(Slip Opinion)

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

In the Matter of:	
Multitrade Limited Partnership	PSD Appeal No. 92-2

(Decided April 29, 1992)

ORDER DENYING REVIEW

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Timothy J. Dowling (Acting).

MULTITRADE LIMITED PARTNERSHIP

PSD Appeal No. 92-2

ORDER DENYING REVIEW

Decided April 29, 1992

Syllabus

In separate petitions for review, two citizens, Margaret P. West and Dale Phillips, have challenged the decision of the Virginia Department of Air Pollution Control (VDAPC) to issue an amended prevention of significant deterioration (PSD) permit to Multitrade Limited Partnership, for construction and operation of a small wood-fired power generation plant. VDAPC recently amended the permit to delete coal as a fuel option and to include a restriction preventing the facility from operating until certain specific offsets are obtained and made enforceable. Both Ms. West's petition and Mr. Phillips' petition challenge the amended permit because it does not contain a provision that was in the original version. The omitted provision required recordkeeping of wood shipments to the facility. Mr. Phillips' petition also raises the issue of whether the shut down of another company's boilers, which will provide offsets for Multitrade's emissions, will be federally enforceable.

Held: Ms. West's petition for review is denied because it fails to identify any factual or legal errors or any policy consideration or exercises of discretion that warrant review. Mr. Phillips' petition is denied because it was not filed in a timely fashion and because it fails to identify any factual or legal errors or any policy considerations or

exercises of discretion that warrant review.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Timothy J. Dowling (Acting).

Opinion by Judge McCallum:

In separate petitions for review, two citizens, Margaret P. West and Dale Phillips, have challenged the decision of the Virginia Department of Air Pollution Control (VDAPC) to issue an amended prevention of significant deterioration (PSD) permit to Multitrade Limited Partnership, for construction and operation of a small wood-fired power co-generation plant in the northern part of Pittsylvania County, Virginia. As requested by the Environmental Appeals Board, VDAPC has filed a response to the petitions. For the reasons set forth below (following page) the petitions for review are denied.

Under the rules governing this proceeding, there is no appeal as of right from the permit decision. Ordinarily, a petition for review of a PSD permit determination is not granted unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. See 40 CFR 124.19 (a). The preamble to the regulations states that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional [State] level***." 45 Fed. Reg. 33,412 (May 19, 1980). The burden of demonstrating that the permit conditions should be review is therefore on the petitioner. In this case, the petitioners have not carried that burden.

Background: An earlier version of the permit was issued on April 8, 1991. Numerous parties appealed the earlier version, and after settlement negotiations with several of the parties, Multitrade agreed to ask VDAPC to amend the permit significantly by, inter alia, deleting the use of coal as a permitted fuel. As a result of the settlement negotiations, some of the parties withdrew their petitions. With respect to the other petitions, the Administrator dismissed them without prejudice on January 21, 1992, since the issues raised in the petitions would likely become moot by reason of Multitrade's stated intention to seek substantial changes in the permit. The Administrator remanded the permit to the State for whatever proceedings it deemed appropriate in response to Multitrade's request for permit changes. Subsequently, in accordance with Multitrade's request, VDAPC amended the permit to delete coal as a fuel option and to include a restriction preventing the facility from operating until certain specific offsets are obtained and made enforceable. The amended version of the permit was issued on February 21, 1992.

West Petition: Margaret West challenges the amended permit because it does not contain a provision that was in the original version. The omitted provision required recordkeeping of wood shipments.[See footnote 1]

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Footnote 1. The omitted provision reads as follows:

> The permittee shall maintain records of all wood shipments, including origin of shipment and a certification that the wood fuel

(continued...)

VDAPC represents that the provision was left out by mistake and, upon completion of the appeal, it will add language to the amended permit that is almost identical to the omitted language. VDAPC also points out that the amended permit still contains Specific Conditions 21 and 22, which together (i) define the type of wood that may be burned at the facility, (ii) require that wood burned at the facility be analyzed, upon the request of VDAPC, and (iii) specify that records of the analyses be kept current for the most recent three-year period. Moreover, we note that the omitted permit provision relates wholly to State-law concerns unrelated to the applicable federal PSD regulations at 40 CFR 52.21. In light of these considerations, we conclude that Ms. West's petition does not identify any factual or legal errors or any policy considerations or exercises of discretion that warrant review. Her petition is therefore denied.[See footnote 2]

Phillips Petition: VDAPC received a copy of a petition for review from a citizen named Dale Phillips. VDAPC has included a copy of the Phillips petition with its response to the West petition and has responded to the issues raised in the Phillips petition. The petition is in the form of a letter addressed to this Agency's Administrator at the Headquarters address and dated March 20, 1992. Other than the copy forwarded by VDAPC, however, there is no indication that the Agency ever received the letter, and the Agency did not receive VDAPC's copy of the petition until well after the deadline for filing the petition had passed. Accordingly, Mr. Phillips's petition is denied as untimely.

