IN RE ANADARKO UINTAH MIDSTREAM, LLC

NSR Appeal No. 18-01

ORDER DENYING REVIEW

Decided November 15, 2018

Syllabus

WildEarth Guardians ("Petitioner") petition the Environmental Appeals Board ("Board") to review a decision by U.S. EPA Region 8 ("Region") to issue six synthetic minor new source review permits to Anadarko Uintah Midstream, LLC ("Anadarko") authorizing continued operation of six natural gas compression facilities in Uintah County, Utah, within the boundaries of the Uintah and Ouray Indian Reservation. The Region issued the permits pursuant to the Federal Minor New Source Review Program in Indian Country. 40 C.F.R. §§ 49.151-.161.

The six facilities are currently operating under emission controls and other requirements established in a federal consent decree entered on March 26, 2008 ("2008 Consent Decree"). Anadarko requested the permits in this matter to incorporate the requirements of the 2008 Consent Decree into the six federally issued permits, so that the 2008 Consent Decree as to these facilities could be terminated. Because the facilities were operating pursuant to the 2008 Consent Decree, which effectively limited the facilities' potential to emit to below major source levels, the Region treated the facilities as existing synthetic minor sources. On appeal, Petitioner argues that the Region violated the Tribal Minor New Source Review rules by inappropriately concluding that issuance of the six permits did not constitute permitting actions warranting an air quality impacts analysis ("AQIA") pursuant to 40 C.F.R. § 49.154(d). That section states that "[i]f the reviewing authority has reason to be concerned that the construction of your minor source or modification would cause or contribute to a [National Ambient Air Quality Standards] or [Prevention of Significant Deterioration] increment violation, it may require you to conduct and submit an AQIA." The Region concluded that the transfer of emissions and operational requirements from the 2008 Consent Decree to minor source permits did not result in any construction or modification and thus section 49.154(d) was not applicable, and in any event section 49.154(d) is permissive and, in its discretion, the Region determined that an AQIA was not warranted for these facilities.

Held: The Board denies WildEarth Guardians' Petition for Review. The Petitioner has not demonstrated clear error or an abuse of discretion in the Region's determination not to require an AQIA for these facilities.

Before Environmental Appeals Judges Aaron P. Avila, Mary Kay Lynch, and Mary Beth Ward.

Opinion of the Board by Judge Lynch:

I. *STATEMENT OF THE CASE*

On June 7, 2018, the U.S. Environmental Protection Agency Region 8 ("Region") issued six Clean Air Act ("CAA") synthetic minor new source review permits authorizing continued operation of six natural gas compression facilities in Uintah County, Utah, within the boundaries of the Uintah and Ouray Indian Reservation. The Region issued the permits pursuant to the Federal Minor New Source Review Program in Indian Country. 40 C.F.R. §§ 49.151-.161. The permitted facilities, operated by Anadarko Uintah Midstream, LLC ("Anadarko"), a subsidiary of Anadarko Petroleum Corporation, are: Archie Bench Compressor Station, Permit No. SMNSR-UO-000817-2016.001, Bitter Creek Compressor Station, Permit No. SMNSR-UO-000818-2016.001, East Bench Compressor Station, Permit No. SMNSR-UO-000824-2016.001, North Compressor Station, Permit No. SMNSR-UO-000071-2016.001, North East Compressor Station, Permit No. SMNSR-UO-001874-2016.001, and Sage Grouse Compressor Station, Permit No. SMNSR-UO-001875-2016.001.

The facilities are currently operating under requirements established in a federal consent decree entered on March 26, 2008 ("2008 Consent Decree"). *See United States v. Kerr-McGee Corp.*,[1] No. 07–CV–01034–EWN–KMT, 2008 U.S. Dist. LEXIS 24494, (D. Colo. Mar. 26, 2008) (Administrative Record ("AR") Index No. 4.1) (granting motion to enter Consent Decree).[2] Anadarko applied for

[1] Kerr-McGee Corporation is a subsidiary of Anadarko Petroleum Corporation. *See* 2008 Consent Decree § III, ¶ 5.g.

[2] The Region filed a certified index to the administrative record along with an "index number" for each record document. In addition, the index includes the initials of the facility when referring to documents unique to one of the permits (i.e., "AB" when referring to the Archie Bench permit, "BC" for Bitter Creek, "EB" for East Bench, "N" for North, "NE" for North East, and "SG" for Sage Grouse). This Order will cite record

the permits in this matter to incorporate the requirements of the 2008 Consent Decree into the six federally issued permits, so that the Consent Decree as to these facilities could be terminated.

On July 7, 2018, WildEarth Guardians ("Petitioner") filed a petition seeking Environmental Appeals Board ("Board") review of the Region's six permitting decisions. WildEarth Guardians presents a single issue for resolution in this matter: Whether the Region violated the Tribal Minor New Source Review regulations by concluding that the issuance of the six permits did not constitute permitting actions warranting an air quality impacts analysis ("AQIA") under 40 C.F.R. § 49.154(d). The Region responds that the instant permitting actions are for existing facilities, involve no physical or operational changes, and as such do not fall within the provision in section 49.154(d). The Region maintains that, in any event, section 49.154(d) is permissive, and that an AQIA was not warranted for these facilities. Briefing in this appeal was completed on August 16, 2018. For the reasons stated below, the Board denies the Petition for Review.

