

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION
WASHINGTON, DC

In re:)
)
)
Footprint Salem Harbor Development, LP) PSD Appeal No. 14-02
)
)
MassDEP Application No. 12-022)
MassDEP Transmittal No. X254064)
)

EPA OFFICE OF AIR AND RADIATION'S
SUPPLEMENTAL BRIEF IN RESPONSE TO
BOARD'S ORDER OF JULY 14, 2014

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INTRODUCTION

The EPA Office of Air and Radiation (“OAR”) submits this supplemental brief prepared by the Office of General Counsel (“OGC”) in response to the Order Directing Supplemental Briefing issued by the Environmental Appeals Board (“Board” or “EAB”) on July 14, 2014, in the above-captioned matter.

In response to the question reflected in the Board’s order, OAR does not read EPA’s Prevention of Significant Deterioration (“PSD”) regulations to require the application of the Best Available Control Technology (“BACT”) with respect to one ozone precursor (nitrogen oxides (“NO_x”) or volatile organic compounds (“VOCs”)) that is not emitted in significant amounts, regardless of whether the proposed source would emit the other precursor in significant amounts. When a proposed new major stationary source has the potential to emit 40 tons per year (“tpy”) or more of either VOCs or NO_x, but not both, a permitting authority does not have an obligation to apply BACT to the ozone precursors that the source does not have the potential to emit in significant amounts. Thus, OAR’s view is that there was no error in the decision of the Massachusetts Department of Environmental Protection (“DEP”) to omit limitations on VOCs from the PSD permit issued to Footprint Power Salem Harbor Development, LP (“Footprint”). The omission of VOC limitations from the PSD permit can also be supported on the ground that VOCs are excluded from PSD because the Footprint facility is to be located in an area designated nonattainment for ozone.

BACKGROUND

In its order dated July 14, 2014, the Board directed OAR and OGC to file a supplemental brief that addresses the following question:

If a proposed new major stationary source has the potential to emit 40 tpy of either VOCs or nitrogen oxides but not both, what obligation does the permitting authority have, in applying BACT to ozone emissions, to apply BACT to the ozone precursor that does not exceed the 40 tpy standard?

OVERVIEW OF EPA REGULATIONS

Under section 165(a)(4) of the Clean Air Act, the construction or modification of a major emitting facility must be “subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility.” 42 U.S.C. § 7475(a)(4). BACT in turn is defined as “an emissions limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility.” 42 U.S.C. § 7479(3).

EPA’s regulation at 40 C.F.R. 52.21(j)(2) states that “[a] new major stationary source shall apply the best available control technology for each regulated NSR [New Source Review] pollutant that it would have the potential to emit in significant amounts.” Similarly, section 52.21(j)(3) states that “[a] major modification shall apply best available control technology for each regulated NSR pollutant for which it would result in a significant net emissions increase at the source.”

“Regulated NSR pollutant” is further defined in EPA’s regulations at section 52.21(b)(50)(i) to include “[a]ny pollutant for which a national ambient air quality standard [NAAQS] has been promulgated,” including “[a]ny pollutant identified . . . as a constituent or precursor to a pollutant for which a national ambient air quality standard has been promulgated.” More specifically, EPA regulations identify that VOCs and NO_x “are precursors to ozone in all attainment and unclassifiable areas.” 40 C.F.R. 52.21(b)(50)(i)(b)(1).

“Significant” is defined in EPA’s regulations at section 52.21(b)(23)(i) in reference to a net emissions increase or the potential of a source to emit a pollutant. As to ozone, this is a rate

of emissions that would equal or exceed “40 tpy of volatile organic compounds or nitrogen oxides.”

Thus, EPA’s PSD regulations do not require application of BACT to pollutants that are emitted in less than significant amounts (in the case of ozone, less than 40 tpy of VOCs or NO_x). This element of EPA’s regulation was based on its inherent authority to exclude from regulation those activities that are *de minimis* or trivial in nature. *See Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans*, 45 Fed. Reg. 52676, 52722-23 (Aug. 7, 1980) (citing *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979)). The Supreme Court has recently affirmed EPA’s authority to limit application of BACT to circumstances where the pollutant is emitted in excess of a *de minimis* level. *See Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 2435 n.1, 2449 (2014).

