

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

**In Re Hess Newark Energy Center
Permit No. BOP110001**

PSD Appeal No. 12-02

MOTION TO DISMISS PETITION AND FOR EXPEDITED REVIEW

Pursuant to 40 C.F.R. Part 124 and Section III.D of the Environmental Appeals Board Practice Manual, Intervenor Hess NEC, LLC (“Hess NEC”), operator of the Hess Newark Energy Center, moves to dismiss the Petition for Review filed by the Ironbound Community Corporation and the New Jersey Environmental Justice Alliance (collectively, “Petitioner”), on the grounds that the Environmental Appeals Board (“the Board”) has no jurisdiction over this appeal, and further requests expedited review of this motion. Hess NEC has consulted with Petitioner, who has advised that it will oppose this motion.

INTRODUCTION

Petitioner claims that Hess NEC failed to conduct a sufficiently detailed analysis of “alternative sites, sizes, production processes, and environmental control techniques,” as required by N.J.A.C. 7:27-18.3(c)(2), in its cost-benefit analysis in support of a new natural gas electrical generation unit it plans to construct in Newark, New Jersey. *See* Pet. for Review at 4. Hess NEC vigorously contests this assertion and will, if necessary, file a response on the merits demonstrating that it submitted a more-than-adequate alternatives analysis and that the decision

of the New Jersey Department of Environmental Protection (“NJDEP”) to issue the permit should be upheld.¹ But regardless of the merits of Petitioner’s assertions, the Board has no jurisdiction over this appeal. The Board’s jurisdiction is limited to review of permits or permit conditions issued by EPA or by states acting on behalf of EPA on the basis of delegated federal authority. Petitioner’s claims arise under the Nonattainment New Source Review (“NNSR”) provisions in New Jersey’s State Implementation Plan (“SIP”), which have been fully approved by EPA and incorporated into 40 C.F.R. part 52, the regulations implementing the Clean Air Act state program approval process. *See* 40 C.F.R. §52.1578. Thus, for purposes of NNSR, New Jersey is not a delegated state under the Clean Air Act and challenges to permit conditions arising under them are not within the jurisdiction of the Board.

PROCEDURAL AND FACTUAL BACKGROUND

Hess NEC sought a permit—as relevant to this motion—to construct a nominal 655 megawatt combined cycle electric generating facility that will be fired by natural gas. *See* Application for Prevention of Significant Deterioration and New Source Review Preconstruction Permit at 1-1 (Oct. 2011) (“Permit Application”), attached hereto as Exh. 1. The facility will be sited on 25 acres in the city of Newark in Essex County, New Jersey. *Id.* The project is considered a new major stationary combustion source under both the PSD and NNSR regulations because its potential annual emissions exceed major source thresholds. *Id.* at 3-1 to 3-2. New Jersey is currently designated as non-attainment for ozone and (in most of the state, including where the Hess NEC facility is located) for fine particles (PM_{2.5}).

¹ Specifically, Petitioner’s attempt to analogize an alternatives analysis under the NNSR provisions to an alternatives analysis under the National Environmental Protection Act fails, since the degree of analysis required under the two statutes is quite different. *See* Pet. at 4-5.

The New Jersey Department of Environmental Protection received written and verbal comments on the Permit Application and responded in a Hearing Officer's Report issued on September 13, 2012. *See* Hearing Officer's Report (Sept. 13, 2012), attached hereto as Exh. 2. In that report, the Hearing Officer noted comments regarding alternative siting and environmental justice issues² and concluded that Hess NEC had met the relevant legal requirements, including the alternatives analysis required by N.J.A.C. 7:27-18.3(c)(2). *Id.* at 22-27. Permit No. BOP110001 was issued the same day. *See* Air Pollution Control Operating Permit (Sept. 13, 2012) ("Permit"), attached hereto as Exh. 3. Petitioner filed for review of the Permit by the Board on October 13, 2012, claiming that Hess NEC had failed to undertake a sufficiently detailed alternatives analysis as required by N.J.A.C. 7:27-18.3(c)(2). *See* Pet. at 4-10. Under applicable rules, the Permit is stayed pending this review. *See* 40 C.F.R. §§ 124.15(b), 124.19(f). Hess NEC moved to intervene in this matter on October 24, 2012, in order to protect its interest in the Permit. *See* Mot. for Leave to Intervene, PSD Appeal No. 12-02 (Oct. 24, 2012) (Rec. Doc. 2).

ARGUMENT

I. Because Petitioner Challenges Permit Conditions That Were Not Issued on the Basis of Delegated Federal Authority, the Board Has No Jurisdiction over the Petition

In this case, Petitioner's sole challenge to the Permit is based on the alternatives analysis requirement of N.J.A.C. 7:27-18.3(c)(2). However, because this requirement arises from an approved SIP, it is not a "federally-issued" permit condition reviewable by the Board.