II. *STANDARD OF REVIEW*

Although this matter is governed by the Federal Minor New Source Review Program in Indian Country ("Tribal Minor NSR") under 40 C.F.R. part 49, the Board has held that in reviewing challenges to tribal minor new source permits under part 49, it will look to EPA's regulations at 40 C.F.R. part 124 to guide its review and that Board decisions under part 124 serve as relevant precedent in this context. *In re Salt River Project Agric. Improvement & Power Dist. – Navajo Generating Station*, 17 E.A.D. 312, 314-15 (EAB 2016).

As the Board has stated regarding the part 124 regulations, the petitioner bears the burden of demonstrating that review is warranted. *See In re La Paloma Energy Ctr., LLC*, 16 E.A.D. 267, 269 (EAB 2014); *see also* 40 C.F.R. § 124.19(a)(4). Ordinarily, the Board will deny review of a permit decision and thus not remand it unless the petitioner demonstrates that the permit decision is based on a clearly erroneous finding of fact or conclusion of law, or involves a matter of policy or exercise of discretion that warrants review. *Id.* § 124.19(a)(4)(i)(A)-(B); *see, e.g.*, *La Paloma Energy Ctr.,* 16 E.A.D. at 269. The Board's power to grant review "should be only sparingly exercised," and "most permit conditions should be finally determined at the [permit issuer's] level."

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documents by their title, the Region's assigned index number, and, where appropriate, the initials of the relevant facility (e.g., "AR Index No. 1.11" or "AR Index No. 1.10 NE").

Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see also* Revisions to Procedural Rules Applicable in Permit Appeals, 78 Fed. Reg. 5281, 5282 (Jan. 25, 2013).

When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit to determine whether the permit issuer exercised "considered judgment" in issuing the permit. *See, e.g.*, *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 191, 224-25 (EAB 2000); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997); *see also In re Shell Offshore, Inc.*, 13 E.A.D. 357, 386 (EAB 2007) (permit issuer must articulate with reasonable clarity the reasons supporting its conclusions and the significance of the crucial facts it relied on in reaching its conclusions). In reviewing a permit issuer's exercise of its discretion, the Board applies an abuse of discretion standard. *See, e.g.*, *In re Guam Waterworks Auth.*, 15 E.A.D. 437, 443 n.7 (EAB 2011). The Board will uphold a permit issuer's reasonable exercise of discretion if that exercise is cogently explained and supported in the record. *See Ash Grove*, 7 E.A.D. at 397 ("[A]cts of discretion must be adequately explained and justified."); *see also Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner * * * .").

III. *LEGAL AND FACTUAL BACKGROUND*

A. *New Source Review Permitting Program*

The New Source Review ("NSR") permitting program was introduced as part of the 1977 Clean Air Act Amendments and requires that modern pollution control equipment be installed when industrial facilities are built or modified in a manner that affects emissions. The program requires owners or operators to obtain permits limiting air emissions before they begin construction and is commonly referred to as the "preconstruction air permitting program." The permitting program is designed to ensure that air quality is not significantly degraded from the addition of new and modified sources where the air is currently clean (i.e., air attaining the National Ambient Air Quality Standards ("NAAQS")), and that air quality does not worsen in areas that are not attaining the NAAQS. *See* CAA §§ 160-169, 42 U.S.C. §§ 7470-7479 (requirements for prevention of significant deterioration); CAA §§ 171-193, 42 U.S.C. §§ 7501-7515 (requirements for nonattainment areas).

The NSR permitting program applies to both major and minor stationary sources. Major sources are facilities that have the potential to emit pollutants in amounts equal to, or greater than, the corresponding major source threshold levels.

CAA § 169(1), 42 U.S.C. § 7479(1). These threshold levels vary by pollutant, source category, or both. *Id.* Minor sources are facilities that have the potential to emit pollutants in amounts less than the corresponding major source thresholds. 40 C.F.R. § 49.152(d). Synthetic minor sources are facilities that have the potential to emit pollutants at or above the major source threshold level, but voluntarily accept enforceable limits to keep their emissions below the major source thresholds. *Id.* Such restrictions must be enforceable as a practical matter. *See* CAA §§ 160-193, 42 U.S.C. §§ 7470-7515; *see also* EPA, New Source Review (NSR) Permitting, http://www.epa.gov/nsr.

EPA promulgated regulations governing the Tribal Minor NSR program in 2011. *See* Review of New Sources and Modifications in Indian Country, 76 Fed. Reg. 38,748 (July 1, 2011). Thus, at the time the parties negotiated and the district court entered the 2008 Consent Decree, there was a regulatory gap for facilities, like the six in this matter, located in Indian country. No NSR permitting mechanism for these types of sources in Indian country existed at the time.

