IN THE MATTER OF OGDEN MARTIN SYSTEMS OF ONONDAGA, INC., ET AL.

PSD Appeal No. 92–7

ORDER DENYING REVIEW

Decided December 1, 1992

Syllabus

Five citizens' organizations have filed a joint petition for review of a Prevention of Significant Deterioration (PSD) permit issued to Ogden Martin Systems of Onondaga County, Inc. and the Onondaga County Resource Recovery Authority. The permit was issued on June 15, 1992, by the New York State Department of Environmental Conservation pursuant to a delegation of authority from U.S. EPA. The permit authorizes construction of a solid waste incinerator in Onondaga County, New York.

Petitioners raise six issues. They claim that four permit conditions that impose emissions limitations and monitoring requirements on the facility do not represent best available control technology (BACT). Additionally, they argue that the permit should be remanded for a new BACT analysis to take into account recently enacted state legislation that they claim will affect the "economic assumptions" on which the permit determination was based. Finally, they argue that the permit conditions do not represent BACT for NO, because they do not require the separation of food wastes and rubber from the waste stream prior to combustion.

Held: The petition for review is denied. Petitioners have not demonstrated that the four technical issues were raised during the comment period on the draft permit and therefore these issues have not been preserved for review. The petition for review of the issues relating to the economic assumptions is denied because the New York State law to which the petitioners refer had not been enacted as of the date the permit was issued, and thus, need not have been considered in the State's BACT analysis. Finally, the petition for review of the source separation issue is denied because the petitioners have not demonstrated that the consideration of materials separation of food wastes and rubber as part of the BACT analysis was inadequate.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich:

The New York State Department of Environmental Conservation (hereinafter "NYSDEC") issued a Prevention of Significant Deteriora-

tion (PSD) permit on June 15, 1992, authorizing Ogden Martin Systems of Onondaga County, Inc. and the Onondaga County Resource Recovery Agency to construct a solid waste incinerator in Onondaga County, New York. The NYSDEC issued the permit pursuant to a delegation of authority from U.S. EPA under 40 C.F.R.§52.21(u). Because of the delegation, the New York permit is considered an EPA-issued permit for purposes of federal law (40 C.F.R. §124.41; 45 Fed. Reg. 33423 (May 19, 1980)), and is subject to review under 40 C.F.R. § 124.19 before becoming final. Recycle First, Inc., the Atlantic States Legal Foundation, Inc., the Iroquois Group of the Sierra Club, the Jamesville Positive Action Committee and the Outer Comstock Neighborhood Association have filed a joint petition for review[1] of the permit, asking that the permit be remanded for reconsideration. As requested by the Environmental Appeals Board, the NYSDEC has filed a response. For the reasons stated below, the petition for review is denied.

A petition will not ordinarily be granted unless the permit determination is clearly erroneous or involves an exercise of discretion or policy that is important and therefore should be reviewed as a discretionary matter. 40 C.F.R. § 124.19. As the preamble to the Part 124 regulations states: "[the] power of review should be only sparingly exercised" and "most permit conditions should be finally determined at the Regional [State] level * * *." 45 Fed. Reg. 33,412 (May 19, 1980). The burden of demonstrating entitlement to review rests on the petitioners. ***In re Hadson Power 14-Buena Vista,*** PSD Appeal Nos. **92–3, 92-4** and **92–5,** at **3** (EAB, October 5, 1992); ***In re Multitrade Limited Partnership,*** PSD Appeal No. **92–2,** at **2** (EAB, April 29, 1992). In this case, the petitioners have not satisfied the regulatory criteria for review with regard to any of the issues they raise.

Petitioners raise ***six*** issues. Petitioners object, on technical grounds, to four permit conditions that impose emission limitations and monitoring requirements on the facility (Issues **1–4**).[2] They argue

[1] All five petitioners have standing to petition for review since they either filed comments on the draft permit or participated in the public hearing that preceded issuance of the permit. See 40 C.F.R. § 124.19(a).

