

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

In re:)
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Select Steel Corporation)
of America) Docket No. PSD 98-21
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Permit No. 579-97)
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ORDER DENYING REVIEW

On June 9, 1998, the St. Francis Prayer Center of Flint, Michigan filed a petition for review of a federal Prevention of Significant Deterioration ("PSD") permit issued to Select Steel Corporation of America by the Michigan Department of Environmental Quality ("MDEQ").¹ The permit provides preconstruction authorization under the federal PSD program, see Clean Air Act § 165, 42 U.S.C. § 7475; 40 C.F.R. § 52.21, for Select Steel's proposed steel "mini-mill," which is expected to produce 43 tons per hour of specialty steels when operational.

¹ On September 10, 1979, the Regional Administrator of EPA Region V delegated authority to the State of Michigan to implement and enforce the federal PSD program. See 45 Fed. Reg. 8348 (1980). The permits MDEQ issues in accordance with that program are considered federal permits. See 40 C.F.R. § 124.41 (terms "EPA" and "Regional Administrator" mean the delegate agency when a state exercises delegated authority to administer PSD permit program); 45 Fed. Reg. 33,290, 33,413 (1980) ("For the purposes of Part 124, a delegate State stands in the shoes of the Regional Administrator. Like the Regional Administrator, the delegate must follow the procedural requirements of part 124. . . . A permit issued by a delegate is still an 'EPA-issued permit.'").

The Prayer Center seeks review of seven aspects of Select Steel's permit. See Letter from Fr. Phil Schmitter & Sr. Joanne Chiaverini, St. Francis Prayer Center, to Eurika Stubbs, Clerk, U.S. EPA Appeals Board (June 9, 1998) [hereinafter Petition for Review]. Upon receipt of the Petition for Review, the Environmental Appeals Board ("Board") requested a response from MDEQ, which the State filed on August 19, 1998. See Response of the Michigan Department of Environmental Quality to the Petition of the St. Francis Prayer Center (Aug. 19, 1998) [hereinafter MDEQ Response].

To obtain Board review of a PSD permit decision, a petitioner must, as a threshold matter, have standing to challenge the permit and must appeal issues that have been properly preserved for review. 40 C.F.R. § 124.19(a). The St. Francis Prayer Center clearly has standing to appeal the permit decision in this case because it filed comments on the draft permit and participated in the public hearing. See *id.*; MDEQ Response at 2. Reviewability, however, is less clear: we cannot determine, on the record before us, whether all the issues the Prayer Center raises on appeal were previously raised in comments to MDEQ on the draft permit. See MDEQ, *Select Steel Corporation of America: Response to Comments Document* (May 27, 1998) [hereinafter *Response to Comments*] (summarizing "significant" comments only and providing responses). The Prayer Center does not refer us to written comments or portions of the hearing transcript to prove that the issues it raises on

appeal were raised before MDEQ. Nor does MDEQ allege that the Prayer Center's issues were not raised during the comment period. Instead, MDEQ asserts that "[t]he petitioner in this case has not demonstrated that [MDEQ's] previous responses to [petitioner's] objections were clearly erroneous or otherwise warrant review." MDEQ Response at 4 (emphasis added). In light of this statement and MDEQ's failure to challenge reviewability, we will assume for purposes of this appeal that the issues raised here were raised below and, thus, are properly before us.

To obtain review on the merits, a petitioner must demonstrate that the permit, or, more precisely, a permit condition, is based on:

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

40 C.F.R. § 124.19(a). We address each of the Prayer Center's seven contentions, and MDEQ's responses, in the paragraphs below.

1. *Lead Monitoring*

First, the Prayer Center alleges that Select Steel's permit is deficient because it lacks a monitoring requirement for lead. Petition for Review at 1. In response, MDEQ contends that at present, the technology that would allow continuous monitoring of lead emissions does not exist. MDEQ Response at 4. In the absence of such technology, MDEQ chose to ensure Select Steel's compliance

with the lead emissions limit by requiring the company to install a baghouse for the melt-shop that MDEQ determined satisfies Best Available Control Technology ("BACT").² MDEQ, Supplement to Permit No. 579-97, Select Steel Corp. of America, Flint, MI ¶ 18 (May 27, 1998) [hereinafter PSD Permit]. The permit also mandates monitoring of baghouse operating parameters to ensure proper functioning, performance of a stack test to verify that lead emissions do not exceed the permit limit, visible emissions monitoring, and several maintenance and contingency measures. See PSD Permit ¶¶ 22-24, 28, 32, 34, 36, 40, 49-50. In light of these factors, we cannot find that MDEQ erred by failing to impose on Select Steel a monitoring requirement for lead. Accordingly, we deny review of this issue.