B. *The Facilities*

The six facilities at issue in this matter are natural gas compressor stations operating on the Uintah and Ouray Indian Reservations. The facilities collect gas from the surrounding field via a low-pressure gas collection system and compress the gas into intermediate pressure pipelines.[3] The six facilities are very similar, consisting of reciprocating internal combustion engines used for field gas compression, pneumatic controllers, heaters, and storage tanks. *See, e.g.*, Technical Support Document for Archie Bench Compressor Station 3 (AR Index No. 1.10 AB). Emissions from each facility consist primarily of nitrogen oxides, carbon monoxide, and volatile organic compounds. *See id.* at 5.

C. *The 2008 Consent Decree*

As noted above, a regulatory gap existed in 2008, which affected the ability of these facilities to obtain permits during that time frame, and they have been

[3] *See* Technical Support Documents for Proposed Permits (Jan. 8, 2018): Archie Bench Compressor Station (AR Index No. 1.10 AB); Bitter Creek Compressor Station (AR Index No. 1.10 BC); East Bench Compressor Station (AR Index No. 1.10 EB); North Compressor Station (AR Index No. 1.10 N); North East Compressor Station (AR Index No. 1.10 NE); and Sage Grouse Compressor Station (AR Index No. 1.10 SG); *see also* Public Notice: Request for Comments, Proposed Air Quality Permits to Construct Anadarko Uintah Midstream, LLC Multiple Facilities (Jan. 8, 2018) (AR Index No. 1.9).

operating instead under the terms of the 2008 Consent Decree. In relevant part to this proceeding, the 2008 Consent Decree resolved claims by the United States on behalf of EPA under the CAA for civil penalties and injunctive relief for violations relating to natural gas production operations in Indian country within the Uintah Basin. Among other things, the 2008 Consent Decree includes requirements to control emissions from the compressor engines by requiring the installation of oxidation catalysts as well as low-emissions dehydrators and low-bleed pneumatic controllers. 2008 Consent Decree § IV.D., ¶¶ 40-41. The 2008 Consent Decree also requires that the oxidation catalyst installed on the compressor engines achieve 93% destruction efficiency for carbon monoxide. *Id.* ¶ 41; *see also* EPA Responses to Comments from WildEarth Guardians on the Proposed [Minor New Source Review] Permits for Six Facilities Pursuant to the [Minor New Source Review] Permit Program at 40 CFR Part 49, at 3-5 (June 7, 2018) (AR Index No. 3.1) ("Response to Comments") (citing 2008 Consent Decree).

The record shows that with the emissions controls and other conditions mandated by the 2008 Consent Decree, the facilities' potential to emit ("PTE")[4] is below applicable major source thresholds.[5] *See* 2008 Consent Decree § IV.A, ¶¶ 9-11 (requirements for low emission dehydrators); *id.* § IV.D, ¶¶ 40-41, 49-57 (requirements for compressor engines); *id.* § IV.E., ¶¶ 63-65 (requirements for low-bleed pneumatic controllers); Response to Comments at 3-5; *see also* November 8,

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[4] PTE is defined in the 2008 Consent Decree as:

> [T]he maximum capacity of a stationary source to emit a pollutant regulated under the [CAA] under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant regulated under the [CAA], including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable and, as applicable, also legally and practicably enforceable by a state or local air pollution control agency.

2008 Consent Decree § III, ¶ 5.m.

[5] *See* CAA § 169(1), 42 U.S.C. § 7479(1) (defining "major emitting facility" in terms of "potential to emit"); 40 C.F.R. § 52.21(b)(1) (defining "major stationary source").

2016 Permit Applications[6] at App. E (Emission Summary) for: Archie Bench Compressor Station (AR Index No. 1.8 AB), Bitter Creek Compressor Station (AR Index No. 1.8 BC), East Bench Compressor Station (AR Index No. 1.8 EB), North Compressor Station (AR Index No. 1.8 N), North East Compressor Station (AR Index No. 1.8 NE), and Sage Grouse Compressor Station (AR Index No. 1.8 SG).

The 2008 Consent Decree provides that the relevant control requirements established in Sections IV.A, .D, and .E shall be considered "federally enforceable" and, as applicable, "legally and practicably enforceable" for purposes of calculating the PTE of a source or facility as may be applicable under the CAA. 2008 Consent Decree § VI, ¶ 74. The 2008 Consent Decree further contemplates that the Consent Decree could be terminated as to these six facilities if federally enforceable permits later incorporated these requirements. The 2008 Consent Decree states:

> Where a control requirement, recordkeeping requirement, reporting requirement or other requirement of this Consent Decree is incorporated into a federally enforceable permit, [the permittee] may serve upon the United States and the State a Request for Partial Termination. Upon approval of such request by the [United States], the filing of a joint stipulation by the Parties and the Court's approval in accordance with Paragraph 168, the Consent Decree provision in question shall be superseded by the corresponding permit provision, which shall govern as the applicable requirement.

