IN RE PRAIRIE STATE GENERATION STATION

PSD Appeal No. 05-02

REMAND ORDER

Decided March 25, 2005

Syllabus

Before the Board is a petition seeking review of certain conditions of a prevention of significant deterioration permit decision issued by the Illinois Environmental Protection Agency ("IEPA"). The permit was issued to the Prairie State Generating Company, LLC for the construction of a 1500-megawatt coal-fired electric generation facility in Washington County, Illinois. The petitioners, the American Bottom Conservancy, the American Lung Association of Metropolitan Chicago, the Clean Air Task Force, Health and Environmental Justice-St. Louis, the Lake County Conservation Alliance, the Sierra Club, and Valley Watch ("Petitioners"), raise a total of twenty-five issues objecting to various permit provisions.

Among other things, Petitioners assert that IEPA committed legal error when it issued its responsiveness summary seven days after issuing the final permit. In so doing, Petitioners argue that IEPA failed to comply with the procedural requirements of 40 C.F.R. sections 124.17 and 124.18 during the permit issuance process. Those sections require that the permit issuer issue a response to comments document at the time of permit issuance, and base his or her permit decision on the administrative record, including the response to comments. Under these circumstances, before reaching the merits of the substantive issues Petitioners raise, the Board must determine whether to remand the permit decision.

Held: IEPA violated the requirements of 40 C.F.R. sections 124.17 and 124.18 by issuing the permit decision without having the response to comments in the record before it. The failure to issue the response to comments at the time of permit issuance is neither harmless, inconsequential, nor trivial. Thus, IEPA failed to base its final permit decision on the administrative record, which must include the response to comments. Accordingly, IEPA's final permit decision is vacated and remanded. On remand, IEPA must reconsider and reissue a final permit decision, after due consideration of comments received and of the response to comments document, exercising its discretion as appropriate and in accordance with the facts and the law.

Before Environmental Appeals Judges Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge Stein:

I. *STATEMENT OF THE CASE*

Before the Board is a petition seeking review of certain conditions of a prevention of significant deterioration ("PSD") permit decision issued by the Illinois Environmental Protection Agency ("IEPA").[1] The permit was issued to the Prairie State Generating Company, LLC ("Prairie State") for the construction of a 1500-megawatt coal-fired electric generation facility in Washington County, Illinois. The petitioners, the American Bottom Conservancy, the American Lung Association of Metropolitan Chicago, the Clean Air Task Force, Health and Environmental Justice-St. Louis, the Lake County Conservation Alliance, the Sierra Club, and Valley Watch ("Petitioners"), raise a total of twenty-five issues objecting to various permit provisions. *See* Petition for Review ("Petition") (filed Feb. 23, 2005).[2]

Among other things, Petitioners assert that IEPA committed legal error when it issued its responsiveness summary seven days after issuing the final permit. Petition at 20-21. In so doing, Petitioners argue that IEPA failed to comply with the procedural requirements of 40 C.F.R. sections 124.17 and 124.18 during the permit issuance process. Those sections require that the permit issuer issue a response to comments document at the time of permit issuance, and base his or her permit decision on the administrative record, including the response to comments. Under these circumstances, before reaching the merits of the substantive issues Petitioners raise, we must determine whether to remand the permit decision.[3] *See In re Weber # 4-8*, 11 E.A.D. 241, 242 (EAB 2003). For the reasons stated below, we conclude that a remand is appropriate.

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[1] The IEPA administers the PSD program in Illinois pursuant to a delegation of authority from U.S. EPA Region V. *See* 46 Fed. Reg. 9580 (Jan. 29, 1981). Because IEPA acts as EPA's delegate in implementing the federal PSD program within the State of Illinois, the permit is considered an EPA-issued permit for purposes of federal law, and is subject to review by the Board pursuant to 40 C.F.R. § 124.19. *See In re Kendall New Century Dev.*, 11 E.A.D. 40, 47 n.11 (EAB 2003).

[2] Documents are "filed" with the Board on the date they are received.

[3] Both IEPA and the permittee in this matter, Prairie State, have filed partial responses to the Petition addressing this issue. *See* IEPA's Partial Response to Petition (Mar. 15, 2005); Prairie State Generating Company, LLC's Partial Response to Petition (Mar. 15, 2005). Prairie State has also filed a motion seeking leave to intervene in this proceeding. *See* Prairie State Generating Company, LLC Motion for Leave to Intervene (Mar. 15, 2005). To the extent that Prairie State seeks leave to participate in the proceedings by responding to the Petition, the motion is granted and Prairie State's Partial Response has been admitted to the record before the Board in this matter.