PERMITS ISSUED BY DEP TO FOOTPRINT SALEM HARBOR

The draft PSD permit prepared by the Massachusetts DEP for public comment contained emissions limitations for VOCs. *See* Exhibit 5 to MassDEP’s Response to the Amended Petition for Review (“DEP Response”) at 6. However, a table in the Fact Sheet prepared by DEP communicated that PSD review did not apply to VOCs and indicated that the annual emissions of VOCs from the project were projected to be 28 tons per year, which is below the 40 tpy PSD significant emissions rate for VOCs listed in the table. *See* Exhibit 1 to DEP Response at 7. The Fact Sheet did not include a BACT analysis supporting the emissions limitations for VOCs. *Id.* at 8-15.

In response to public comments on the permit, DEP stated that “volatile organic compounds (VOC) have been removed from the PSD Fact Sheet and PSD Permit since neither

criteria pollutant will be emitted at or above its available PSD significance level.” Exhibit 20 to DEP Response at 8. DEP reiterated later in its response to comments that “VOC has been removed from the PSD permit since allowable VOC emissions are below the VOC PSD significance level.” *Id.* at 10. In addition, DEP explained that “BACT for CO and BACT for VOC are outside the scope of this PSD Permit, but are addressed in the state issued 310 CMR 7.02 CPA Approval.” *Id.* at 9.

This facility is located in Essex County, Massachusetts, which is designated as a moderate ozone nonattainment area for the 1997 ozone NAAQS and an unclassifiable/attainment area for the 2008 ozone NAAQS. 40 C.F.R. § 81.322. Furthermore, the entire state of Massachusetts is in the Ozone Transport Region (“OTR”). 42 U.S.C. § 7511c(a). For areas within the OTR, the Clean Air Act specifies that “any stationary source that emits or has the potential to emit at least 50 tons per year of volatile organic compounds shall be considered a major stationary and subject to the requirements which would be applicable to major stationary sources if the area were classified as a Moderate nonattainment area.” 42 U.S.C. § 7511c(b)(2).

In addition to the PSD permit, Massachusetts DEP issued a Plan Approval for this facility that includes limits on NO_x intended to satisfy the Lowest Achievable Emissions Rate (“LAER”) requirement under the nonattainment NSR program. *See* Exhibit 23 to DEP Response at 6-7. The Plan Approval also includes limits on VOCs that are based on the Massachusetts minor source permitting requirements. *See* Exhibit 23 to DEP Response at 25. The VOC limits in this permit are identical to the VOC limits that DEP removed from the draft PSD permit. *Compare* Exhibit 23 to DEP Response at 25, *with* Exhibit 5 to DEP response at 6.

ARGUMENT

I. UNDER EPA REGULATIONS, BACT APPLIES ONLY TO OZONE PRECURSORS INDIVIDUALLY EMITTED AT OR ABOVE THE 40 TPY SIGNIFICANT EMISSIONS RATE

When a proposed new major stationary source has the potential to emit 40 tpy or more of either VOCs or NO_x, but not both, the source is only obligated to apply BACT to the ozone precursor that equals or exceeds the 40 tpy threshold. This result is supported by the terms of EPA's PSD regulations, and this reading of EPA regulations has consistently been applied in PSD permitting decisions by EPA and state permitting authorities.

The Petition for Review in this case argues that pollutants should be aggregated for purposes of determining applicability of BACT when those pollutants are precursors of the same NAAQS pollutant. However, this approach is not supported by EPA regulations. EPA regulations require BACT "for *each* regulated NSR pollutant that it would have the potential to emit in significant amounts." 40 C.F.R. 52.21(j)(2) (emphasis added). A "regulated NSR pollutant" includes "[a]ny pollutant for which a [NAAQS] has been promulgated" and "[a]ny pollutant identified ... as a constituent or precursor for a pollutant for which a [NAAQS] has been promulgated." 40 C.F.R. 52.21(b)(50)(i). This definition states further that VOCs and NO_x are precursors to ozone. *Id.* Thus, ozone is a regulated NSR pollutant because it is a "pollutant for which a NAAQS has been promulgated." In addition, VOCs and NO_x are each regulated NSR pollutants because they are precursors to ozone. These definitions do not establish that only ozone is a regulated NSR pollutant. Rather, the precursors to ozone are each also regulated NSR pollutants. Thus, in light of the definition of the term "regulated NSR pollutant," the use of that term in section 52.21(j) should be read to mean that each precursor is individually addressed as a separate pollutant for purposes of determining BACT applicability.