2. *Dioxin Monitoring*

Second, the Prayer Center alleges that the permit allows dioxin emissions to be unmonitored for the first eighteen months of the mill's operation. Petition for Review at 1. In fact, the permit contains no monitoring or any other requirement for dioxin. MDEQ explains that it did not require dioxin monitoring because

² The Clean Air Act and the PSD regulations require, among other things, that new major stationary sources, such as the proposed Select Steel facility, employ the "best available control technology," or BACT, to minimize emissions of regulated pollutants. 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 52.21(j)(2). BACT is determined by the permitting authority on a pollutant-by-pollutant basis, "taking into account energy, environmental, and economic impacts and other costs." 40 C.F.R. § 52.21(b)(12). In its Petition for Review, the Prayer Center has not disputed MDEQ's BACT determination for lead.

continuous emissions monitoring systems for this chemical do not exist. MDEQ Response at 6. Moreover, MDEQ notes that EPA conducted research on American electric arc furnaces ("EAFs") -- presumably of the type to be used by Select Steel (although MDEQ fails to make this clear) -- and concluded that dioxin emissions are not a concern in the operation of such furnaces. EPA reportedly found that American EAFs do not use chlorinated solvents in the melting process, that the EAFs are operated at very high temperatures, and that radiant heat from electricity (rather than coke combustion) is used to melt the scrap metal. MDEQ Response at 7; *Response to Comments* at 8. It is clear that MDEQ, after considering these factors, made a judgment that dioxin monitoring is not necessary in this case. The Prayer Center makes no argument and points out no data to refute MDEQ's judgment. In these circumstances, MDEQ's decision is not clearly erroneous. Thus, we deny review of this issue.

3. *VOC Monitoring*

Third, the Prayer Center alleges that the permit allows volatile organic compound ("VOC") emissions to go unmonitored for the first eighteen months of the mill's operation. This is somewhat of a misreading of the permit: as explained below, Select Steel may operate for one and possibly up to two years before it must begin VOC monitoring. See PSD Permit ¶ 33. More to the point for present purposes, MDEQ notes that Select Steel's potential to emit VOCs is 38 tons per year and that this level of emissions is

not considered "significant" under the PSD regulations. MDEQ Response at 7; see 40 C.F.R. § 52.21(b)(23)(i) (potential to emit 40 tons per year or more of VOCs is "significant" under PSD regulations). MDEQ asserts that because Select Steel's potential to emit VOCs is not significant, "VOC emissions monitoring is not required under federal law." MDEQ Response at 7.

This statement, while technically true, is somewhat misleading. In fact, *pre-application* monitoring of VOCs is not mandatory because Select Steel's potential to emit is less than the significance level, but MDEQ nonetheless retains authority under the federal PSD program to require *post-construction* monitoring of VOCs. See 40 C.F.R. § 52.21(m)(1)(i)(a), (m)(2). Such monitoring can be required if the permitting authority determines it necessary to track the effect VOC emissions may have or are having on air quality.³ 40 C.F.R. § 52.21(m)(2).

The permit issued by MDEQ gives Select Steel one year from plant start-up to implement a continuous emissions monitoring system ("CEMS") for VOCs. PSD Permit ¶ 33. Select Steel may choose to install an alternative monitoring system, called "parametric monitoring," instead of the CEMS, but if it does so MDEQ must first review, test, and accept the system. *Id.* If MDEQ

³ MDEQ states, in its response to the Prayer Center's petition, that the VOC emissions monitoring required in the permit is based on state law. MDEQ Response at 7. While that may be true, the relevant permit condition makes no reference to state law and, instead, cites various federal regulations and guidance documents. See PSD Permit ¶ 33.

rejects the parametric system, the CEMS must be installed within two years of plant start-up. *Id.*

MDEQ does not explain why Select Steel is given up to two years to bring VOC emissions monitoring on-line. However, the regulations give the permitting authority discretion in implementation, 40 C.F.R. § 52.21(m)(2), and the Prayer Center does not explain why it believes MDEQ's exercise of this discretion by allowing this monitoring delay is problematic. We deny review of this issue because the petition identifies neither clear error in MDEQ's decisionmaking processes nor an important policy consideration that justifies Board review.