2008 Consent Decree § XXV, ¶ 167.

D. *The 2011 Tribal Minor NSR Program*

In order to address the regulatory gap in Indian country permitting described above, EPA published a proposed rule governing new sources and modifications in Indian country in 2006, *see* 71 Fed. Reg. 48,696 (Aug. 21, 2006), and published the final rule in 2011. *See* 76 Fed. Reg. 38,748, 38,753 (July 1, 2011) ("This final rule will allow us to address that gap and more fully implement the NSR program in Indian country."). The rulemaking established the Tribal Minor NSR program, codified at 40 C.F.R. §§ 49.151-.161. EPA directly implements these provisions in areas where there is no approved tribal implementation plan, such as the areas

[6] The permit applications for the six facilities were submitted by Anadarko on November 8, 2016, and, will be referred to collectively as the "November 8, 2016 Permit Applications."

where these six facilities are located. Among other things, the rule provides a mechanism for a stationary source that would otherwise be deemed major under the NSR program to voluntarily accept restrictions on its PTE and thereby become a synthetic minor source,[7] and it recognizes that synthetic minor sources could be established in several ways. *See* 40 C.F.R. § 49.153(a)(3) (applicability section). Section 49.158 addresses synthetic minor source permits and section 49.154 addresses permit application requirements.

E. *The Permits*

The Tribal Minor NSR program under part 49 applies to the permitting of several types of minor sources, including existing synthetic minor sources. The program provides for the permitting of these sources when the sources have been previously operating pursuant to a federal implementation plan or an operating permit under 40 C.F.R. part 71 or, as here, where a facility has obtained synthetic minor status through an alternative mechanism that included enforceable emissions

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[7] The applicable regulation defines "synthetic minor source" as "a source that otherwise has the potential to emit regulated NSR pollutants in amounts that are at or above those for major sources * * *, but that has taken a restriction so that its potential to emit is less than such amounts for major sources. Such restrictions must be *enforceable as a practical matter*." 40 C.F.R § 49.152(d) (emphasis added). The regulations also define the term "enforceable as a practical matter" to mean that:

> [A]n emissions limitation or other standard is both legally and practicably enforceable as follows: (1) An emission limitation or other standard is legally enforceable if the reviewing authority has the right to enforce it. (2) Practical enforceability for an emission limitation or for other standards * * * in a permit for a source is achieved if the permit's provisions specify: (i) A limitation or standard and the emissions units or activities at the source subject to the limitation or standard; (ii) The time period for the limitation or standard * * *; and (iii) The method to determine compliance, including appropriate monitoring, recordkeeping, reporting and testing.

Id. § 49.152(d).

limitations.[8] The regulations require the permit application to include the existing controls and limitations. 40 C.F.R. § 49.154(a)(2)(vii)-(viii).

In November 2016, Anadarko submitted applications for synthetic minor source permits for the six existing facilities. *See* November 8, 2016 Permit Applications. The applications stated that Anadarko sought "to establish federally enforceable limits as required by the" 2008 Consent Decree. *See, e.g.*, Letter from Natalie Ohlhausen, Sr. HSE Rep., to Claudia Smith, U.S. EPA Region 8 (Nov. 4, 2016) (AR Index No. 1.8 AB) (attaching synthetic minor source permit application for Archie Bench Compressor Station). The applications further characterized the situation as an "[e]xisting source operating under synthetic minor limits, as regulated under [the 2008] Consent Decree, submitting an application for a synthetic minor permit under Part 49." November 8, 2016 Permit Applications at App. A.

Because the facilities have been operating since 2008 under the federally enforceable limitations established in the 2008 Consent Decree, the Region considered the facilities existing synthetic minor sources and used the part 49 procedures for synthetic minor sources to incorporate the 2008 Consent Decree requirements into a federal minor source permit. The Region issued and publicly noticed draft permits for the facilities in January 2018 and opened a thirty-day public comment period in accordance with 40 C.F.R. §§ 49.157 (public participation requirements) and .158 (synthetic minor source permits). The public notice stated that the permitting actions applied to existing natural gas compression facilities and that the facilities requested enforceable emissions limits consistent with the 2008 Consent Decree. *See* Public Notice: Request for Comments, Proposed Air Quality Permits to Construct Anadarko Uintah Midstream, LLC Multiple Facilities (Jan. 8, 2018) (AR Index No. 1.9). The Notice stated further that:

> These [permitting] actions will have no adverse air quality impacts. The emissions at these existing facilities will not be increasing due to th[ese] permit action[s]. In addition, these actions do not authorize the construction of any new emission sources, or emission

[8] For such existing sources, the owner/operator had to submit a synthetic minor source permit application by September 4, 2012. 40 C.F.R. § 49.153(a)(3)(v); *see also id.* § 49.158(c)(3). Failure to submit the permit application by this deadline resulted in the source no longer being treated as a synthetic minor and becoming subject to all requirements for major sources. *See* 40 C.F.R. § 49.158(c)(4)(iii).

> increases from existing sources, nor do they otherwise authorize any other physical modifications to the facility[ies] or [their] operations.

Id. Similarly, each of the technical support documents accompanying the various draft permits stated that the permitting action applies to the existing facility and does "not authorize the construction of any new emission sources, or emissions increases from existing units, nor does it otherwise authorize any other physical modifications to the facility or its operations."[9] *See, e.g.*, Technical Support Document for Archie Bench Compressor Station at 3 (AR Index No. 1.10 AB); *supra* note 3. Rather, the Region made clear that the permits were "only intended to incorporate required and requested enforceable emission limits and operational restrictions from [the 2008 Consent Decree]." Technical Support Document for Archie Bench Compressor Station at 3 (AR Index No. 1.10 AB).

