetening facility * * * which has caused numerous evacuations and medical difficulties," and an August 27, 2000 methane gas explosion at a landfill. Schindler Petition at 3.

At the outset, Ms. Schindler's comments attribute health complaints in the local population to unspecified "pollutants" from a myriad of sources, including the Facility. In expressing this broad grievance, however, she does not identify specific permit conditions that she is challenging as erroneous and whose revision or removal could redress her concerns. As we have held earlier, in order to meet their burden of proof in obtaining review of a final permit, persons must clearly identify the permit conditions for which they seek review. *See In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 772 (EAB 1997); *In re LCP Chemicals-New York*, 4 E.A.D. 661, 664 (EAB 1993). She has not complied with this requirement in this instance. Even in the case of parties representing themselves, without counsel such as Ms. Schindler, where we apply a more relaxed standard, such parties must still identify the permit conditions they allege are erroneous with sufficient clarity to justify Board review. *See Commonwealth Chesapeake*, 6 E.A.D. at 772.

To the extent, however, that Ms. Schindler's comments in her petition can be read as referring to *emissions of* PM_{10} from other sources and the influence of topography and meteorology on the ambient impact of those emissions, we find that MDEQ did adequately respond to her earlier concerns in this regard.

During the public comment period, Ms. Schindler referred to the meteorological and geographical setting of the facility as well as its location in an industrialized area, and stated that "we are a community that cannot afford the additional health problems that will be associated with 43 more tons per year of particulate emission." Hearing Transcript at 9.

In its response to comments, MDEQ noted that the "impact of the PM_{10} emissions from the Facility * * * would not exceed [NAAQS]" and thus would not pose a threat to public health. *See Response to Comments* (MDEQ, Question and Answer Document for Proposed Permit To Install For TES Filer City Station Permit No. 519-87F (June 30, 2000), question 4). The MDEQ had earlier stated this conclusion in its *SAR* that accompanied the draft permit, explaining that the required air quality impact analysis performed by Tondu and approved by MDEQ showed compliance with the NAAQS. *See SAR* at 7. Moreover, an examination of the air quality impact analysis reveals that, contrary to Ms. Schindler's assertions, the MDEQ did in fact consider meteorological and topographical features in the context of air quality modeling in reaching its conclusion.[12] *See* Response to Schindler Petition Ex. D (Ambient Impact Analysis ("AIA")).

As the AIA explains, Tondu employed an air quality model ("dispersion model") of the Facility's emissions to predict ground level concentrations of PM_{10} based on five years of meteorological data from an area in the general vicinity of the Facility. AIA at 5. As the document further indicates, the source of this data was located near Lake Michigan, in an area "anticipated to experience similar weather conditions" as those experienced at the Facility. *Id.* at 18. Tondu's analysis also explains that the dispersion model used "elevated terrain" as a modeling parameter in order to reflect the fact that "while the terrain near the facility is flat, the terrain rises substantially to the south of the facility and on the northern side of Manistee Lake." *Id.*

In light of the above foregoing information indicating MDEQ's consideration of the meteorological and topographical factors, Ms. Schindler's petition does not identify how the MDEQ failed to "address" these factors in its analysis of the impacts of PM_{10} on ambient air. Her petition merely repeats her earlier statements criticizing the MDEQ for not having considered the above factors, while ignoring evidence that indicates that the MDEQ did indeed consider them. Thus, her statement in this regard does not justify review of the Final Permit on this basis.

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[12] Although Ms. Schindler does not specifically link her objections concerning the Facility's topographical and geographical setting and location in an industrial area, *see infra*, to the ambient air quality analysis approved by MDEQ, we note that such factors are ordinarily taken into consideration within the air quality models that form the basis of ambient air quality analyses required by the PSD program. *See generally* 40 C.F.R. pt. 50, App. W (*Guideline on Air Quality Models*); 40 C.F.R. § 52.21(k)(1).