² The Petitioner has not raised environmental justice considerations as the basis for its appeal, but relies solely on the alternatives analysis requirements of New Jersey Administrative Code Subchapter 18 and 42 U.S.C. § 7503(a)(5) as grounds for appeal.

A. The Board’s jurisdiction is limited to review of federally-issued permits or permit conditions

The Board’s jurisdiction over permit appeals is strictly limited by the Consolidated Rules of Practice (“CROP”), codified at 40 C.F.R. part 124 and by program approvals codified in 40 C.F.R. part 52 vesting jurisdiction over certain Clean Air Act programs in the states . For example, the provision permitting Board review does “not apply to PSD permits issued by an approved State.” 40 C.F.R. § 124.1(e). An “approved state” is defined by the CROP as a state that administers an “approved program.” *Id.* § 124.41. An “approved program” is defined as a SIP providing for the issuance of PSD permits that has been approved by EPA in accordance with the Clean Air Act and its implementing regulations. *Id.* The Board’s Practice Manual states this restriction more directly, limiting its own jurisdiction to “federally-issued” PSD and other permit decisions. Environmental Appeals Board Practice Manual at 36 (2012). The Practice Manual goes on to state that “[t]he EAB generally does not have authority to review state-issued permits; such permits are reviewable only under the laws of the state that issued the permit.” *Id.* at 37.

The test for whether a permit is federally-issued turns on how the relevant state administers the PSD/NNSR program from which the permit or permit conditions arise. Under the Clean Air Act, a PSD or NNSR program “or portions thereof” may be administered within a state in one of three ways. *See In re Power Holdings of Ill., LLC*, PSD Appeal No. 09-04, slip op. at 23 n.18 (EAB Aug. 13, 2010); *In re Milford Power Plant*, 8 E.A.D. 670, 673 (EAB 1999). First, EPA may directly administer the program. *See* 42 U.S.C. §§ 7409-10, 7475, 7478; 40 C.F.R. pt. 52; *Milford*, 8 E.A.D. at 673. Second, EPA can delegate its authority to operate the PSD program to the state. *Milford*, 8 E.A.D. at 673. In such cases, PSD or NNSR permits are “federally-issued” by the state on behalf of EPA. *See* 40 C.F.R. § 52.21(u); *In re Seminole Elec.*

Corp., PSD Appeal No. 08-09, slip op. at 10 (EAB Sept. 22, 2009). Third, if a state PSD or NNSR program meets certain requirements of federal law, EPA can approve the program and incorporate it into the state's SIP. *See* 42 U.S.C. §§ 7410, 7416, 7471; 40 C.F.R. § 51.166. EPA's approval and promulgation of a SIP renders the elements of that SIP the applicable law for purposes of the Clean Air Act, and empowers the state to administer the relevant Clean Air Act programs under its own authority. 42 U.S.C. §§ 7410, 7416, 7471; *see also Milford*, 8 E.A.D. at 673 (when the state's SIP has been approved by the EPA, "the state . . . conduct[s] PSD permitting under its own authority"). For example, with respect to NNSR, the relevant rules at 40 C.F.R. § 52.24 state that "[t]his section does not apply to major stationary sources . . . locating in a clearly defined part of a non-attainment area . . . where EPA finds that a plan which meets the requirements of Part D of Title I of the Act is in effect and being implemented.

Permit conditions that arise from state-issued PSD or NNSR permits are not subject to review by the Board. *See* 40 C.F.R. § 124.1(e); *In re BP Cherry Point*, 12 E.A.D. 209, 214 (EAB 2005) ("[T]he Board lacks authority to review conditions of a state-issued permit that are adopted solely pursuant to state law."). "Such permits are regarded as creatures of state law that can be challenged only under the state system of review." *In re Carlton, Inc. North Shore Power Plant*, 9 E.A.D. 690, 693 (EAB 2001). This holds true even where the challenged condition is found in a permit that combines federally-issued and state-issued elements. In such a case, the Board's jurisdiction extends only to the portion of the permit issued on the basis of delegated federal authority. *See id.* (permit conditions arising under SIP provisions approved by EPA, as opposed to conditions based on delegated federal authority, must be reviewed in a state forum); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 110 n.5 (EAB 1997) (Board's jurisdiction does not extend to elements of state SIP approved by EPA). *Cf. Power Holdings of Ill.*, PSD

Appeal No. 09-04, slip op. at 23 n.18 (noting that “portions” of the PSD program may be administered within a state in different ways).