The Region also considered whether the requirements in section 49.154(d) applied to these permit applications. Specifically, section 49.154(d) provides that if the permit is for the construction of a new minor source, synthetic minor source, or a modification at an existing source, the reviewing authority may require an AQIA if it has reason to be concerned that the construction or modification would cause or contribute to a NAAQS or Prevention of Significant Deterioration ("PSD") increment violation. But, as discussed above, the Region concluded that since there was no construction or modification of the sources, the AQIA provisions under 40 C.F.R. § 49.154(d)(1) were not applicable, and that even if they were applicable, an AQIA was not otherwise warranted. *Id.* at 4, 7.

In February 2018, Petitioner submitted comments on the draft permits. *See* Letter from Jeremy Nichols, Climate & Energy Program Dir., WildEarth Guardians, to U.S. EPA Region 8, Air Program (Feb. 7, 2018) (AR Index No. 2.1) ("WildEarth Guardians' Comments"). Petitioner disagreed with EPA Region 8's determination that there was no reason to be concerned that the facilities' emissions

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[9] Under the applicable regulations, "construction means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) *that would result in a change in emissions*." 40 C.F.R. § 52.21(b)(8) (emphasis added). The definitions in section 52.21 (addressing prevention of significant deterioration of air quality) apply to the Tribal Minor NSR rule unless the terms are defined in paragraph (d) of section 152. *See* 40 C.F.R. § 49.152(b).

Modification is defined as "any physical or operational change at a source that would cause an *increase* in the allowable emissions of a minor source." 40 C.F.R. § 49.152(d) (emphasis added).

would cause or contribute to a violation of the ozone or nitrogen dioxide ("NO_2") NAAQS and commented that therefore there was a duty to analyze the air quality impacts of the sources under 40 C.F.R. § 49.154(d). Petitioner maintained that this duty to conduct an AQIA existed regardless of whether emissions from the sources would change. *Id*. at 3. Petitioner cited data showing poor air quality in the Uintah Basin and pointed out that in 2017 EPA recommended that a portion of the Uintah Basin, including the portion where the facilities are located, be designated as nonattainment for the 2015 ozone NAAQS. *Id*. at 2.[10] Also, according to Petitioner, the facilities were not "existing," but involved *construction* or *modification*, as these terms are defined in the regulations. *Id.* at 3. Petitioner took the position that "while the facilities may physically 'exist,'" they have not previously been subject to any CAA permitting action and should therefore be considered newly constructed. *Id.* Under these circumstances, Petitioner asserted that the Region erred in failing to require an AQIA. *Id*.

The Region issued the final permits on June 7, 2018, along with a response to comments on the draft permits. *See* Letter from Monica Matthews-Morales, Dir., Air Program, Office of P'ships & Reg. Assistance, U.S. EPA Region 8, to Mike Weaver, Ops. Manager, Anadarko Uintah Midstream, LLC (June 7, 2018) (AR Index No. 3.1) ("June 7, 2018 Letter").[11]

In responding to Petitioner's comments, the Region explained why an AQIA was neither required nor necessary. First, the Region explained that the transfer of emissions and operational requirements from the 2008 Consent Decree to minor source permits under 40 C.F.R. part 49 did not constitute "construction" of a new facility or "modification" of existing facilities, and thus 40 C.F.R. § 49.154(d) was simply inapplicable. Instead, the facilities *were existing sources* that were subject to federally enforceable limitations under the 2008 Consent Decree, and Anadarko sought the proposed permits only to incorporate these requirements into a permit, so that the 2008 Consent Decree could be terminated as to these six facilities. Response to Comments at 4. The Region further determined

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[10] On April 30, 2018, EPA designated portions of the Uintah Basin as a "Marginal nonattainment area" for the 2015 ozone NAAQS. Additional Air Quality Designations for the 2015 Ozone NAAQS, 83 Fed. Reg. 25,776, 25,837-38 (June 4, 2018) (effective date Aug. 3, 2018); *see* Response to Comments at 3. Uintah County has not been designated nonattainment for any other NAAQS pollutant. *See* 40 C.F.R. § 81.345.

[11] As previously indicated, the Region's Response to Comments document, attached to the June 7, 2018, letter will be cited as "Response to Comments."

that – even if 40 C.F.R. § 49.154(d) did apply – the permitting of these facilities did not present any "reason for concern" justifying an AQIA because permitting them would not cause or contribute to a NAAQS violation for ozone or NO_2. *Id*. at 3 (stating that air quality monitoring data shows no NO_2 NAAQS violations in the Uintah Basin and that the sources at issue in this matter were in existence at the time of the Uintah Basin nonattainment designation for the 2015 ozone NAAQS). As the Region stated:

> The requirements in the proposed permits are intended to be equivalent to the [2008 Consent Decree] requirements. Additionally, the definition of "construction" cited by the commenter is not met because the proposed permits do not authorize any physical change[s] in the method of operation that result in a change of emissions, but instead only incorporate existing requirements from the [2008 Consent Decree] into an [Minor New Source Review] permit. If the proposed permits are not issued, the emissions at each source will remain the same under the limits established by the [2008 Consent Decree] * * * . [T]he proposed permits do not add new emission limits or control requirements that would alter the emissions-reducing effects of the [2008 Consent Decree].