In addition, contrary to Ms. Schindler's assertions, the MDEQ addressed the issue of additional pollution sources in the vicinity of the Facility. MDEQ addressed this issue by stating in its response to comments that, consistent with Agency policy for modeling air impacts, it did not consider the contribution of other industries in the area of the Facility because the air quality impact analysis submitted by Tondu predicted that the ambient impact of the Facility's PM_{10} emissions would be below the significant ambient impact levels ("SILs"). *See Response to Comments* at 3; *see* also U.S. EPA, *New Source Review Workshop Manual* ("*NSR Manual*") at C.24.[13]

Agency policy, as set forth in the *NSR Manual*, provides that facilities whose emissions are shown, based on dispersion modeling, not to increase ambient concentrations by more than SILs need not undergo a "full impact analysis," which includes an estimation of additional contributing sources of air pollution. *Id.* Consistent with this approach, Tondu performed a "preliminary analysis" limited to the Facility's emissions of PM_{10} in order to determine whether the impact from these emissions exceeded the applicable SILs and a full impact analysis would therefore be required. *See NSR Manual* at C.24; AIA at 16; *see also In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 340-41 (EAB 1999); *In re Knauf Fiber Glass*, 8 E.A.D. 121, 148 (EAB 1999) (describing Agency's use of SILs to determine need for full impact analysis as recommended in *NSR Manual*). According to Tondu's preliminary analysis, the impact of those emissions would not exceed the applicable SILs for PM_{10} of 5 micrograms (" g")/m^3(24-hour average) and 1 g/m^3 (annual average), therefore not requiring a full impact analysis. *See* AIA at 16.

Moreover, the Board has previously deferred to the Agency's long-established PSD policy of using SILs as thresholds for determining whether a new or modified pollution source needs to perform a full impact analysis. *See In re AES Puerto Rico L.P.*, 8 E.A.D. 347 (deferring to Agency's "established policy" in upholding Region II's use of SILs to determine that a full impact analysis of PSD stationary source was unnecessary). Because Ms. Schindler, in her petition, does not identify how MDEQ erred in its air quality analysis determining that the Facility's emissions of PM_{10} did not exceed the applicable SILs, we conclude that her arguments on the need to consider the ambient impacts of pollution sources other than the Facility do not merit review.

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[13] The *NSR Manual* was issued as a guidance document for use in conjunction with new source review workshops and training, and to guide permitting officials with respect to PSD requirements and policy. Although it is not accorded the same weight as a binding Agency regulation, the NSR Manual has been considered by this Board as a statement of the Agency's thinking on certain PSD issues. *See e.g., Hawaii Elec. Light Co.*, 8 E.A.D. 72 n.7; *EcoEléctrica*, 7 E.A.D. at 59 n.3.

Having concluded that Ms. Schindler, in her petition, does not show how MDEQ's earlier response to her concerns in this respect were clearly erroneous, we find that she has not sustained her burden of showing that review is warranted. *See In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 5 (petitions for review may not simply repeat objections made during the comment period; instead they must demonstrate why the permitting authority's response to those objections warrants review); *accord In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999). Thus, we deny review of the Final Permit with regard to Ms. Schindler's arguments that MDEQ failed to address the influence of topographic and meteorological factors on the impact of the Facility's PM-10 emissions, or the Facility's location in an industrialized area.[14,15]

4. *Alleged Failure to Address Elevated Rates of Heart Disease and Stroke in Manistee County*

Ms. Schindler asserts that MDEQ, in issuing the Final Permit, erroneously failed to address above average death rates from heart disease and stroke in Manistee County (where the Facility is located) as revealed in a "multicounty study." *See* Schindler Petition at 5; Exh. E. She also states that the above findings, scientific studies indicating a link between disease and fine particulate matter, and the Facility's topographical and meteorological setting all "suggest a possible correlation" between the above factors and "adverse effects" from the Facility and other surrounding industries. Schindler Petition at 5. She avers that the above circumstance "call for an independent Environmental Impact Study." Schindler Petition at 5.

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[14] Ms. Schindler, in connection with these arguments, seems also to challenge the classification of the area in which the Facility is located as attainment for PM_{10}, a classification which she describes as allowing "an increase in admittedly more harmful emissions of PM_{10} and less, increasing the threat to our health and welfare." *See* Schindler Petition at 4-5. To the extent that Ms. Schindler seeks reclassification of the Facility area to "non-attainment" for PM_{10}, we decline review of the Final Permit, for in previous cases involving similar challenges, we have held that "[r]eclassification of an area from attainment or unclassifiable to non-attainment may not be addressed in a PSD permit proceeding such as this case." *In re Encogen Cogeneration Facility,* 8 E.A.D. 244, 250 n.11 (EAB 1999); *In re Hawaii Elec. Elec. Light Co.*, 8 E.A.D. 66, 73 n.10 (EAB 1999).