[2] Petitioners argue that four Special Conditions of the permit should be revised: First, they argue that a provision should be added to the permit requiring a minimum sampling interval of "at least four hours" for emissions of particulate matter (Petition at 3). Second, they argue that the 10% opacity limit for the fabric filter system should be reduced to "5% with a 30 minute averaging time * * *" (Petition at 3). Third, they argue that the permit should set a level for emissions of "trace metals" (Petition at 4). Fourth they argue that the permit should be revised to require 90%

that the four permit conditions "[do] not reflect the 'best available control technology' ('BACT') * * *."[3] Petition for Review at **3.** However, none of these four technical issues have been preserved for review. Petitioners do not claim that any of these issues were the subject of comment during the comment period on the draft permit, as required by 40 C.F.R. §124.19(a), or that they were not reasonably ascertainable at that time.[4] Moreover, the NYSDEC, in its response to the petition, states that none of these issues were raised during the comment period. NYSDEC Response to Petition at 3-4. Therefore, since petitioners have failed to satisfy a regulatory criterion for review of these issues, their request for review is denied. ***See In re Union County Resource Recovery Facility,*** PSD Appeal No. 90-1 (Adm'r, November 28, 1990).

As another basis for seeking review, petitioners argue that the NYSDEC should be required to revise its economic analysis for the proposed facility to take into account the effect of a vote by the New York State legislature on June 27, 1992, which repealed legislation that had required public utilities to pay at least six cents per kilowatt hour for electricity purchased from independent power generators (Issue 5).[5] According to the petitioners, when the proposed incinerator is deprived of a legislative guarantee that it will obtain six cents per kilowatt hour for its electricity, the "economic viability" of incineration as compared to recycling will decrease. The petitioners maintain that the permit should be remanded to the NYSDEC so that it can perform a new BACT analysis in light of the "major shift in the economic assumptions" on which the initial permit determination was based. Petition for Review at 19.

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availability of the continuous emissions monitoring system for both days per month and hours per day (Petition at 4**).**

[3] Section 169(3) of the Clean Air Act provides that BACT is an "emissions limitation based on the maximum degree of reduction of each pollutant subject to regulation" that is "achievable" for the facility after "taking into account energy, environmental, and economic impacts and other costs." 42 U.S.C. §7479(3). Pursuant to 40 C.F.R. §52.21(j)(2), the permittee is required to apply BACT to limit emissions of regulated pollutants that it would have the potential to emit in significant amounts.

4A petition for review of a permit determination shall include "a demonstration that any issues being raised were raised during the public comment period * * * to the extent required by these regulations * * *." **40** C.F.R. §124.19(a). Pursuant to 40 C.F.R. §124.13, persons objecting to the conditions of a draft permit must "raise all reasonably ascertainable issues and submit **all** reasonably available arguments supporting their position by the close of the public comment period * * *."

[5] *See* New York State Public Service Law §66-c, a copy of which is appended to the petition.

Pursuant to 40 C.F.R. §124.18(c), "[t]he record [on appeal] shall be complete on the date the final permit is issued." The legislation to which the petitioners refer had not been enacted as of June 15, 1992, when the permit was issued, and therefore was not in existence at the time the NYSDEC made its decision. Therefore, there was no error since the NYSDEC's decision was based on the law as of the date the record closed. As explained in ***In re Columbia Gulf Transmission Company,*** PSD Appeal No. 88–11, at 4–5 (Adm'r, July 3, 1990), closing the record after the public comment period "bring[s] order to the decisionmaking process, enabling permit issuers such as the State to manage their dockets efficiently and bring[s] finality to permit proceedings." Therefore, the petitioners' request for review of this issue is denied.6

Finally, petitioners argue that the permittees "[have] not committed to an adequate program to separate nitrogen-containing wastes from the solid waste stream," as a means of reducing nitrogen oxide emissions, because the permit does not require the removal of food wastes and rubber from the waste stream prior to incineration (Issue 6). Petition at 2 and 27. They claim that EPA's recent decision in ***In re Brooklyn Navy Yard,*** PSD Appeal No. 88–10 (Adm'r, Feb. 28, 1992), holds that "[r]eduction of NO, [nitrogen oxide] from the municipal solid waste stream would necessarily focus on ***all*** nitrogen producing parts of the waste stream including: * * * food wastes [and] and rubber * * *." (Emphasis added.)7 Appeal at 26.

