

EPA Environmental Appeals Board Denies Citizens' Petition For Review Of Air Permit

Four citizens filed a petition with the United States Environmental Protection Agency (EPA) Environmental Appeals Board (EAB) for review of a prevention of significant deterioration (PSD) air permit issued by the Michigan Department of Environmental Quality (MDEQ) to Indeck-Niles L.L.C. (Indeck) to construct a 1,076 megawatt natural gas-fired turbine electrical generating station in Niles, Michigan. The EAB rejected all five of the issues raised as bases for the EAB to review issuance of the PSD permit. In addition, one of the citizens was dismissed from the case because he did not participate in the public hearing or submit written comments on the permit and, therefore, lacked standing to participate in the petition for review under EPA's Clean Air Act (CAA) rules.

Indeck submitted a PSD permit application to MDEQ to build a new natural gas-fired generating station in November 2000. Niles, Michigan is located in an area designated by the EPA as "attainment" or "unclassifiable" for meeting the national ambient air quality standards (NAAQS) for the "criteria" air pollutants of particulate matter, carbon monoxide (CO), nitrogen oxides (NO_x), and ozone. Particulate matter is regulated in the form of particulate matter with an aerodynamic diameter of less than or equal to a nominal 10 micrometers, abbreviated as "PM₁₀." An air pollution source's compliance with the ozone NAAQS is measured in terms of its emission of volatile organic compounds (VOCs), which are ozone precursors.

EPA's PSD rules require the permitting agency (MDEQ) to perform an ambient air quality and source impact analysis as part of a preconstruction review process in order to determine that a new major source will not contribute to exceeding either the NAAQS or a PSD air quality "increment." An "increment" is the "maximum allowable increase in concentration that is allowed to occur above a baseline concentration for a pollutant." In addition, the PSD

regulations require that a new major source employ “best available control technology” (BACT) to control emissions of the criteria air pollutants.

MDEQ determined that the Indeck generating station met the definition of a major source – which is defined by EPA in the case of electric generating plants as “a fossil fuel-fired steam electric plant of more than 250 million British thermal units per hour heat input that emits 100 tons per year or more of any pollutant subject to regulation under the Clean Air Act.” Based on information provided by Indeck, MDEQ determined that the Indeck generating station had the potential to emit CO, NO_x, PM₁₀, and VOCs in amounts qualifying as “significant” under EPA’s PSD regulations and would be required to install control technology representing BACT for those emissions. The citizens did not contest, however, MDEQ’s selection of BACT for the Indeck generating station.

MDEQ prepared an ambient air quality report in which it included that the Indeck generating station would not cause or contribute to any violations of the relevant air quality standards, issued a draft permit in September 2001, and held a public hearing on the draft permit. A final permit was issued in December 2001, along with MDEQ’s response to the comments it had received from the public.

Five Issues Raised for Review

The citizens raised five issues in their petition for review of the Indeck’s PSD permit:

1. The citizens argued that the Indeck generating station will be a source of the hazardous air pollutant (HAP) formaldehyde and that Indeck had mischaracterized the amount of HAPs that will be emitted by the station in an attempt to evade maximum available control technology (MACT) requirements under the CAA that would be imposed in the future. They complained that MDEQ relied exclusively on the information provided by Indeck and

Indeck's turbine supplier without seeking third party review of the data. They also argued that the formaldehyde emissions should be subject to continuous monitoring to ensure that they do not exceed threshold levels.

2. The citizens argued that air modeling studies performed by MDEQ did not adequately account for local topography in the vicinity of the Indeck generating station - that meteorological data from South Bend, Indiana; Flint, Michigan; or the Palisades nuclear plant in Covert, Michigan did not mimic conditions in the Niles area.
3. The citizens requested that the EAB require an economic impact analysis of the effects of siting multiple power plants in southwestern Michigan and north-central Indiana, arguing that to allow that allowing increases of the criteria air pollutants in the area would cause the area to lose the ability to attract industry and adversely impact community health.
4. The citizens next argued that the generating station should be required to cease its gas-fired turbine operations on "ozone action days" because the NO_x emissions from the facility are an ozone precursor.
5. Finally, the citizens argued that the permit should contain a requirement that the generating station should also immediately cease operations whenever any citizens complained about ammonia odors because they were concerned that the NO_x emission control technology to be employed might result in emissions of ammonia.

Standard Of Review

The EAB next explained the standard of review it is required to employ in reviewing the citizens' petition for review. The EAB stated that under EPA's regulations, a decision to issue a PSD permit ordinarily will not be reviewed "unless the decision is based on either a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or

exercise of discretion that warrants review.” The EAB explained that the burden of demonstrating that review is warranted rests on the person challenging a permit decision and that the person must state the objections to the permit raised for review and explain why the issuing agency’s previous responses to those objections is clearly erroneous or otherwise warrants review – that it is not enough for the person to simply restate the objections previously raised in the public comment period. The EAB must also assess whether the objections relate to the PSD program – if they do not, then the EAB has no jurisdiction. The EAB ultimately concluded that four of the five issues raised in the petition for review were not within the EAB’s jurisdiction or were otherwise not a part of the PSD program.