II. *RELEVANT BACKGROUND*

Prairie State submitted a permit application to IEPA on October 19, 2001. IEPA issued a draft permit on or about February 4, 2004, and held a public hearing on March 22, 2004, at which Petitioners' representatives testified. *See* Petition at 3 (citing Hearing Transcript, Exhibit 3 to Petition). Petitioners also submitted extensive written comments on the draft permit. *See id*. at 3-4 (citing Exhibits 4-9 to the Petition).

IEPA issued its final permit decision on January 14, 2005. The response to comments document, however, referred to by IEPA as the "responsiveness summary," had not been issued at the time of permit issuance. Rather, according to IEPA, the responsiveness summary was issued on January 21, 2005, seven days after permit issuance. IEPA states that on January 21, 2005, it notified the parties by mail that the final permit has been issued and "directed persons interested in viewing a copy of the Permit or the Responsiveness Summary to the [IEPA]'s Web site." IEPA's Partial Response to Petition ("IEPA's Partial Response") at 2 (Mar. 15, 2005).[4]

III. *ANALYSIS*

Under 40 C.F.R. section 124.17(a), "*[a]t the time that any final permit decision is issued* * * *, the [permit issuer] shall issue a response to comments." 40

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[4] Although Petitioners also use January 21 as the date of issuance for the responsiveness summary, the Board questions whether IEPA's action of simply directing those who participated during the comment period to IEPA's website was sufficient to make the responsiveness summary "available to the public" as required by 40 C.F.R. 124.17(c). IEPA's actions in this regard presupposes that all persons who comment on permits will have access to the internet. In other analogous circumstances, we have found this not to be a reasonable assumption. *See In re Hillman Power Co. L.L.C.*, PSD Appeal Nos. 02-04, 02-05, and 02-06 (Order Directing Service of PSD Permit Decision on Parties that Filed Written Comments On Draft PSD Permit Decision, Denying Motions to Dismiss, and Directing Briefing on Merits) at 4 (EAB, May 24, 2002) ("Indeed, it is not reasonable to assume that all persons who comment on permits will even have access to the internet"). Moreover, merely notifying commenters by mail that a permit had been issued and directing them to a web site to view copies of the permit itself, as IEPA apparently did here, may not satisfy the obligation under 40 C.F.R. § 124.15 to notify "each person who submitted written comments or requested notice of the permit decision." *See In re Hillman Power Co. LLC, supra*, interlocutory order at 3-6 (EAB, May 24, 2002) (finding mere posting on permitting authorities' website to be insufficient to satisfy obligation under 40 C.F.R. § 124.15 to notify commenters of the permit decision), available electronically at http://www.epa.gov/eab/psd-int.loc.ords/hillman.pdf. While it is true that IEPA did give written notice that a permit decision had been issued, a commenter would have no way of determining whether to petition for review or the basis for any such petition until he or she had the opportunity to review the actual permit decision. One consideration raised in *Hillman* was whether merely posting information on a website could adversely affect appeal rights, which are time-limited. However, as these issues were not raised in the present matter, we do not address these issues here.

C.F.R. § 124.17(a) (emphasis added). In addition, under 40 C.F.R. section 124.18, the permit issuer must base the final permit decision on the administrative record, which must be "complete" on the date he or she issues the final permit. Absent a response to comments, the administrative record is not complete. *See In re Weber # 4-8*, 11 E.A.D. 241, 246 (EAB 2003) (vacating and remanding underground injection control permit where permit issuer violated 40 C.F.R. §§ 124.17 and .18 by issuing the permit without having the response to comments in the record). These requirements ensure that the decision maker gives serious consideration to comments before, or at the time of, making his or her final permit decision. *Id*. at 5; *In re Rockgen Energy Ctr.*, 8 E.A.D. 536, 556 (EAB 1999) (remanding part of a PSD permit because the record did not make clear whether the state had meaningfully complied with 40 C.F.R. § 124.18); *In re Atochem N. Am. Inc*., 3 E.A.D. 498, 499 (Adm'r 1991) (vacating permit decision and remanding Resource Conservation and Recovery Act permit where permit issuer failed to timely respond to public comments in accordance with 40 C.F.R. § 124.17 before issuing the permit).

IEPA concedes that the responsiveness summary did not issue at the time of permit issuance and that "strict adherence to the literal command of 40 C.F.R. § 124.17(a) was not observed." *Id*. at 4. Nevertheless, IEPA states that a review of all public comments, and the preparation of a draft responsiveness summary, had begun "well in advance of permit issuance," and that technical staff had considered all comments prior to permit issuance. *Id; see also* Prairie State Generating Company, LLC's Partial Response to Petition ("Prairie State's Partial Response") at 2 (Mar. 15, 2005). IEPA states that it can provide affidavits supporting this assertion. *Id*. at 4 n.1. Further, according to IEPA and Prairie State, the delay in issuing the responsiveness summary resulted from the need to compile the 163-page document. Prairie State's Partial Response at 2; IEPA's Partial Response at 5. Prairie State argues that, under the circumstances, a remand would elevate form over substance and cause unnecessary delay. Prairie State's Partial Response at 2; *see also* IEPA's Partial Response at 8 (stating that the short-term delay was not patently offensive to the applicable regulations).