The NYSDEC responds that the petitioners did not meet the procedural requirement for review of this issue because the issue was not raised during the public comment period.8 The NYSDEC

6 The NYSDEC also asserts that the facility "may not" be covered by the legislation. Response to Petition at 11. Section 66-c(2) of the law provides that the *six* cents per kilowatt hour minimum sales price shall remain in effect for any contracts for the purchase of electricity at that price executed and filed before June 26, 1992. The NYSDEC claims that "the contract for the facility" in this case was executed and filed before that date. Since the petition for review of this issue has been denied on other grounds, we do not reach this issue.

7 As discussed *infra* at n.13 and associated text, petitioners' statement of the holding in Brooklyn *Navy* Yard is not accurate.

8 The NYSDEC acknowledges that "the Petitioners could argue" that they raised this issue in a letter to Assistant NYSDEC Commissioner Feller on April 22, 1992. Response to Petition at 4. That letter stated that the applicants must consider removal from the waste stream of "a much broader range of items containing nitrogen than can be reached by banning yard waste from the incinerator," including food waste and rubber. Letter from Paul Bums, Co-President, Recycle First, to Robert H. Feller, August 22, 1992, at 2. However, the NYSDEC claims that the issue was "improperly" raised because "the only issue before the Commissioner was carbon monoxide" and

further argues that, even if the petition is not procedurally defective, the petitioners have not demonstrated that the issue warrants review. It maintains that the facility will employ best available control technology and that the petitioners have "failed to identify any study or data" indicating that removing food wastes and rubber from the waste stream will reduce NO, emissions below the levels required under the permit as issued. NYSDEC Response to Petition, at 14 (September 8, 1992). For the reasons set forth below, the Board concludes that the procedural requirements for review have been met but that review is not warranted.

The adequacy of the applicants' analysis of source separation as a means of reducing nitrogen oxide emissions was addressed during the public comment period on the draft permit and therefore that issue was preserved for review.[9] ***See supra*** n. 4. New York State's Commissioner of Environmental Conservation ruled in a May 4, 1992 Interim Decision on the draft permit[10] that petitioners were not entitled to an adjudicatory hearing on the issue of whether materials separation had been adequately considered as a control technology for NO, emissions from the Onondaga facility. Interim Decision at 3. He noted that EPA had held in ***In re Brooklyn Navy Yard*** that "source separation of nitrogen rich wastes had to be considered" as part of a BACT analysis, but concluded that:

> A further analysis of such source separation opportunities in this case is not necessary since the permit already prohibits the wastes identified by the Administrator as high in nitrogen ***(i.e.,*** yard wastes) and requires their source separation and composting.[11]

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because "no supporting documentation for their assertion was provided." Response to Petition at 4.

[9] New York State law provides for public comment on a draft permit at three stages of the permit process: (1) a legislative hearing (or hearings); (2) an issues conference; and (3) an adjudicatory hearing on any issues designated for adjudication after the issues conference. NYSDEC held legislative hearings on the draft permit on April 16 and 17, 1991, and an issues conference on May 23, 1991. The Administrative Law Judge's Order of Disposition, December 11, 1991, did not designate any issues for adjudication.

[10] The Interim Decision disposed of appeals from the Administrative Law Judge's December 11, 1991 Order denying an adjudicatory hearing on the draft permit. See ***supra*** n.9.

[11] The quoted language from the Interim Decision can be read as implying that yard wastes were the wastes "identified by the Administrator as high in nitrogen" in his decision in ***Brooklyn Navy Yard*** and thus the focus of any requisite analysis of potential source separation. However, the Administrator merely cited yard wastes as an example of a "readily discernible" nitrogen-containing component of the **Brooklyn**

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Id. He added that the NYSDEC:

> already requires the source separation of many waste streams based solely on solid waste management concerns, irrespective of the impact on air emissions. Therefore, in order to raise an issue for adjudication, an intervenor would need to show that the source separation of a waste stream or a portion of a waste stream not already subject to such a requirement could result in further reduction of emissions.