Id. at 4-5.

F. *Petitioner's Arguments on Appeal*

On appeal, Petitioner states that it "presents a single question for resolution by the [Board], namely whether EPA Region 8 violated the Tribal Minor NSR rules by inappropriately concluding that issuance of the six permits did not constitute permitting actions warranting air quality scrutiny pursuant to 40 C.F.R. § 49.154(d)." Petition at 11. In support of this assertion, Petitioner presents a number of legal arguments, including, as it did in its comments, that the Region erroneously treated the facilities as existing sources. Petitioner argues that the permitting actions constitute new "construction" because they have "the [e]ffect of approving a change in the method of operation that would result in a change in emissions. The EPA's action would have the effect of establishing enforceable emission limits for the first time ever from the Anadarko facilities, effectively altering the method of operation of the facilities in order to reduce (i.e., change) emissions." *Id*. at 14. According to Petitioner, the Region's permitting actions are

"causing construction and therefore must be guided by the requirements of 40 C.F.R. § 49.154(d)." *Id*. at 14-15.

Petitioner reiterates its comment that the designation of a portion of the Uintah Basin as Marginal nonattainment for the 2015 ozone NAAQS provides a sufficient "reason to be concerned" about air quality and "should compel the EPA to assess the air quality impacts of emissions at existing sources via its permitting actions." *Id*. at 16.

Unlike Petitioner's arguments in its comments on the proposed permit, however, Petitioner appears to now assert, for the first time, that the facilities cannot be considered existing synthetic minor sources because they did not apply for minor source permits within the applicable deadline established in 40 C.F.R. § 49.158(c)(3) and they should not be able to rely on the controls in the 2008 Consent Decree. *See* Petition at 12-13.

Petitioner further questions, for the first time, the Region's reliance on the 2008 Consent Decree in treating the facilities as existing synthetic minor sources because, according to Petitioner, the Region's determination that the 2008 Consent Decree was "enforceable as a practical matter" is "suspect." *Id.* at 13. Petitioner also states that the Consent Decree "does not appear" to limit emissions at the six facilities to levels below major source thresholds.[12] *Id*. at 13-14.

IV. *ANALYSIS*

The single issue for Board resolution in this appeal is whether the Region clearly erred or abused its discretion when it determined that an AQIA was neither required nor necessary for the six permits issued to the Anadarko facilities in this matter. The Board does not address either: (1) challenges to the reliance on the 2008 Consent Decree or (2) the minor source application deadline. Petitioner did not raise these issues in its comments on the proposed permit and therefore they were not preserved for EAB review, as discussed in footnote 13 below.

Petitioner Has Not Demonstrated Clear Error or an Abuse of Discretion in the Region's Determination Not to Require an Air Quality Impacts Analysis

Petitioner argues that the Region erred in its determination that an AQIA was not required pursuant to 40 C.F.R. § 49.154(d). As noted above, section 49.154

[12] Petitioner acknowledges, however, that the six permits do limit the emissions to below the major source thresholds. Petition at 9.

states, in part, that "[i]f the [permit issuer] has reason to be concerned that *the construction* of your minor source or *modification* would cause or contribute to a NAAQS or PSD increment violation, it *may* require you to conduct and submit an [air quality impacts analysis]." 40 C.F.R. § 49.154(d)(1) (emphasis added). Here, the Region determined that the permitting actions would not result in the construction of any new emissions sources or any modifications to any existing sources or operations and that emissions from the existing facilities would not change or increase. The only change was the incorporation of the emissions limits and operation requirements from the existing 2008 Consent Decree into the six synthetic minor source permits at issue in this matter. Under these circumstances, the Region concluded that the provisions for an AQIA were not applicable and that, in any event, it had no "reason to be concerned" that the permits would cause or contribute to a NAAQS or PSD increment violation. The Region clearly articulated its reasoning in the draft permit documents and its Response to Comments. *See, e.g.*, Technical Support Document for Archie Bench Compressor Station at 7 (AR Index No. 1.10 AB); Response to Comments at 3-4.

Petitioner disagrees with the Region's determination that no "construction" results from issuance of the permits. Petitioner asserts that the Region's issuance of the permits, in and of itself, is the equivalent of construction resulting in a change in emissions because the Region is issuing synthetic minor source permits to the six compression stations for the first time. *See* Petition at 14. For the following reasons, the Board disagrees.