Under section 52.21(j), BACT applies to “each regulated NSR pollutant” that is emitted or increased in “significant” amounts. With respect to ozone, significant is defined as an emission rate of “40 tpy of volatile organic compounds *or* nitrogen oxides.” 40 C.F.R. 52.21(b)(23)(i) (emphasis added). As the emission rate is framed as 40 tpy of one precursor “or” the other (rather than “and”), this provision should not be interpreted to mean that one precursor is considered significant whenever the other precursor is emitted in significant amounts. In light of the fact that each precursor is defined as a “regulated NSR pollutant,” OAR interprets this provision to mean simply that the same emissions rate applies whether evaluating VOCs or NO_x. Each precursor should be addressed separately to determine the potential of the source to emit each precursor in significant amounts. Likewise, because the definition uses the term “or” and not “and,” it cannot mean that both VOCs and NO_x are emitted in significant amounts if the sum of both is greater than or equal to 40 tpy.

This language applying BACT to “each” regulated NSR pollutant that is emitted in significant amounts is not the same as the language EPA regulations use in the context of defining a major source or a major modification. In the major source context, EPA’s regulations say that “a major source that is major for volatile organic compounds or NO_x shall be considered major for ozone.” 40 C.F.R. 52.21(a)(1)(ii). This is consistent with EPA’s historic view that a source is classified as a major source if it emits any regulated NSR pollutant above the major source thresholds. *See* 45 Fed. Reg. at 52710-11. In the major modification definition, EPA’s regulation state that “a major stationary source that is significant for volatile organic compounds or NO_x shall be considered significant for ozone.” 40 C.F.R. 52.21(b)(2)(i). This express language does not appear in section 52.21(j) or 52.21(b)(23)(i).

In 2005, EPA added NO_x as a precursor to ozone in each of these parts of its PSD regulations. *See Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2; Final Rule to Implement Certain Aspects of the 1990 Amendments Relating to New Source Review and Prevention of Significant Deterioration as They Apply in Carbon Monoxide, Particulate Matter and Ozone NAAQS; Final Rule for Reformulated Gasoline*, 70 Fed. Reg. 71612, 71679, 71704 (Nov. 29, 2005). Prior to this rule, the significant emissions rate for ozone in PSD was simply 40 tpy of VOCs. NO_x was not separately identified as a precursor for ozone in the PSD program prior to that time. Nothing in the preamble of the 2005 rule indicates EPA intended for this rule to require BACT for both precursors to ozone when only one precursor is emitted over the significance level. Likewise, nothing in the preamble supports the view that the sum of emissions of both ozone precursors should be compared against a significance level of 40 tpy. In the preamble to the 2005 rulemaking, EPA did note that the requirement to perform an ambient impact analysis applies whenever there is a net increase of 100 tpy or more of NO_x. *Id.* This language indicates EPA’s intent that NO_x be separately evaluated from VOCs when determining the applicability of the substantive PSD requirements to individual pollutants after one determines that the source needs to obtain a PSD permit.

Prior to 2005, EPA only regulated both VOCs and NO_x as ozone precursors in the nonattainment NSR program. When EPA added NO_x as a regulated precursor for ozone in the nonattainment NSR provisions, EPA’s revised the definition of “significant,” which mirrors the current definition of significant in the PSD regulations. *See* 40 C.F.R. 51.165(a)(1)(x)(A). EPA’s proposed rule indicates that the Agency intended that the regulations for NO_x “parallel” the requirements for VOCs. *See Prevention of Significant Deterioration (PSD) and*

Nonattainment New Source Review (NSR), 61 Fed. Reg. 38250, 38297-98 (July 23, 1996). This indicates that EPA intended to create similar requirements for NO_x as those for VOCs.