[15] Ms. Schindler, in a separate portion of her petition, favorably cites public hearing comments by Dr. James Skifstad, an engineer, who expressed doubts about the adequacy of standard air quality modeling procedures to project pollutant impacts. Schindler Petition at 6. Explaining that such dispersion analysis is "a far cry from a certain art," particularly in conditions of air turbulence, Mr. Skifstad charged that MDEQ's projection of PM_{10} impacts should be viewed skeptically. Hearing Transcript at 20-21. We find that Ms. Schindler objections to the air modeling (adopting by reference Mr. Skifstad's earlier comments) do not merit our review because they constitute a generic and unsubstantiated attack on air quality modeling per se. They also do not identify any specific flaw in Tondu's air quality modeling that led to an erroneous result. *See Commonwealth Chesapeake Corp.*, 6 E.A.D. at 772 (denying review in PSD case because petitioners failed to show with sufficient specificity why permitting authority's decision was erroneous, consequently providing Board with no basis of review); *accord In re Puerto Rico Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995).

We read this argument as largely a reassertion of the issues already discussed, particularly Ms. Schindler's challenge to the adequacy of the current NAAQS for PM_{10} to assure public health. As we previously discussed, that issue is not reviewable in this forum.

Ms. Schindler's argument that the issuance of the permit warrants preparation of an Environmental Impact Statement ("EIS") is also misplaced. There is no requirement that an EIS be prepared in connection with the PSD permit process; in fact, such permitting processes are specifically exempted. *See* 15 U.S.C. § 793(c)(1) ("No action taken under the Clean Air Act shall be deemed a major federal action significantly affecting the quality of the human environment within the meaning of [NEPA]."); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (1973); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 129 (EAB 1997) (noting that PSD permitting process does not require the preparation of an EIS). Consequently, we deny review of the Final Permit on this basis as well.

5. *Alleged Failure to Address Handling of Solid Waste and Other Chemical Pollutants*

Ms. Schindler contends that MDEQ failed to address comments concerning how the Facility would deal with landfilled waste generated by the tire burning and as well as oil contained in the body of the tires. Schindler Petition at 6. With reference to landfilled waste, Ms. Schindler states that the MDEQ did not address a public hearing participant's comments about "landfill leachate going into Lake Michigan" and possible effects [of the waste] on surface water, aquatic life, ground vegetation and ground water." *Id;* Hearing Transcript at 13. She also asserts that the MDEQ ignored another commenter's question about how "oil" apparently contained in the tires would be "handled." Schindler Petition at 6; Hearing Transcript at 14.

In our view, MDEQ adequately addressed Ms. Schindler's concerns about the landfilled waste by explaining in its response to comments that the Facility would have to "comply with all applicable solid waste management regulations that may include leach test requirements for metals, etc." *Response to Comments* at 5. More to the point, the issue of how waste would be handled generally falls outside the ambit of the PSD program and is beyond the Board's review authority in this case. *See In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 164-67 (in denying petitioners' request for PSD permit review based on permittee's landfill disposal practices, explaining that landfill disposal is not governed by the Clean Air Act

and is thus a "classic non-PSD" issue).[16,17]

In addition, Ms. Schindler's comments on the "handling" of oil contained in the tires is not specific enough for us to determine what the MDEQ failed to "address" in relation to this subject. However, if we regard "handling" of oil as referring to the issue of what pollutants will be contained in the Facility's emissions resulting from the supplemental burning of TDF (which comports with the statement made by the hearing participant she cites, *see* Hearing Transcript at 14), we fail to see how the MDEQ has not already addressed this issue in the Administrative Record, which includes an analysis of the Facility's predicted emissions during supplemental burning of TDF. *See SAR* at 3.

For the foregoing reasons, we deny review of the Final Permit on the basis of these arguments.

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[16] A facility's discharge of solid wastes as well as hazardous air pollutants not regulated under the PSD program, *see infra* note 17, could be subject to PSD review only under one exception. It is legitimate to consider these non PSD-regulated pollutants as collateral environmental impacts in the context of a BACT determination. If a technology has an "incidental effect of increasing or decreasing emissions of unregulated pollutants," consideration of that effect may be taken into account in selecting BACT for a facility. *Knauf Fiber Glass*, 8 E.A.D. 163 n.56; *Genesee Power*, 4 E.A.D. 832, 848 (EAB 1993). However, the Petitioners' argument regarding the Facility's discharge of solid wastes and unregulated air pollutants does not seek Board review on the basis of this exception, for they do not seek to tie their argument to the BACT determination.