The regulations define "construction" as "any physical change or changes in the method of operation (including fabrication, erection, installation, demolition, or modification of an emission unit) that would result in a change in emissions." 40 C.F.R. § 52.21(b)(8); *see id.* § 49.152(b). The terms "begin construction" or "begin actual construction" mean:

> [I]nitiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

Id. §§ 49.152(d), 52.21(b)(11). Petitioner asserts, without providing or citing to any supporting documentation or legal authority, that by issuing permits to the six compressor stations for the first time, the Region's actions "caus[ed] construction"

by "effectively altering the method of operation of the facilities in order to reduce (i.e. change) emissions." Petition at 14. According to Petitioner, the Region's actions resulted in a change in emissions "by setting, for the first time, federally enforceable limits to keep emissions reduced and below potential to emit levels. Thus, construction occurred as a result of [the Region's] permit issuances."[13] *Id.* at 15.

Petitioner's unsupported arguments do not comport with the plain language of the regulations. First, the term "construction" is defined as including "physical change[s]" or "change[s] in the method of operation." 40 C.F.R. § 52.21(b)(8). The permitting actions at issue here do not involve any physical or operational changes to the facilities but only a change in the mechanism for imposing and enforcing the emissions limits and operational requirements. Second, the

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[13] Petitioner also now asserts that the 2008 Consent Decree was not "enforceable as practical matter" and did not actually limit emissions to below major source thresholds and therefore could not be relied upon in determining that the facilities were existing synthetic minor sources. *See* Petition at 13-14. Petitioner, however, offers no support for this argument. Petitioner never mentioned the 2008 Consent Decree in its comments on the draft permit. Moreover, because issues concerning the Region's reliance on the 2008 Consent Decree were reasonably ascertainable but were not raised during the comment period, they were not preserved for review by the Board. *See* 40 C.F.R. §§ 49.157(c)(1), 49.159(d)(3), 124.13, 124.19(a)(4)(ii); *see also In re Christian Cty. Generation, LLC*, 13 E.A.D. 449, 457 (EAB 2008). In addition, a petitioner's generalized discussion of a related topic does not meet the requirement. *See In re ConocoPhillips Co*., 13 E.A.D. 768, 801 (EAB 2008) (noting that issues must be raised with a reasonable degree of specificity).

Similarly, Petitioner proffers an argument for the first time in its appeal to the Board that, under 40 C.F.R. § 49.158(c)(3), the facilities were required to apply for these synthetic minor permits by 2012. In Petitioner's view, failure to do so invalidates the basis for the permitting action and prevents the Region from relying on the 2008 Consent Decree as part of its permitting action and from treating these sources as existing synthetic minor sources. Petition at 4, 12-13. The permitting documents in this matter are clear that both Anadarko and the Region considered these sources existing synthetic minor sources. Petitioner made no mention of the deadline in 40 C.F.R. § 49.158 or the 2008 Consent Decree in its comments. This issue was not preserved for review by the Board. *See Christian Cty.*, 13 E.A.D. at 457; *ConocoPhillips*, 13 E.A.D. at 801. The Board also notes that if the deadline issue had been preserved and Petitioner prevailed, the regulation provides that the source should no longer be considered a synthetic minor source, but should become subject to the requirements for major sources. The very provision Petitioner is trying to enforce, the AQIA provision in section 49.158(c), is not applicable to major sources.

regulatory definition of "construction" includes examples of the types of changes considered "change[s] in the method of operation" that would result in a "change in emissions." *Id.* These include "fabrication, erection, installation, demolition, or modification of an emissions unit." *Id.* These examples all concern the creation of new emissions sources or significant physical changes to existing sources that are clearly beyond the scope of the permitting actions here. Similarly, the above-quoted definitions of "begin construction" and "begin actual construction" indicate that the term "construction" is limited to those activities involving physical changes to a source that are permanent in nature, such as installation of building supports and foundations or constructing permanent storage structures. 40 C.F.R. §§ 49.152(d), 52.21(b)(11).

Further, the definitions state that a "change in the method of operation" refers to "on-site activities other than preparatory activities which mark the initiation of the change." *Id*. §§ 49.152(d), 52.21(b)(11). These definitions clearly limit the term "construction" to those activities involving physical changes or additions. Petitioner's attempt to incorporate the act of permitting a facility into the definition of "construction" is unconvincing and contrary to the plain language of the regulation.

In sum, the Petitioner has not demonstrated that the permitting actions in this matter are other than what the EPA permitting regime contemplated for minor sources – that an AQIA could only be required by the reviewing authority if the source was being constructed or modified.

Even if the Board agreed with Petitioner that the Region's permitting actions could be considered "construction," Petitioner still has failed to demonstrate that the Region erred in finding that no AQIA was warranted, even assuming that 40 C.F.R § 49.154 applied to these facilities. The applicable regulation does not *require* an air quality impacts analysis even when "construction" or "modification" occurs. Rather, the regulation gives the Region discretion to determine whether or not to require an AQIA when permitting a new or modified source. *See* 40 C.F.R. § 49.154(d)(1) (stating that the permit issuer "*may*" require an AQIA where it has "*reason to be concerned*" that construction or modification would cause or contribute to a NAAQS or PSD increment violation (emphasis added)). The preamble to the final rule confirms EPA intended that the permit issuer would have substantial discretion in making this determination. *See* Review of New Sources and Modifications in Indian Country, 76 Fed. Reg. 38,748, 38,761 (July 1, 2011) (stating that "allowing [the permit issuer] discretion for when an AQIA might be required ensures that construction of new minor sources or modifications at existing minor sources do not cause or contribute to a NAAQS or PSD increment violation

when needed, but limits overburdening all minor sources in Indian country with these types of air quality analysis").