That EPA generally intended for the significant emissions rates to apply independently to each precursors is also illustrated by subsequent rulemakings regarding PM_{2.5}. In 2008, EPA established a three-part significant emissions rate for PM_{2.5}: 10 tpy of direct PM_{2.5} emissions, 40 tpy of the emissions of sulfur dioxide as a precursor to PM_{2.5}, and 40 tpy of NO_x emissions as a precursor to PM_{2.5}. See *Implementation of New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers (PM_{2.5})*, 73 Fed. Reg. 28321 (May 16, 2008); 40 C.F.R. 52.21(b)(23)(i). Consistent with the application of the significant emission rates for VOCs and NO_x as ozone precursors described above, EPA wrote the PM_{2.5} regulation to make clear that the 40 tpy level applies to each PM_{2.5} precursor independently. EPA did not separately identify a significant emissions rate for direct ozone emissions because ozone, in contrast to PM_{2.5}, is generally not directly emitted by stationary sources. However, this distinction required an additional significant emissions rate for direct PM_{2.5} emissions. At the same time, EPA listed the significant emissions rates for the precursors for PM_{2.5} in separate clauses. This approach to the significant emissions rates for PM_{2.5} precursor is consistent with how EPA has applied the significant emission rate for ozone precursors. There is no indication in the preambles of either the ozone or PM_{2.5} regulations that EPA specifically intended to achieve a different result for application of BACT to ozone precursors when it used a different format for the ozone significant emissions rate in 2005.

The preamble to the 2008 PM_{2.5} rule also discussed whether precursor emissions should be added together in statements addressing the applicability of PSD major source thresholds to PM_{2.5} and its precursors. In this context, EPA noted generally that “[d]ifferent pollutants,

including precursors, are not summed to determine applicability.” 73 Fed. Reg. at 28331. The preamble to this rule continued: “The thresholds set out in the definitions are applied to each relevant pollutant individually, that is, to direct PM_{2.5} emissions and to emissions of each pollutant identified as a PM_{2.5} precursor for the applicable NSR program.” *Id.*

In several PSD permitting decisions since 2005, EPA and state permitting authorities have applied the BACT requirement to only the individual ozone precursor that is emitted by itself above the 40 tpy significance level. As referenced in the response brief of the permit applicant in this case, EPA Region 1 applied BACT to only NO_x in the Pioneer Valley permit under similar circumstances as the Footprint permit. *See* Exhibit L to Response from Footprint Power Salem Harbor Development LP to Amended Petition for Review. This is illustrated by the summary chart on page 8 of the Fact Sheet for the permit and the absence of a BACT analysis for VOCs on pages 9-29 of this document. Region 1’s Fact Sheet and other documents related to this permit are available on EPA’s internet site.¹

Likewise, in several OCS permits, Region 4 required BACT only where a particular precursor is emitted at a rate equal to or greater than 40 tpy. These permits required BACT for NO_x, but not VOCs, where the potential to emit for NO_x equaled or exceeded 40 tpy but the potential to emit VOCs was below 40 tpy. *See* EPA Region 4, Preliminary Determination & Statement of Basis for OCS Air Permit OCS-EPA-R4005 (Anadarko Petroleum Corporation, Phoenix Prospect: Lloyd Ridge 410 #1), pp. 11, 20 (March 23, 2011)² (source major for NO_x with respect to ozone, but below significant thresholds for all other pollutants, including VOCs, is only required to apply BACT for NO_x.); EPA Region 4, Preliminary Determination & Statement of Basis for OCS-EPA-R4006 (Shell Offshore Inc., DeSoto Canyon and Lloyd Ridge

¹ <http://www.epa.gov/region1/communities/nsemissions.html>

² http://www.epa.gov/region4/air/permits/ocspermits/anadarko/Anadarko_PD_032311.pdf;

Area Lease Blocks), pp. 9-10, 21 (Aug. 19, 2011)³ (source required to apply BACT for significant NO_x emissions, with respect to NO₂, ozone, and PM_{2.5}, but not other pollutants, including VOCs, below the significant rates); EPA Region 4, Preliminary Determination & Statement of Basis for OCS-EPA-R4009 (Murphy Exploration & Production Co., Lloyd Ridge 317), pp. 7, 14 (Feb. 29, 2012)⁴ (same).