Id. Since the NYSDEC considered the issue sufficiently raised to warrant the quoted response, we conclude that the issue was raised during the comment period and has been properly preserved for review.

Petitioners have not demonstrated, however, that the NYSDEC erred in its determination that the facility will employ BACT for NO, emissions. A permit applicant initially bears the burden of identifying the control technology or technologies that will produce the maximum achievable degree of reduction for each regulated pollutant, "after taking into account energy, environmental, and economic impacts and other costs." 42 U.S.C. §7479(3). ***See Citizens for Clean Air*** v. ***U.S. Environmental Protection Agency,*** 959 F.2d 839, 845 (9th Cir. 1992), affirming the Administrator's decision in ***In re Spokane Regional Waste-to-Energy Project,*** PSD Appeal No. 88–12 (Adm'r, June 9, 1989) and ***In re Spokane Regional Waste-to-Energy Project,*** PSD Appeal **No.** 89–4 (Adm'r, January **2,** 1990). "Available" control options are those which are known to have realistic potential for application to the regulated pollutant.[12] If the permit applicant rejects the most stringent control technology, its BACT analysis must justify the rejection. ***In re Mecklenburg Cogeneration Limited Partnership,*** PSD Appeal No. 90–7, at **3-4** (Adm'r, December 27, 1990). The Agency recently held in ***In re Brooklyn Navy Yard, supra,*** that "available information indicates that reducing certain constituents of the waste stream can reduce pollutant emissions," and therefore, that materials separation must be taken into account as an element of a BACT determination. ***Id.*** at 10. In particular, EPA held that

facility's waste stream. This does not mean that in any given case, consideration of source separation can necessarily be limited to yard waste.

[12] The Agency has held that a control technology is "available" when "there are sufficient data indicating (but not necessarily proving)" the technology "will lead to a demonstrable reduction in emissions of regulated pollutants or will otherwise represent BACT." ***In re Spokane Regional Waste-to-Energy,*** **PSD Appeal No. 88-12, at 22 (Adm'r, June 9, 1989).**

permit applicants must consider options for materials separation in developing overall strategies for reducing emissions of NO_x. *Id.* at **16.**

EPA remains firmly committed to requiring individual permit applicants to conduct a critical assessment of materials separation as an achievable control technology for air emissions. However, contrary to the petitioners' claim, EPA did not hold in ***In re Brooklyn Navy Yard*** that an adequate BACT analysis for NO_x must address the potential for materials separation of every nitrogen-containing element of a waste stream, nor did the Agency identify particular components of a waste stream that must be examined as part of such an analysis.[13] Rather, the Agency held that applicants must examine "realistic separation programs" for "readily discernible components of the waste stream that * * * may contribute to NO_x emissions" *(Id.* at **16).** It noted that the permitting authority is required to take into account "energy, environmental and economic impacts and other costs" in determining the maximum achievable reduction in emissions for a facility, adding that some wastes are "more susceptible than others to cost-effective separation from the waste stream prior to incineration." *Id.* The decision emphasizes that "there need not be a consideration of every detail of every conceivable separation and collection program for every individual nitrogen-containing component of the waste stream for the BACT analysis requirements to be satisfied." *Id.* Thus, utilizing the approach described in the ***Brooklyn Navy Yard*** decision, permit applicants must first identify those elements of the waste stream that contribute materially to NO_x emissions and then determine whether removal of those elements from the waste stream is practicable, taking into account the statutorily prescribed considerations.[14]

