BEFORE THE BOARD OF ENVIRONMENTAL QUALITY

STATE OF IDAHO

IN RE: PERMIT APPLICANT GARNET ENERGY LLC (PERMIT NO. 0027-00081)	)	Docket No. 0101-01-10
	)	ORDER GRANTING MOTION FOR SUMMARY JUDGMENT
PENNY STEADHAM AND JONNA WEBER,	)	
Petitioners.	)	

This matter came on for hearing before the hearing officer on February 6, 2002. At issue is the Motion for Summary Judgment filed by Intervenor-Respondent Garnet Energy LCC ("Garnet") on January 9, 2002. Respondent Idaho Department of Environmental Quality ("IDEQ") joined in Garnet's motion on January 25, 2002. Together Garnet and IDEQ moved for summary judgment against the Petition for Stay of Permit Issuance (the "Petition") filed by Petitioners Jonna Weber and Penny Steadham (the "Petitioners") on November 27, 2001. Intervenor-Petitioners Victor Hill and David and Deloris Cram are also parties to the Petition. Hereinafter, Ms. Weber, Ms. Steadham, Mr. and Ms. Cram, and Mr. Hill are referred to collectively as the "Petitioners."

In support of summary judgment, Garnet submitted a legal memorandum and the affidavit of Walter J. Russell, an air modeling expert. IDEQ submitted a memorandum

supported by the affidavit of Mary Anderson, the Air Modeling Coordinator for IDEQ. In response, Mr. and Ms. Cram filed a Motion to Strike Motion for Summary Judgment, and Mr. Hill filed an unsigned and unverified affidavit in opposition to summary judgment. Following those responses, Garnet submitted a reply memorandum in support of summary judgment, along with a second affidavit from Mr. Russell.

On February 9, 2002, oral argument was presented by Garnet and IDEQ through their respective counsel, Kevin Beaton and Lisa Kronberg. Oral argument for the Petitioners was presented by Ms. Weber, Ms. Steadham, Mr. Hill and Ms. Cram. Mr. Cram did not appear at the hearing. At the close of oral argument, the hearing officer granted summary judgment in favor of Garnet and IDEQ, finding the Petitioners failed to raise any genuine issues of material fact and that Garnet and IDEQ are entitled to judgment as a matter of law. This order encompasses the hearing officer's decision granting Garnet's and IDEQ's Motion for Summary Judgment and dismissing each of the Petitioners' claims with prejudice.

I. FINDINGS OF UNDISPUTED FACTS ON SUMMARY JUDGMENT

The undisputed facts of this matter establish that IDEQ properly issued Permit to Construct No. 0027-0081 (the "Permit") to Garnet on October 19, 2001, following extensive review and a full opportunity for public review and comment. The Permit, an air quality preconstruction permit, authorizes Garnet to construct and operate a proposed power facility near Middleton, Idaho. Middleton is located in Canyon County, Idaho, which is designated as an unclassified or attainment area under the Clean Air Act ("CAA"). The proposed Garnet facility is classified as a major stationary source. As a new major stationary source in an unclassified or attainment area, the project is subject to the CAA's Prevention of Significant Deterioration ("PSD") requirements. *See* CAA § 160 - 169 (42 U.S.C. §§ 7470 - 7479). IDEQ has codified

the PSD regulations established by the Environmental Protection Agency ("EPA") in the Rules for the Control of Air Pollution in Idaho (the "Air Rules"), IDAPA 58.01.01 *et seq.* *See* IDAPA 58.01.01.201 - 223.

To obtain a permit to construct pursuant to the Air Rules, an applicant must, among other requirements, demonstrate that the proposed major source: (1) will be subject to the best available control technology ("BACT") for each pollutant subject to regulation, IDAPA 58.01.01.205.01(a), 40 C.F.R. § 52.21((j)(2); and (2) will not cause or significantly contribute to violations of any ambient air quality standard or any PSD increment. *See* IDAPA 58.01.01.202, 203 and 205; 40 C.F.R. § 52.21. According to procedures used by EPA and IDEQ, this latter inquiry requires the use of air dispersion modeling and consists of a preliminary impact analysis and, if necessary, a full impact analysis. *See* Draft New Source Review Workshop Manual ("NSR Manual") at C.24 – C.25 (EPA October 1990). *See also* IDAPA 58.01.01.202.02; 40 C.F.R. § 52.21(l) and (m).