This result is, of course, an outgrowth of the structure of Title I of the Clean Air Act. Title I of the Clean Air Act establishes a partnership between the federal government and the states, in which the federal government sets the standards and the states implement and enforce those standards. *See, e.g., EME.Homer City Generation v. EPA*, --- F.3d ----, 2012 WL 3570721 at *17 (D.C. Cir. Aug. 21, 2012). In this instance, New Jersey has been granted authority to administer the NNSR program by EPA and any challenge based on the New Jersey regulations implementing the NNSR program must be brought under applicable New Jersey procedures.

B. New Jersey is an approved state, not a delegated state, as to its NNSR SIP provisions, which are the sole basis of Petitioner’s appeal

Petitioner’s appeal focuses solely on one complaint: Hess NEC did not conduct an adequate alternatives analysis within the meaning of N.J.A.C. § 7:27-18(c)(3), which requires a prospective permittee to

[s]ubmit to the Department an analysis of alternative sites within New Jersey, and of alternative sizes, production processes, including pollution prevention measures, and environmental control techniques, demonstrating that the benefits of the newly constructed, reconstructed, or modified equipment significantly outweigh the environmental and social costs imposed as a result of the location, construction, reconstruction or modification and operation of such equipment.

The portion of the New Jersey Administrative Code in which this provision is found, N.J.A.C. 7:27-18.1 *et seq.*, was originally proposed as part of the state’s NNSR SIP rules and was provisionally approved by EPA in 1980. *See* 45 Fed. Reg. 15531 (March 11, 1980). After the state submitted revisions, EPA approved the NNSR SIP rules that are reflected in N.J.A.C. 7:27-18.1 *et seq.* *See* 46 Fed. Reg. 21994, 21996 (April 15, 1980). The New Jersey program was then incorporated into 40 C.F.R. § 52.1570(c). *Id.* (incorporating “[a] supplementary

submittal dated August 5, 1980 from [NJDEP] consisting of revisions to Subchapter 18 of the New Jersey Administrative Code, entitled, ‘Control and Prohibitions of Air Pollution from Ambient Air Quality in Nonattainment Areas’ (Emission Offset Rule), N.J.A.C. 7:27-18.1 *et seq.*” into 40 C.F.R. part 52). New Jersey continues today to administer the NNSR provisions under this SIP approval.³

Given this history, it is clear that the New Jersey SIP’s alternatives analysis requirement, which Petitioner claims has been violated, is a “condition[] of a state-issued permit . . . adopted solely pursuant to state law.” *In re BP Cherry Point*, 12 E.A.D. at 214. The New Jersey NNSR SIP provisions constitute an “approved program” administered by the state within the meaning of 40 C.F.R. § 124.41. As such, permit conditions relating to these provisions are “creatures of state law that can be challenged only under the state system of review.” *Carlton, Inc.*, 9 E.A.D. at 693; *see also* 40 C.F.R. § 124.1(e).

In re Carlton, Inc. is on all fours with the instant case, and illustrates the jurisdictional argument made here. In that appeal, Illinois operated its PSD program under delegated federal authority. *Carlton, Inc.*, 9 E.A.D. at 693. But the permit being challenged by the petitioner was issued under the state’s PSD minor program SIP, which had been approved by EPA. *Id.* The Board concluded that it had no jurisdiction over the challenge, because the permit was not issued on the basis of delegated federal authority. *Id.* This appeal presents almost identical facts, and the same jurisdictional analysis applies.

³ By contrast, the state’s proposed PSD program was rejected in 1980 and EPA incorporated 40 C.F.R. § 52.21(b)-(w) into the state SIP. *See* 45 Fed. Reg. 52741 (August 7, 1980). Unlike the NNSR provisions, New Jersey administers these provisions under delegated federal authority.

C. The Board should review this Motion to Dismiss on an expedited basis

The Board has recognized that NSR appeals are time-sensitive, since “new source construction cannot begin prior to receiving a final permit.” Order Governing Petitions for Review of Clean Air Act New Source Review Permits, at 1 (April 19, 2011), *available at* [http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/Standing+Orders/\\$FILE/NSR%20Standing%20Order%204-19-2011.pdf](http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/Standing+Orders/$FILE/NSR%20Standing%20Order%204-19-2011.pdf) (“Standing Order”). In this case, Hess NEC has invested substantial time and resources into the permitting process, only to see its Permit stayed pending resolution of an appeal that applicable precedent and federal laws and regulations establish is not within the jurisdiction of the Board. Hess NEC respectfully requests that the Board expedite its consideration of this matter so that it may begin construction on the emissions units subject to permitting as soon as possible.

CONCLUSION

Considering the foregoing, Intervenor Hess NEC respectfully moves the Board to dismiss the Petition for Review for lack of jurisdiction.

DATE: November 7, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2012, a true and correct copy of the foregoing MOTION TO DISMISS PETITION AND FOR EXPEDITED REVIEW was filed electronically, which results in service on all counsel of record. Additionally, courtesy copies with exhibits were mailed, first class, to the parties listed below.

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