State permitting agencies have also applied the BACT requirement to ozone precursors in this same manner. *See* Florida Department of Environmental Protection, Technical Evaluation & Preliminary Determination, Draft Permit No. PSD-FL-402A, Project No. 1010373-012-AC (Shady Hills Power Company, LLC), p. 6, 20 (Feb. 7, 2012)⁵ (PSD applicability triggered for NO_x, but not VOCs, as an ozone precursor with respect to BACT); State of Georgia Department of Natural Resources, Prevention of Significant Air Quality Deterioration Review, Preliminary Determination, AIRS Number: 04-13-103-00004, Application Number: 20735 (Simpson Lumber company, LLC Meldrim Operations), pp. 5 (Feb. 2012)⁶ (PSD applicability triggered for VOCs, but not NO_x, as an ozone precursor with respect to BACT); Tennessee, Prevention of Significant Deterioration Preconstruction Review and Final Determination for the Proposed US Nitrogen Construction Modification Project, the New Construction of the Carbon Dioxide Liquefaction Facility & the New Construction of the Yara North America Facility in Midway, Tennessee, pp.

³http://www.epa.gov/region4/air/permits/ocspemits/shell/2011_08_19_Document_Shell_%20Pr elimDeterm.pdf

⁴http://www.epa.gov/region4/air/permits/ocspemits/murphy/2012_02_29_MurphyPreliminaryD etermination.PDF.

⁵http://www.dep.state.fl.us/air/emission/construction/shady_hills/TECHNICAL402A.pdf

⁶<http://www.georgiaair.org/airpermit/downloads/permits/10300004/psd20735/10300004pd.pdf>

6, 10 (June 3, 2014)⁷ (PSD applicability triggered for NO_x, but not VOCs, as an ozone precursor with respect to BACT).

II. VOCs ARE ALSO EXCLUDED FROM PSD IN THIS CASE BECAUSE THE FOOTPRINT FACILITY IS LOCATED IN AN OZONE NONATTAINMENT AREA

There are other grounds in this instance to support the conclusion that the PSD BACT requirement does not apply to VOCs emissions from the Footprint facility. Because the area where the Footprint facility is located is designated nonattainment for the 1997 ozone NAAQS, section 52.21(i)(2) of EPA's regulations operates in this instance to exclude ozone and its precursors from PSD entirely. Notwithstanding the applicability of section 52.21(i)(2) to VOCs and NO_x, there are independent grounds to apply BACT to NO_x in this case because the area is an attainment area for each NO₂ NAAQS. 40 C.F.R. 81.322.

In the context of section 52.21(i)(2), OAR interprets "particular pollutant" to include both VOC and NO_x as ozone precursors. Unlike the BACT provision in section 52.21(j), the exclusion in section 52.21(i)(2) does not use the term "regulated NSR pollutant" which classifies each precursor as a separate "pollutant." As applied in ozone nonattainment areas, section 52.21(i)(2) would have no meaningful effect if "particular pollutant" did not address the ozone precursors.

Although Essex County is designated unclassifiable/attainment for the 2008 ozone NAAQS, section 52.21(i)(2) still applies to exclude ozone precursors from PSD. In cases where EPA has issued separate designations for each NAAQS applicable to a pollutant, EPA has made clear that it interprets the PSD exclusion for non-attainment pollutants in section 52.21(i)(2) to apply based on any nonattainment designation for the pollutant, even if the area is designated

⁷ http://www.tennessee.gov/environment/ppo/docs/air/us-nitrogen-yara-psd_final-determination_06032014.pdf

attainment for other NAAQS for that same pollutant. *National Ambient Air Quality Standard for Particulate Matter*, 78 Fed. Reg. 3086, 3263 (Jan. 15, 2013) (addressing whether dual review, application of both PSD and NNSR, is required when an area is area is designated nonattainment for one PM_{2.5} NAAQS and attainment for the other).

Date: July 25, 2014

Respectfully Submitted,

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

Pursuant to 40 C.F.R. § 124.19(d)(iv), this Supplemental Brief complies with the word limits set by the Board. According to the word count function in Microsoft Word, this Supplemental Brief contains 3,339 words.

/s/

Brian L. Doster

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Supplemental Brief in Response to Board's Order of July 14, 2014, in the matter of Footprint Salem Harbor Development, LP, PSD Appeal No. 14-02, were sent to the following persons by United States mail this 25th day of June, 2014:

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