In the present case, the Region determined that an AQIA was not warranted because, as discussed above, the permits do not authorize any change in allowable emissions or any physical modification to the operation of their facilities. *See* Response to Comments at 4. Rather, the permits are intended to incorporate emissions limits specified in the 2008 Consent Decree – limits that Petitioner concedes will result in emissions from the facilities that are below major source thresholds. *See* Petition at 9 (stating that "when factoring in the emissions controls and limits Anadarko requested to be incorporated into [the synthetic minor new source review] permits, the facilities would emit less than major source thresholds"); *see also* November 8, 2016 Permit Applications App. E (Emission Summary) for: Archie Bench Compressor Station (AR Index No. 1.8 AB), Bitter Creek Compressor Station (AR Index No. 1.8 BC), East Bench Compressor Station (AR Index No. 1.8 EB), North Compressor Station (AR Index No. 1.8 N), North East Compressor Station (AR Index No. 1.8 NE), and Sage Grouse Compressor Station (AR Index No. 1.8 SG). As the Region stated in responding to comments, "[t]he control requirements in the proposed permits merely memorialize requirements for substantial reductions from equipment at the facilities that have already been achieved as a result of the [2008 Consent Decree]." Response to Comments at 5. The Region therefore determined that because the permitting actions would not result in any emissions increase or changes in the facilities' methods of operation, an AQIA was not warranted. Although Petitioner disagrees with this determination, it has not demonstrated, nor does the record reflect, that the Region clearly erred or abused its discretion in making this determination.

Finally, the Region rejected Petitioner's claim that the air quality in the Uintah Basin, as reflected in the NAAQS, "should compel the EPA" to require an AQIA in its detailed response to comments on the draft permits because issuing the six permits would not cause or contribute to a violation of the NAAQs or PSD increments:

> The EPA disagrees with the commenter that the issuance of the proposed permits will cause or contribute to a violation of the 8-hour ozone or 1-hour NO_2 NAAQS or to a PSD increment violation. As to NO_2, there are no nonattainment area designations for the 1-hour NO_2 NAAQS (*see* 77 FR 9533 (February 17, 2012)), and current air quality monitoring data for the 1-hour NO_2 NAAQS in the Uinta Basin [do] not indicate any violations. As to ozone, under applicable EPA regulations these oil and natural gas sources were already

> existing at the time of the Uinta Basin nonattainment area designation for the 2015 ozone NAAQS (as well as at the time of the earliest air quality measurements used to support the designation). * * * The emissions of each source at the time of construction were subject to federally enforceable limits under [the 2008 Consent Decree]. * * * EPA is issuing these permits to permanently memorialize the requirements that were established in the [2008 Consent Decree], so that the [2008Consent Decree] can be terminated and to allow for continued operation of the emissions units * * *. Following a regulatory procedure to transfer requirements from [the 2008 Consent Decree] to federal minor source permits does not cause any new construction or new emissions to occur, and it does not trigger the provisions the commenter cites to assert that an air quality impacts analysis (AQIA) is required.

Response to Comments at 3.

In order to support a petition for review, a petition must show, with factual and legal support, why a permit condition or other challenge warrants Board review, including an explanation as to why the Region's response to those objections (the Region's basis for its decision) is clearly erroneous or otherwise warrants review. *See* 40 C.F.R. § 124.19(a)(4)(ii); *See also In re ExxonMobil Chem. Co*., 16 E.A.D. 383, 388-89 (EAB 2014); *In re Seneca Res. Corp.*, 16 E.A.D. 411, 416 (EAB 2014); *In re City of Palmdale*, 15 E.A.D. 700, 705-06 (EAB 2012). While the Board takes seriously Petitioner's concerns regarding the potential impacts of pollutant emissions on the air quality of the Uintah Basin, the Petition fails to confront the Region's response to comments, nor does the Petition otherwise demonstrate any clear error by the Region in determining that an air quality impacts analysis was not warranted on the record before the Region here. *See In re Beeland Group LLC,* 14 E.A.D. 189, 196, 207 (EAB 2008) (denying review for failure to confront the Region's response to comments with sufficient specificity to demonstrate the responses were clearly erroneous). Indeed, Petitioner states that the EPA action in permitting these facilities would "effectively alter[] the method of operation of the facilities in order to *reduce* (i.e., change) emissions. Petition at 14 (emphasis added). The Region made a determination that there was "no reason to be concerned" that emissions would cause or contribute to a NAAQS or PSD increment violation for the reasons it explained in the proposed permits and technical support documents, as well as in its Response to Comments. While Petitioner disagrees with this determination, Petitioner fails to demonstrate that the

Region's response was clearly erroneous, an abuse of discretion, or otherwise warrants Board review.

V. *CONCLUSION*

For the reasons stated above, the Board denies WildEarth Guardians' Petition for Review.

So ordered.