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[13] Petitioners inaccurately state that the ***Brooklyn Navy Yard*** decision holds that permit applicants must consider as BACT the removal of "all nitrogen-producing parts of the waste stream * * * including food wastes [and] rubber." Appeal at **26.** The only reference to food wastes and rubber in the ***Brooklyn Navy Yard*** decision appears in a quotation from the permittee's brief referring to a **1989** Federal Register notice in which EPA identifies food wastes and rubber as components of municipal solid waste. ***Id.*** at **17.**

[14] An important limitation on any requirement for source separation is that EPA's PSD regulations do not permit EPA, or require a State permitting authority, to redefine the source in order to reduce emissions. ***In*** re ***Hawaiian Commercial & Sugar*** Company, PSD Appeal No. **92-1,** at 6–7 (EAB, July 20, 1992); ***In re Pennsauken County, New Jersey Resource Recovery Facility (Remand Order),*** PSD Appeal No. *88-*8, at **10-11** (Adm'r, Nov. **10, 1988).** This limitation was recognized in ***Brooklyn Navy Yard*** in that the Administrator read the source separation requested in the petition as neither seeking to redefine the source nor as rendering the facility nonviable. He determined that "consequently" such source separation "would constitute fuel clean-

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The permit at issue here utilizes both conventional control technology (Selective Non-Catalytic Reduction)[15] and source separation (of yard wastes)[16] to control NO, emissions at the Onondaga facility. It also includes a requirement, dictated by State solid waste policies, that the facility will recycle at least 40 percent of its processible waste stream by 1997.[17] The BACT analysis for the facility characterizes recycling as a "critical component of all comprehensive waste management programs" and states that "a legitimate, well-conceived materials separation program will be employed" at the Onondaga facility. BACT Analysis at 5-12.

The analysis identifies yard waste and food waste as the two largest contributors of nitrogen to the facility's waste stream, 16% and 12% by weight, respectively. *Id*. at 5-19. It notes that yard waste is required to be removed from the waste stream prior to combustion. It acknowledges that removing food wastes from the waste stream may reduce NO, emissions, but states that the separation of such wastes from the waste stream is not "a viable option" because of their "putrescible nature." *Id*. The County's Comprehensive Recycling Analysis, with which the permittees have agreed to comply,[18] notes that the County has no current plans for recycling rubber because of the "limited amount" of rubber in the municipal waste stream. Onondaga County Comprehensive Recycling Analysis, at 21 (November 1, 1991).

The State has incorporated source separation of yard wastes into the permit. The permittees' BACT Analysis and the County's Comprehensive Recycling Analysis, upon which the State's BACT determination for the facility is based, articulate plausible rationales for rejecting source separation of food wastes and rubber. Therefore, the State's BACT determination is sufficient to satisfy its obligation to consider source separation in identifying the most stringent available control technology for NO,.

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ing or treatment" within the meaning of the BACT definition. *In re Brooklyn Navy Yard, supra,* at 18 and 20 n.7. We have not considered whether source separation of food wastes and rubber would have resulted in a redefinition of the source in this case since that issue was not raised by any party to this appeal.

[15] Permit Special Condition III.A.

[16] Permit Special Condition III.0.1.

[17] Permit Special Condition III.Pprovides that the permittees shall implement the recycling program established in accordance with the Onondaga County Comprehensive Recycling Analysis. That program does not require materials separation of either food wastes or rubber.

[18] *See supra* n.17.

Once a permit has been issued and a petition for review has been filed, the petitioners have the burden of demonstrating that the State's BACT determination was clearly erroneous. Here, petitioner would have to show that the combination of materials separation and control technologies prescribed by the permit are inadequate to satisfy the statutory criteria for BACT. The petitioners assert in two short paragraphs in their appeal brief that the BACT determination for NO_x is clearly erroneous because it fails to consider source separation of food wastes and rubber. However, the State did consider which elements of the waste stream were appropriate for source separation, and the administrative record contains the results of that analysis. Petitioners do not support their assertion with any evidence as to why the analysis is erroneous in light of both the potential for reducing NO_x emissions and the other statutory considerations for a BACT analysis. Therefore, they have failed to meet their burden of demonstrating that the issue warrants review, and their petition is denied.

So ordered.