As an alternative holding, we conclude that Mr. Phillips' petition must be denied on the merits. The petition raises two issues, the first of which is the same Issue raised by Ms. West, discussed above. The second issue relates to Specific Condition 34 of the revised permit, which provides as follows:

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(...continued)

> meets the definition of wood as stated in Specific Condition 21 of the revised permit. These records shall be available on site for inspection by Department personnel and shall be kept current for the most recent three-year period. (Section 120-02-11 of State Regulations).

Footnote 2. Because curing the omission will only involve a minor amendment to the permit to address a matter under State, not federal, law, the permit may reissue without further recourse to the Agency.

> On September 18, 1991, the Aqualon Company ("Aqualon") notified the Department that Aqualon had permanently ceased all air emissions of any pollutant regulated under the federal Clean Air Act, the Virginia Air Pollution Control Law and the Regulations promulgated under those laws, from four boilers (the "Boilers") located at the corner of Hercules Road and Winston Churchill Drive in Hopewell, Virginia. On September 20, 1991, the Department notified Aqualon Company that the shut down of the Boilers was state enforceable. Multitrade Limited partnership shall not commence commercial operation of the facility described in this permit until the shut down of the boilers is federally enforceable, provided however, that such commercial operation may commence if the shut down of the Boilers has not become federally enforceable within twelve (12) months after the date of this permit.

(Permit, Specific Condition 34, p. 10.)

In his petition, Mr. Phillips complains that Specific Condition 34

> is very confusing and seems contradictory to me. The revised permit does not make it clear that the offsets at Aqualon are required to be made federally enforceable. I request that this matter be clarified before the permit becomes final and the offsets be made federally enforceable.

It is important to emphasize at the outset that neither the Clean Air Act nor its implementing regulations requires Specific Condition 34 to be in permit. Specific Condition 34 was placed in the permit at the request of the permittee pursuant to a settlement agreement among Multitrade, the Department of the Interior, and various environmental groups. Neither EPA nor VDAPC was a party to the settlement agreement. In addition, no one is contending that Specific Condition 34 does not implement the settlement agreement faithfully: the settlement agreement, like Specific Condition 34, provides that

Multitrade may not commence commercial operation of the facility until the Aqualon shut-downs are federally enforceable, provided however that within a year after the permit amendment, Multitrade may commence commercial

operations even if the Aqualon shut-downs have not been made federally enforceable.[See footnote 3]

As we read the petition, petitioner's principal concern appears to be that the permit provision does not ensure that the Aqualon shut-downs will be federally enforceable by the time Multitrade commences commercial operation of the facility. Petitioner is apparently disturbed by the possibility that, after 12 months, the permit would allow Multitrade to commence commercial operation even if the Aqualon shut-downs have not become federally enforceable. This is not a matter that can, or should, be rectified by us, for the plain terms of the settlement agreement clearly contemplate that possibility, and Specific Condition 34 merely mirrors the settlement agreement. Since EPA is not a party to the agreement, and in the absence of some reason for concluding that the permit is unlawful, petitioner's concern about federal enforceability does not provide any justification for reviewing the permit provision. For instance, petitioner has not shown or alleged any basis for believing that Multitrade's permit will violate federal law if the Aqualon shut-downs are not a federally enforceable condition to Multitrade's permit. (We note for the record that VDAPC is of the opinion, as expressed in its response to the petition, that the Aqualon shut-downs are federally enforceable, e.g., through the State Implementation Plan.) Nor has petitioner given us any other reason to review this permit provision. Accordingly, we conclude that Mr.

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Footnote 3. The settlement agreement provides as follows:

> Multitrade shall not commence commercial operation of the Facility until after the Consent Agreement or other mechanism to prohibit the Aqualon emissions from the Boilers has become state enforceable and federally enforceable, provided however, that Multitrade may commence commercial operation if the state-enforceable prohibition on Aqualon emissions from the Boilers has not become federally enforceable within twelve (12) months after the permit for the Facility has been changed in accordance with Paragraph 1 of this Agreement.

(quoted in VDAPC's Response, at 4.)

Phillips' petition does not identify any factual or legal errors or any policy considerations or exercises of discretion that warrant review. His petition is therefore denied, and the permit is final for purposes of federal law.

So ordered.