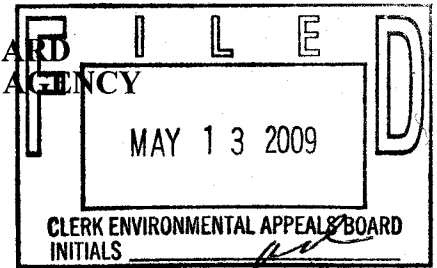


US EPA ARCHIVE DOCUMENT

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



In re:

Dominion Energy Brayton Point, LLC

Permit No. 052-120-MA14

PSD Appeal No. 09-01

ORDER DENYING PETITION FOR REVIEW

On April 2, 2009, U.S. EPA Region 1 ("Region") issued a Prevention of Significant Deterioration ("PSD") permit to Dominion Energy Brayton Point, LLC ("Dominion") authorizing construction and operation of two new natural draft cooling towers at Dominion's existing facility in Somerset, Massachusetts. In a two-page petition filed with the Environmental Appeals Board ("Board") on May 1, 2009, Bristol County Broadcasting, Inc. ("BCB") seeks review of the permit pursuant to 40 C.F.R. § 124.19 (Appeal of RCRA, UIC, NPDES, and PSD Permits). *See* [BCB] Petition for Review (May 1, 2009) ("Petition"). In particular, BCB seeks Board review on the ground that "the construction of the cooling towers in proximity to Bristol County's broadcast tower would have a significant adverse affect on its AM radio transmissions." *Id.* at 1. On May 7, 2009, the Region filed a response to BCB's Petition along with a request that the Board expedite any decision

in this matter.¹ See Response to Petition for Review and Request for Expedited Decision (May 7, 2009).²

Under the rules governing this proceeding, a PSD permit ordinarily will not be reviewed 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 C.F.R. § 124.19(a); 45 Fed. Reg. 33,290, 33,412 (May 19, 1980). The Board's analysis of PSD permits is guided by the preamble to section 124.19, which states that the Board's power of review "should be only sparingly exercised" and that "most permit conditions should be finally determined at the [permit issuer's] level." 45 Fed. Reg. at 33,412; accord *In re Cardinal FG Co.*, 12 E.A.D. 153, 160 (EAB 2005). The burden of demonstrating that review is warranted rests with the petitioner. *In re BP Cherry Point*, 12 E.A.D. 209, 217 (EAB 2005); *In re Steel Dynamics, Inc.*, 9 E.A.D. 740, 744 (EAB 2001). Further, as the Board has previously stated, the Board's jurisdiction to review PSD permits extends only to those

¹ According to the Region, an expedited decision is necessary "to avoid serious environmental harm to the Mount Hope Bay aquatic ecosystem." Response to Petition for Review and Request for Expedited Decision at 1 (May 7, 2009). The Region states, in part, as follows:

Pursuant to the federal Clean Air Act, the Region issued the challenged [PSD] permit * * * to Dominion Energy Brayton Point, LLC ("Dominion"), to authorize Dominion's construction of cooling towers at its Brayton Point Station power plant. The Region had previously issued Dominion an administrative compliance order under the federal Clean Water Act requiring Dominion to construct the cooling towers (for which the challenged PSD permit is required) in order to remedy serious harm to the Mount Hope Bay aquatic ecosystem. * * * [B]ecause of the schedule and sequence of steps in the construction and startup of the cooling towers, even brief delays caused by this litigation could unnecessarily result in an additional year of delay in completing the cooling tower project and an attendant additional year of serious damage to the aquatic ecosystem of Mount Hope Bay.

Id. at 1-2.

² Dominion has filed a motion to intervene in this matter. Dominion Energy Brayton Point, LLC Motion for Leave to Intervene (May 11, 2009). Upon consideration, Dominion's motion is granted and its brief in support of summary disposition is hereby admitted to the record before the Board.

issues relating to permit conditions that implement the federal PSD program. *See In re Hawaii Elec. Light Co., Inc.*, 10 E.A.D. 219, 238 (EAB 2001). The PSD review process is not an “open forum for consideration of every environmental aspect of a proposed project,” *In re Knauf Fiber Glass GmbH*, 8 E.A.D. 121, 127 (EAB 1999), and “[t]he Board will deny review of issues that are not governed by the PSD regulations because it lacks jurisdiction over them.” *In re Russell City Energy Center*, PSD Appeal No. 08-01, slip op. at 40 (July 29, 2008), 14 E.A.D. ____; *see also In re Sutter Power Plant*, 8 E.A.D. 680, 688 (EAB 1999); *Zion Energy, L.L.C.*, 9 E.A.D. 701, 706 (EAB 2001). Under the applicable regulations, the Board is charged only with ensuring that a PSD permit decision comports with the requirements of the federal PSD program. *See Clean Air Act* § 165(a)(4), 42 U.S.C. § 7475(a)(4).