To determine ambient impacts from the proposed facility, Garnet performed a preliminary impact analysis, which included air dispersion modeling. At IDEQ's suggestion and in accordance with PSD requirements, Garnet modeled the emissions of the proposed power facility using the Industrial Source Complex Short-Term, version 3 computer model ("ISCSST3"). *See* IDAPA 58.01.01.202.02; 40 C.F.R. Part 51, Appendix A to Appendix W. In the model, Garnet used meteorological data from the Boise Airport for the years 1987 through 1991, which IDEQ determined, pursuant to EPA guidance, was representative of the impact area. *See* 40 C.F.R. Part 51, App. W at § 9.3.1. Garnet's modeling, which IDEQ confirmed, demonstrated that maximum pollutant concentrations from the predicted emissions of the proposed facility will be less than significant contribution levels (significant impact levels or

"SILs"), set forth in IDAPA 58.01.01.006.93. As a result, IDEQ determined that Garnet was not required to conduct a full-impact, multi-source analysis. *See* NSR Manual at C.24. IDEQ also determined that the proposed Garnet facility met BACT requirements.

On April 10, 2001, IDEQ issued a draft Permit to Garnet, finding emissions from the proposed facility would not significantly cause or contribute to a violation of any ambient air quality standard or PSD increment. IDEQ provided public notice of the draft Permit and held a public meeting and a public hearing in Middleton, on July 18, 2001, and July 25, 2001, respectively. In addition, IDEQ allowed thirty (30) days for written public comment. Subsequently, IDEQ issued the Permit, on October 19, 2001, finding that Garnet's proposed facility complies with PSD requirements. IDEQ issued its response to public comments on the same day. As part of the Permit, Garnet is required to monitor $PM_{2.5}$, ozone and meteorological data continually for a period of four (4) years. Permit § 3.16.4.

On November 27, 2001, the Petitioners submitted the Petition challenging IDEQ's issuance of the Permit as unlawful. In the Petition, the Petitioners argue that: (a) IDEQ used an improper air dispersion model to determine the air quality impacts of the proposed Garnet facility; (b) IDEQ failed to require a full impact analysis of the proposed Garnet facility; (c) IDEQ employed incorrect data in the air dispersion model; (d) the Permit violates the settlement agreement reached in *Idaho Clean Air Force v. EPA*; (e) IDEQ is required to consider the water quality impacts of the proposed Garnet facility in the Permit; (f) IDEQ must require Garnet to prepare a risk management plan for the proposed facility as part of the Permit; (g) IDEQ failed to address the impact of the proposed Garnet facility on the surrounding airshed and the Northern Ada County Maintenance Plan for PM_{10}; and (h) stricter monitoring of the proposed Garnet

facility is required. Garnet and IDEQ moved for summary judgment on each of the issues raised by Petitioners.

As discussed more thoroughly below, the hearing officer grants summary judgment in favor of Garnet and IDEQ on each of those claims and dismisses the Petition with prejudice.

II. STANDARD OF REVIEW ON SUMMARY JUDGMENT

By order issued February 4, 2002, the hearing officer determined that the Rules of Administrative Procedure before the Board of Environmental Quality ("Administrative Rules"), IDAPA 58.01.23 *et seq.*, apply to the Petition and govern this contested case proceeding. The Administrative Rules provide that, unless the hearing officer finds otherwise, motions for summary judgment in contested cases are governed by Idaho Rule of Civil Procedure 56. IDAPA 58.01.23.213.02. In the instant matter, the hearing officer applies the standards for summary judgment set forth in Rule 56.

Pursuant to Rule 56(c), summary judgment is appropriate when the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The adverse party is unable to rest on the allegations of their pleadings but must set forth specific facts showing that there is a genuine issue for hearing. I.R.C.P. 56(e); *Baxter v. Craney,* 135 Idaho 166, 170, 16 P.3d 263, 267 (2000). Summary judgment is appropriate if the trial court finds there is no genuine issue of material fact after liberally construing the record and drawing all reasonable inferences in favor of the nonmoving party. *Landvik by Landvik v. Herbert*, 130 Idaho 54, 57, 936 P.2d 697, 700 (1997).

In addition, in reviewing an agency decision in a contested case proceeding, the "agency's experience, technical competence, and specialized knowledge may be utilized in the

evaluation of the evidence." Idaho Code Section 67-5251(5) (2001). As the trier of fact, the hearing officer must give due consideration and deference to the technical expertise and special skill of the agency whose action is being challenged. *See Baltimore Gas and Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103, 2255, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983); *Appalachian Power Co. v. EPA*, 135 F.3d 179, 802 (D.C. Cir. 1998). *See also* I.C. § 67-5251(4)(b); IDAPA 58.01.23.602 (allowing the hearing officer to take official notice of the "generally recognized technical or scientific facts within the agency's specialized knowledge.")