[17] In connection with her discussion of the composition of emissions from TDF burning, Ms. Schindler refers to an attached exhibit that she claims "contradicts" the MDEQ's statements about the "difference in emissions between tire burning and coal burning." Schindler Petition at 6. While Ms. Schindler does not describe the substance of these contradictions in the body of her petition, the exhibit to which she appears to be referring reports that, based on emissions testing, a California cement kiln's replacement of coal with TDF to supply a portion of its fuel needs would result in increased emissions of NOx, particulate matter, lead, benzene, mercury and dioxin. *See* Schindler Petition Exh. F (West Valley Citizens Air Watch, *Kaiser test results in Dioxins increase in tire Burn*, SVTC ACTION News, Summer 1996.*).* (Here, Ms. Schindler appears to have mistakenly referred to the exhibit as "Exhibit G;" however, the contents of Exhibit F appear most consistent with her statement.) The exhibit also states that the EPA recognizes dioxins "as the most potent man-made carcinogen." *Id.* With respect to the Facility's emissions of NOx, particulate matter, and lead, besides not addressing the relevance of test results from another type of facility, Ms. Schindler does not explain how the MDEQ erred in concluding that, based on an emissions test, the Facility's emission of these pollutants during supplemental TDF burning would be *lower* than such emissions during the burning of coal and wood alone. *SAR* at 2. Thus, review of the Final Permit is not warranted on this basis. With respect to the Facility's emissions of benzene, mercury, and dioxin, such pollutants fall within the category of "hazardous air pollutants" listed in CAA § 112(b)(6), 42 U.S.C. § 7412(b)(6). These pollutants are expressly excluded from direct consideration under the PSD program. *Id.*; *see In re West Suburban Recycling and Energy Center*, 6 E.A.D. 692, 696 n.6 (EAB 1996); *In re Robbins Resource Recovery Co.*, 3 E.A.D. 648, 653 (Adm'r 1991). Although a facility's emissions of hazardous air pollutants are not subject to PSD review as a general rule, there is a limited exception for PSD review within the context of a BACT determination, *see supra* note 16. However, Ms. Schindler has not alleged this exception as a basis for Board review in this proceeding.

6. *BACT Determination*

In his petition, Mr. Collins asserts that MDEQ failed to meet the requirements for BACT in issuing the Final Permit. *See* Collins Petition. Specifically, Mr. Collins asserts that prior to permit issuance, "pilot plant studies of Venturi Wet Scrubbers and electrostatic precipitators [should] be made while test-burning old tire fragments *in parallel with* or *after* the preexisting dry scrubber and baghouse filter control technology." *Id.* (emphasis added). Further, Mr. Collins avers that "[i]t is my belief that both of the units I recommend for testing will be found superior for removing dust particles as compared to the bag filters for the final flue gas." *Id.* Mr. Collins finally states that the "wet scrubber may also be superior to the dry scrubber presently installed for removal of SO_2." *Id.*

Petitioner Schindler characterizes BACT as being among the several issues of public concern that MDEQ "failed to address" in issuing the Final Permit. Schindler Petition at 6. She does not develop this contention further, except to cite Mr. Collins' public hearing statements in which Mr. Collins voiced similar opinions to those in his petition. Hearing Transcript at 16. *Id.*[18]

The PSD regulations require that new major stationary sources and major modifications of such sources employ the "best available control technology," or "BACT," to minimize emissions of regulated pollutants. 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 52.21(j)(2). Under the rules governing the PSD permitting process, the permit applicant is responsible for proposing an emissions limitation that constitutes BACT based on an analysis of pollution control technology alternatives. 42 C.F.R. § 52.21(n)(1)(iii). The ultimate BACT decision is made by the permit-issuing authority.

Because Mr. Collins' and, by adoption, Ms. Schindler's challenge of the MDEQ's BACT analysis does not identify how MDEQ clearly erred or abused its discretion in its determination that the baghouse/dry scrubber combination constitutes BACT for the Facility, we deny review as discussed below.