As the Board stated in response to similar arguments in *In re Weber*, both Prairie State and IEPA miss the point. In particular, the failure to issue the response to comments at the time of permit issuance "is neither harmless, inconsequential, nor trivial." *Weber*, 11 E.A.D. at 245.

> The idea behind the regulations is that the *decision maker* have the benefit of the comments and the response thereto to inform his or her permit decision. Thus, while it is important in its own right that agency staff consider public comments in the course of recommending action on the permit, their review cannot substitute for the obligations the regulations impose on the decision maker. These regu-

> lations focus on the actions of the *decision maker* and the record he or she has to consider, not on whether his or her staff have reviewed public comments and prepared a draft response thereto. Significantly, *Atochem* emphasized that the decision maker must consider comments with a truly open mind, rather than with a view to defending a decision he or she already has made. 3 E.A.D. at 499.

Id. (emphasis in original). *See In re Amerada Hess Corp. Port Reading Refinery*, 12 E.A.D. 1, 18-19 (EAB 2005) (purpose of regulatory requirement in 40 C.F.R. § 124.17 (a) that the "Director" issue a response to comments document at the time the permit is issued is "to ensure that the decision maker has the benefit of the comments and the responses thereto to inform his or her permit decision."). As in *Weber*, accepting IEPA's and Prairie State's arguments that the permit need not be remanded in this case despite the failure to comply with the above-cited regulations, "would denigrate, if not render superfluous, the important role the * * * decision maker must exercise." *Weber*, 11 E.A.D. at 245. We therefore conclude that a remand is in order. As in *Weber*, although this remand might not result in any changes to the final permit, a remand is nevertheless appropriate to ensure that IEPA fully complies with the requirement to give adequate and timely consideration to public comments at the time of issuing the final permit decision.[5] *Id.*

IV. *CONCLUSION*

IEPA violated the requirements of 40 C.F.R. sections 124.17 and 124.18 by issuing the permit decision without having the response to comments in the record before it. Thus, IEPA failed to base its final permit decision on the administrative record, which must include the response to comments. Accordingly, IEPA's final permit decision is vacated and remanded. On remand, IEPA must reconsider and reissue a final permit decision, after due consideration of comments received and of the response to comments document, exercising its discretion as appropriate and in accordance with the facts and the law. *See Weber*, 11 E.A.D. at 246. This remand does not require a reopening of the public comment period. An administrative appeal of the remand decision will be required in order to exhaust adminis-

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[5] Prairie State attempts to distinguish this case from the Board's prior cases by stating that "IEPA gave thoughtful and full consideration to all public comments," and that this consideration is documented in the responsiveness summary. Prairie State's Partial Response at 3. We find Prairie State's assertions unconvincing. Because the responsiveness summary was not issued at the time of permit issuance, it is not clear from the record before us that IEPA gave adequate and timely consideration to public comments. Moreover, as noted above, the key point is that the *decision maker*, not just his or her staff, must have the responsiveness summary before him or her at the time of permit issuance and must base the permitting decision on such summary. 40 C.F.R. §§ 124.17 — .18.

trative remedies under 40 C.F.R. § 124.19(f)(1).[6]

So ordered.[7]

[6] On remand, the parties are also encouraged to pursue the possibility of a negotiated resolution to some or all of the issues raised in the Petition.

[7] On March 24, 2004, Petitioners filed a "Motion for Leave to File Reply Brief on April 1, 2005" ("March 24 Motion"). Petitioners seek the Board's permission to respond to IEPA's and Prairie State's partial replies relating to IEPA's failure to issue the responsiveness summary at the time the final permit decision was issued. Given our decision in this matter, however, the Board concludes that a further response on this issue from Petitioners is not necessary. The March 24 Motion also seeks to "put before the Board a more complete discussion of the irregularities related to the record underlying the permit * * *." March 24 Motion at 2. Given today's decision, however, the Board finds it unnecessary to address this issue at the present time. Similarly, we need not reach Petitioners' March 8 "Motion Requesting the Opportunity to File an Amended Petition Thirty Days After IEPA and USEPA Certify the Record and Make the Record Available to the Public." However, we would expect that, on remand, IEPA will fully comply with its obligations under the applicable regulations to provide petitioners with access to the full administrative record on which the permit decision was based. *See* 40 C.F.R. § 124.18(a) (requiring that a final permit decision be based on the administrative record).