4. *Blood Lead Levels*

Fourth, the Prayer Center raises the issue of blood lead levels ("BLLs") in children living in the vicinity of the proposed steel mill. The Prayer Center quotes Dr. Rebecca Bascomb, M.D. as stating that "the children of Flint are already 'maxed out' on lead and are 50% above the national average of lead blood levels for children." Petition for Review at 1. The Prayer Center does not explain what is meant by "'maxed out' on lead." *See id.* MDEQ, however, cites a BLL study it conducted that indicates the "level of concern" for lead is 10 micrograms per deciliter (" $\mu\text{g}/\text{dL}$ "). MDEQ, Air Quality Div., *Evaluation of the Potential Dry Deposition and Children's Exposures to Lead Emissions from the Proposed Select Steel Facility*, at 2 (May 15, 1998) [hereinafter *BLL Study*]. At

BLLs above this threshold, children's development and behavior may be adversely affected. *Id.* It may be that the Prayer Center meant, in its use of the term "maxed out," that children in Flint are currently at or near the lead level of concern. MDEQ contends otherwise, based on its interpretation of the results of the BLL study.⁴

MDEQ conducted the BLL study to estimate the potential for air deposition of lead from Select Steel into soil around the proposed facility. MDEQ estimated background levels of lead in air and soils and combined those figures with three different estimates of the amount of lead present in house dust (high, medium, and low). MDEQ then analyzed the differences between children's environmental lead exposure under these three scenarios, in each instance comparing current estimated background BLLs (alternative "a") to estimated BLLs after adding in Select Steel's projected emissions (alternative "b"). MDEQ's findings are presented in Table 4 of the study, which is reproduced below.

**TABLE 4. Modeled Blood Lead Levels for the Three Scenarios,
With and Without the Potential Incremental Impacts
of the [Select Steel] Facility**

⁴ MDEQ also determined that "even with the addition of the lead proposed to be emitted by Select Steel, the lead concentrations would be more than ten times lower than the National Ambient Air Quality Standards." MDEQ Response at 2.

| Scenario | Description of the Scenario | Average BLL in the Population of Children ($\mu\text{g}/\text{dL}$) | Percentage of Children with BLL > 10 $\mu\text{g}/\text{dL}$ |
|----------|---|---|--|
| 1a | background lead in soil and air; zero house dust lead | 2.1 | 0.04 |
| 1b | emission's impacts to soil and air added to scenario 1a | 2.2 | 0.05 |
| 2a | background lead in soil and air; moderate house dust lead (200 $\mu\text{g}/\text{g}$) | 3.3 | 0.87 |
| 2b | emission's impacts to soil and air added to scenario 2a | 3.4 | 0.97 |
| 3a | background lead in soil and air; high house dust lead (2000 $\mu\text{g}/\text{g}$) | 11.8 | 61.13 |
| 3b | emission's impacts to soil and air added to scenario 3a | 11.8 | 61.13 |

MDEQ's study reveals that in the first two scenarios involving low and medium levels of house dust lead, the addition of Select Steel's projected emissions causes a 0.01% and 0.1% increase, respectively, in the percentage of children with BLLs greater than 10 $\mu\text{g}/\text{dL}$. *Id.* at 8 & tbl. 4. Children's BLLs, on average, increased 0.1 $\mu\text{g}/\text{dL}$ in both of those scenarios, although in both cases the average BLLs already were below the 10 $\mu\text{g}/\text{dL}$ level of concern. *Id.* The study also reveals that in the third scenario involving a high level of house dust lead, the addition of Select Steel's emissions has no discernible impact on the percentage of children with BLLs in excess of the level of concern or on the average BLL of affected children. *See id.*

MDEQ characterizes these figures as indicating "at most a very small shift" in children's BLLs attributable to Select Steel.⁵ *Response to Comments* at 3.

The Prayer Center's petition identifies no clear error in MDEQ's analysis or conclusions regarding BLLs in the vicinity of the proposed facility. Thus, we deny review of this issue.

5. *EIS and Cumulative Impacts*

Fifth, the Prayer Center contends that MDEQ failed to prepare an Environmental Impact Statement ("EIS") for the proposed project and failed to assess the cumulative impacts of all sources of pollution in the area. MDEQ did not err by failing to prepare an EIS: as MDEQ rightly points out, PSD permits are not subject to the EIS provisions of the National Environmental Policy Act. MDEQ Response at 7; see 40 C.F.R. §

⁵ Viewed differently, an increase of 0.01% -- from 0.04% to 0.05% -- is actually a 25% increase, and an increase of 0.1% -- from 0.87% to 0.97% -- is an 11.5% increase. As noted in the text, MDEQ has characterized the difference between 0.04 and 0.05 as "very small." In the underlying BLL study, MDEQ stated that "[t]here is a lack of criteria for judging what level of incremental increase in blood lead levels is small enough to be considered 'de minimis' for a preventative regulatory program." *BLL Study* at 9. MDEQ noted further that, while the impacts might be very small and were based on "conservative" assumptions, this called for "risk management decisions." *Id.* at 1, 9.