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[18] In her petition, Ms. Schindler also states that an engineer, whom she identifies as "Ron Bauman," also questioned the MDEQ's BACT determination. Schindler Petition at 6. A Mr. "Ronald C. Bauman" (whom we assume is the same person) did express objections to the MDEQ's BACT analysis in a petition for review he filed with the Board on September 11, 2000 (PSD Appeal No. 00-6). However, we dismissed his petition for lack of standing because Mr. Bauman had not participated in the public hearing or submitted written comments in this proceeding. *In re Tondu Energy Co.*, PSD Appeal Nos. 00-6 & 00-8, (EAB, Nov. 3, 2000) (Order Denying Review). As explained elsewhere, for an issue to be raised on appeal, it must have first been raised with the permit issuer, to give the permit issuer an opportunity to respond. Accordingly, we will not consider Mr. Bauman's objections through the vehicle of Ms. Schindler's appeal.

The MDEQ's BACT review and determination contained the following statement:

> The [Facility's] boilers are controlled by a dry scrubber/baghouse system. This system provides excellent control of finer particulate, such as PM-10 * * *. Staff concurs with [Tondu's] conclusions that the existing dry scrubber/baghouse system is BACT for the proposed TDF firing.

SAR at 3.

Tondu's conclusions that the Facility's current pollution control technology constitutes BACT, which MDEQ endorsed, appear in Tondu's permit application under the heading "BACT Review for PM/PM_{10}." *See* NTH Consultants, Ltd., *Permit to Install Application to allow the combustion of Tire-Derived Fuel in Boilers #1 and #2*, pp. 13-14 (Mar. 31, 2000). These conclusions consist of the following statements:

> Particulate Matter (PM) emissions from the coal/wood-fired boilers may be minimized by the use of baghouses, ESPs or wet (venturi) scrubbers. Wet scrubbers are outdated due to their inability to meet the stringent PM emission limits set by the PSD BACT requirements and their generation of wet sludge by-products that require additional treatment and disposal.
>
> Both the baghouse and ESP [electrostatic precipitator] technologies may be designed and operated to achieve the same outlet grain loading. However, it is theorized that the baghouse is better able to control the finer PM emissions, which include trace heavy metals, and organic emissions. The baghouse (filter cake) also removes additional SO_2 emissions when used downstream of an SO_2 scrubber. Therefore, we have concluded that the existing dry scrubber/baghouse system is representative of BACT for PM_{10} * * *.

Id.

Mr. Collins' statements in his petition regarding the need to conduct pilot testing of electrostatic precipitators and wet scrubbers simply fail to address or respond to the content of MDEQ's BACT review or Tondu's underlying analysis of emissions control alternatives. Specifically, his statements do not challenge any of the premises underlying the BACT determination: that wet scrubbers are unable to meet stringent PM emission limits; that wet scrubbers generate sludge by-products that necessitate treatment and disposal; that a baghouse is better able to control finer PM emissions, including trace heavy metals and organics; and that the baghouse provides additional SO_2 control.

As stated previously, it is Mr. Collins' burden to show that MDEQ made a clear error. By merely asserting his opinion that alternative technologies would be preferable, unsubstantiated by any data, Mr. Collins falls far short of meeting that burden.[19] In this regard, Mr. Collins makes no effort to explain why MDEQ should require "pilot testing" of a technology that the MDEQ has already determined to be inferior with respect to the emissions control and environmental criteria that underlie a BACT determination. *See supra.* Nor does he present any information or data regarding the previous application of electrostatic precipitators and wet scrubbers to sources similar to the Facility to demonstrate their availability for this particular application, involving the burning of TDF.

Because Mr. Collins' and Ms. Schindler's petitions merely allege general error in MDEQ's BACT review of the Facility without in any way addressing its content, the Petitioners have failed to meet their burden of proof in seeking review of the Final Permit on this basis.*See* 40 C.F.R. § 124.19(a); *In re AES Puerto Rico, L.P.*, 8 E.A.D. 324, 328 (EAB 1999); *Inter-Power of New York*, 5 E.A.D. at 153.

III. *CONCLUSION*

For the reasons discussed, the Board denies review with respect to all the issues the Petitioners have raised.

So ordered.

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[19] *See In re Inter-Power of New York, Inc.*, 5 E.A.D. 130, 152 (EAB 1994)(holding that petitioner's "mere allegations" of error in PSD case did not satisfy petitioner's burden of proof justifying permit review under 40 C.F.R. § 124.19); *accord In re Hadson Power 14 — Buena Vista*, 4 E.A.D. 258, 294 n.54 (EAB 1992).