No Jurisdiction To Hear Issues One, Three, Four, And Five

The EAB next explained that its jurisdiction extends only to issues that relate either to the explicit requirements of the CAA’s PSD provisions, EPA’s PSD regulations, or that are otherwise linked to the PSD program. Quoting an earlier EAB decision, it stated:

The PSD review process is not an open forum for consideration of every environmental aspect of a proposed project, or even every issue that bears on air quality. In fact, certain issues are expressly excluded from the PSD permitting process. The Board will deny review of issues that are not governed by the PSD regulations because [the Board] lacks jurisdiction over them.

Regarding the first issue – emissions of the HAP formaldehyde – the EAB held it had no jurisdiction to review this issue because the PSD statutory provisions and regulations do not apply to HAPs regulated under the CAA. The EAB explained that the only exception to this general rule is that if a control technology has the effect of increasing emissions of a HAP, then that effect may be considered in selecting BACT for the facility. The citizens did not raise this issue in their petition for review, however, they only argued that MDEQ should have not relied

on emission data provided by Indeck and its suppliers and that formaldehyde emissions should be continuously monitored.

The EAB also held that the fourth and fifth issues were outside of its jurisdiction. The EAB stated that the fourth issue, that the facility should be required to shut down on ozone action days, and the fifth issue, that the facility should be required to shut down on citizen complaints of ammonia odors, were both environment-related issues that arise under state or local laws, not under the federal PSD program. The EAB explained that “ozone action days” are part of a voluntary program implemented on a local level and that odor issues are governed by the Michigan air pollution control rules. The EAB also noted that, as was the case with formaldehyde, the citizens had not argued that ammonia emissions would be a potential incidental effect or collateral impact of the control technology selected as BACT.

Regarding the third issue, the siting of multiple power plants in southwestern Michigan and north central Indiana, the EAB noted that issues relating to siting are not necessarily beyond its jurisdiction, but that it has typically deferred to state and local agencies responsible for zoning and land use decisions. Accordingly, the EAB declined to review the citizens’ arguments based on local business and land-use planning issues.

Dismissal Of Issue Two

Regarding the second issue, the citizens argued that “the city of Niles straddles the St. Joseph River and would be the recipient of air emissions from the proposed plant during periodic climatic temperature inversions and the more frequent wind direction/speed phenomena that occurs [sic] almost daily in which during early morning and evening hours there are winds from the northeast at six to seven miles per hour.” They further argued that “[r]elying on surface meteorological data from South Bend, Indiana and upper air data from Flint, Michigan or the

Palisades Nuclear Plant in Covert, Michigan does not in any way mimic meteorological/topological interactions in the Niles area.”

These issues were raised by the citizens in comments filed with MDEQ during the public comment period for the permit. The EAB concluded that the citizens had failed to show that MDEQ’s response to these issues was clearly erroneous or that the issue otherwise warranted review by the EAB.

The EAB stated that MDEQ explained in its response to comments that it used actual topological data in its modeling analysis, contrary to the citizens’ argument. Regarding the citizens’ arguments on the meteorological data, the EAB observed that the issues raised were highly technical in nature and that, absent compelling circumstances, the EAB would defer to the permitting agency’s determination on such issues that rely heavily on the agency’s technical expertise.

After quoting MDEQ’s response to the citizens’ comments, the EAB stated that MDEQ’s response showed “that MDEQ understood [the citizens’] concerns regarding localized weather inversions” and that “MDEQ’s response to comments also shows that MDEQ analyzed whether the meteorological data were representative of the local conditions and that MDEQ concluded that the data were sufficiently representative.” MDEQ explained that it used data from the Palisades nuclear plant in Covert in order to determine whether the proximity of Lake Michigan would affect the modeling results and that the data collected there actually resulted in modeled impacts that were lower than those predicted using the South Bend data. MDEQ concluded that this result showed that the South Bend data were sufficiently representative for determining whether emissions from the Indeck generating station would result in any of the applicable air quality standards being exceeded.

The EAB explained that EPA's guidance states a preference for site-specific meteorological data if one or more years of quality-assured site-specific data is available. The guidance further states that if at least one year of such site-specific data is not available, then five years of meteorological data from the nearest National Weather Service (NWS) station may be used. Data from other sources may also be used if that data is equivalent in accuracy and detail to the NWS data and is more representative of the area involved.

The EAB stated that the citizens had not shown that one or more years of quality-assured site-specific meteorological data was available for the Niles area and that the citizens had not produced any evidence that MDEQ erroneously concluded that the South Bend data was sufficiently representative. Therefore, the EAB held that the citizens had not met their burden of showing that MDEQ's response to their comments on ambient air quality and source impacts was clearly erroneous and, accordingly, also denied the citizens request for review of the second issue in their petition.

In Re: Indeck-Niles, L.L.C., PSD Appeal No. 02-03 (March 11, 2002).

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