Based on the BLL data and the fact that both the ambient air quality standard for lead and any relevant ambient air quality increments (e.g., particulate matter) are satisfied, MDEQ concluded that "the negligible potential impact on blood lead levels did not merit denial of the permit application." MDEQ Response at 6. Petitioners have not shown, at least as to the PSD requirements, that this exercise of judgment by MDEQ is clearly erroneous.

124.9(b)(6). In addition, MDEQ states that its Air Quality Division conducted an "additional impact analysis" pursuant to the federal PSD regulations. See 40 C.F.R. § 52.21(o) ("[t]he owner or operator shall provide an analysis of the impairment to visibility, soils and vegetation that would occur as a result of the source . . . and general commercial, residential, industrial and other growth associated with the source"). According to MDEQ, the additional impact analysis "showed that the facility emissions were well below federal and state ambient air quality standards and screening levels, and that no adverse impact on soils and vegetation from the facility is expected." MDEQ Response at 7-8.

Although we have not had the opportunity to review the additional impact analysis for ourselves, we cannot find clear error on MDEQ's part when the the Prayer Center has stated only, in the most general of terms, that the cumulative impact of pollution is "not known." It appears that at least some relevant information about cumulative impacts is, in fact, known. See MDEQ Response at 7-8; *Response to Comments* at 3. Moreover, the Prayer Center has failed to explain why it believes MDEQ's responses to comments on these issues are not adequate. See, e.g., *In re Puerto Rico Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995) ("[T]o establish that review of a permit is warranted, [40 C.F.R.] § 124.19(a) requires a petitioner to both state the objections to the permit that are being raised for review, and to

explain why the [permitting authority's] previous response to those objections . . . is clearly erroneous or otherwise warrants review."). Thus, we deny review of the EIS and cumulative impact issues.

6. *Slag Handling Process*

Sixth, the Prayer Center asserts that "no real process to handle the slag has been developed either on site or elsewhere." Petition for Review at 1. MDEQ counters by referencing Paragraph 45 of the permit, which states:

Applicant shall not operate the facility unless a fugitive dust control program, as approved by the District Supervisor, is implemented and maintained. This program must be designed to limit all fugitive dust emissions from . . . all of the slag material operations throughout the plant.

PSD Permit ¶ 45. In addition, the permit establishes a visible emissions limit for slag handling operations and requires testing to verify that the visible emissions limit is met. PSD Permit ¶¶ 43-44. In light of these provisions, it is plain that MDEQ has considered and addressed the air impacts of slag handling operations. In our view, MDEQ's approach is not clearly erroneous, and the Prayer Center has raised no specific facts suggesting otherwise. Accordingly, we deny review of this issue.

7. *Title VI*

Finally, the Prayer Center claims that MDEQ's decision to grant this permit violates Title VI of the Civil Rights Act because "the vast majority of the people within 3 miles of the

proposed site are minority Americans and will be burdened with a disparate impact of pollution in an already deeply polluted area." Petition for Review at 1. The Prayer Center raised this same Title VI claim in a separate complaint, which it filed with EPA's Office of Civil Rights ("OCR") on the same day as the PSD petition. See Letter from Fr. Phil Schmitter & Sr. Joanne Chiaverini, St. Francis Prayer Center, to Diane E. Goode, Director, U.S. EPA Office of Civil Rights (June 9, 1998). OCR accepted the Prayer Center's complaint for further processing on August 17, 1998, and provided MDEQ 30 days in which to respond to the allegations raised therein. See Letter from Ann E. Goode, Director, EPA-OCR, to Dennis Drake, Chief, Air Quality Division, MDEQ (Aug. 17, 1998). After receipt of MDEQ's response, OCR will continue its process for investigating the Title VI allegations. See 40 C.F.R. § 7.120(d).

We must deny review of this claim on jurisdictional grounds. EPA has chosen to assign to OCR -- and not to the Board -- responsibility for ensuring Agency compliance with Title VI. OCR will therefore address the Prayer Center's Title VI concerns on behalf of the Agency in accordance with its own procedures. See 40 C.F.R. Part 7. The Board, for its part, has no jurisdiction to evaluate and resolve Title VI complaints.

In sum, we deny review of all the elements of the Prayer Center's petition.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 9/11/98

By: _____/s/_____

Ronald L. McCallum
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of Select Steel Corporation of America, Docket No. PSD 98-21, were sent to the following persons in the manner indicated:

By Certified Mail,
Return Receipt Requested:

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_____/s/_____
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