Moreover, the applicable regulations impose other important thresholds to review. As the Board has made clear, section 124.13 imposes an obligation on persons who believe that a proposed permit issuance is inappropriate to “raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position” during the public comment period. 40 C.F.R. § 124.13. *In re ConocoPhillips Co.*, PSD Appeal No. 07-02, slip op. at 7 (June 2, 2008), 13 E.A.D. _____. As we have stated before, the regulatory requirement that petitioners raise issues during the public comment period “is not an arbitrary hurdle, placed in the path of potential petitioners simply to make the process of review more difficult; rather it serves an important function related to the efficiency and integrity of the overall administrative scheme.” *In re Christian County Generation, LLC*, PSD Appeal No. 07-01, slip op. at 14, 13 E.A.D. ____, ____ (quoting *BP Cherry Point*, 12 E.A.D. 209, 219 (EAB 2005)) (citation omitted). “The purpose of such a provision is to ‘ensure that the Region has an opportunity to address potential problems with the draft permit before the permit

becomes final, thereby promoting the longstanding policy that most permit decisions should be decided at the regional level, and to provide predictability and finality to the permitting process.” *In re Shell Offshore, Inc.*, PSD Appeal Nos. 07-01 & 07-02, slip op. at 53 n.55, 13 E.A.D. at ____ (quoting *In re New England Plating Co.*, 9 E.A.D. 726, 732 (EAB 2001)); *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999); *see also Christian County*, slip op. at 14, 13 E.A.D. at ____ (“The effective, efficient and predictable administration of the permitting process demands that the permit issuer be given the opportunity to address potential problems with draft permits before they become final.”) (quoting *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 (EAB 1999)). The Board routinely denies review of issues raised on appeal that were reasonably ascertainable, but were not raised during the public comment period. *See Christian County*, slip op. at 12, 13 E.A.D. at ____ (citing, e.g., *Shell Offshore*, slip op. at 52-53, 13 E.A.D. at ____; *BP Cherry Point*, 12 E.A.D. at 218-20).

In this case, nothing in the petition before us challenges any provision of the PSD permit governing air emissions of regulated pollutants. Rather, as stated above, BCB alleges only that construction of the cooling towers will interfere with AM radio transmissions, thus putting it outside the scope of the Board’s jurisdiction over PSD permit decisions.

In addition, although it appears that BCB prepared comments relating to the construction of the cooling towers, these comments were submitted to the State of Massachusetts rather than to the Region. Moreover, the comments were submitted on March 13, 2009, fourteen days after the close of the Region’s public comment period. *See Public Notice of Federal Prevention of Significant Deterioration Permit and Public Comment Period* (stating that public comments on the draft permit

should be submitted to U.S. EPA Region 1 no later than February 27, 1009). Thus, even if the comments had been filed with the Region rather than the State, the Region would have had no obligation to consider comments filed after the close of the comment period. See *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 194 n.32 (EAB 2000). Thus, based on the record presently before us, BCB lacks standing to appeal. See *In re Beeland Group, LLC*, UIC Appeal No. 08-02, slip op. at 8-9 (Oct. 3, 2008), 14 E.A.D. ____.

Under these circumstances, for the reasons stated above, BCB's petition for review is hereby denied.

So ordered.³

Dated: May 13, 2009

ENVIRONMENTAL APPEALS BOARD

By: Charles J. Sheehan
Charles J. Sheehan
Environmental Appeals Judge

³ Although the Board will ordinarily provide a petitioner with 10 days to file a response to a motion for summary dismissal, where, as here, a petition is jurisdictionally deficient on its face and exigent circumstances exist justifying an expedited decision, the Board may issue its decision without a reply from petitioner.

The panel deciding this matter is comprised of Environmental Appeals Judges Charles J. Sheehan, Edward E. Reich, Kathie A. Stein. See 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Denying Petition for Review in the matter of Dominion Energy Brayton Point, LLC, PSD Appeal No. 09-01 were sent to the following persons in the manner indicated:

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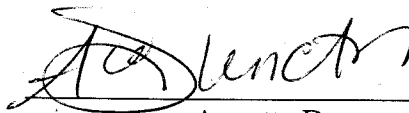
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Dated: MAY 13 2009



Annette Duncan
Secretary