III. FINDINGS OF LAW ON SUMMARY JUDGMENT

A. IDEQ used the Proper Air Dispersion Model

The Petitioners first claim that Garnet and IDEQ used the wrong air dispersion model to assess the ambient impacts from the proposed facility. The Air Rules require all estimates of ambient concentrations to be based on the applicable air quality models, data bases, and other requirements specified by EPA in 40 C.F.R. Part 51, Appendix W (Guideline on Air Quality Models). IDAPA 58.01.01.202.02. *See also* 40 C.F.R. § 52.21(l)(1). In the Guideline on Air Quality Models (the "Guideline"), EPA sets forth approved air dispersion models that are designed to ensure consistency and accuracy and encourage standardization of model applications. 40 C.F.R. Part 51, App. W at Preface (a). Based on the Guideline, Garnet used and IDEQ approved use of ISCST3 to estimate the ambient impacts from the proposed power facility. *See* 40 C.F.R. Part 51, App. A to App. W at A.5. The evidence presented by Garnet and IDEQ demonstrates that ISCST3 is an universally accepted model and is presently the preferred model to analyze the ambient air impacts of proposed industrial sources. The evidence also showed that ISCST3 is the only model used by IDEQ for permitting purposes to estimate

ambient impacts from industrial sources in the Treasure Valley. This evidence was not refuted by the Petitioners.

The Petitioners claim that Garnet and IDEQ should have used the WYNDvalley or CAMx models, instead of ISCST3; however, they offer no basis to substantiate those claims. The uncontradicted evidence presented by Garnet and IDEQ demonstrated that both WYNDvalley and CAMx are inappropriate models for the proposed Garnet facility—WYNDvalley because it does not accurately assess a single elevated point source and CAMx because it does not accurately estimate impacts of individual industrial sources at the point of maximum concentration. In addition, the Petitioners offer no evidence to demonstrate that either WYNDvalley or CAMx is an EPA-approved model for industrial source permitting or that use of those models would have resulted in a different outcome in Garnet's modeling analysis.

The hearing officer also notes that determining which air dispersion model is appropriate to predict the ambient impacts of a proposed industrial source is a highly technical decision. Consequently, it is one that that is best left to the expertise of the implementing agency. As noted in a recent federal appeals court decision:

> Statistical analysis is perhaps the prime example of those areas of technical wilderness into which judicial expeditions are best limited to ascertaining the lay of the land. Although computer models are 'a useful and often essential tool for performing the Herculean labors Congress imposed on EPA in the Clean Air Act,' their scientific nature does not easily lend itself to judicial review.

Appalachian Power Co. v. EPA, 135 F.3d at 802 (citation omitted). Accordingly, the hearing officer finds no genuine issue of material fact on this claim. The evidence presented by Garnet and IDEQ remains unrefuted by the Petitioners. The proper air dispersion model was employed by Garnet and used by IDEQ to calculate the ambient impact from Garnet's proposed facility.

B. IDEQ used Proper Data in ISCST3

The Petitioners also argue that Garnet and IDEQ introduced erroneous data considerations in the ISCST3 model, using inappropriate meteorological data. The Petitioners also claim that IDEQ failed to account for secondary aerosol formation. Specifically, the Petitioners argue that the meteorological data from the Boise Airport for 1987 through 1991 was improper and not representative of the meteorological conditions in Middleton. EPA requires meteorological data to be representative of the worst-case meteorological conditions, over the most recent five (5) year period. 40 C.F.R. Part 51, Appendix W at §§ 9.3.1.1(a) and 9.3.1.2(a). The evidence presented by Garnet and IDEQ showed that the data from the Boise Airport from 1987 through 1991 was representative of the most recent, worst-case meteorological conditions in the Treasure Valley. IDEQ also determined that the Boise Airport data was representative of the meteorological conditions in Middleton. IDEQ has used the Boise Airport data consistently to model industrial sources in the Treasure Valley.

The Petitioners failed to introduce evidence showing that another meteorological data set would be more representative of meteorological conditions in Middleton and failed to refute the evidence presented by Garnet and IDEQ that use of the meteorological data from the Boise Airport was proper. In addition, the Petitioner presented no evidence that the use of other meteorological data would have changed the results of the ISCST3 model. As with modeling decisions, an agency's choice of meteorological data is entitled to discretion. *See In re Hibbing Taconite Co.*, 2 EAB 838 (EAB 1989) (the choice of meteorological data utilized in PSD permitting analysis is largely within the discretion of the state permitting agency); *In re Knauf Fiber Glass*, 1999 WL 64235 (EAB 1999) (use of off-site meteorological data which represented worst case conditions was appropriate); *In re Kawaihae*, 7 EAB 107 (EAB 1997) (same); *In re*

Encogen Cogeneration Facility, 1999 WL 198914 (EAB 1999) ("the choice of appropriate data sets for air quality analysis is an issue largely left to the discretion of the permitting authority.")

The evidence also demonstrates that Garnet and IDEQ were not required to consider secondary aerosol information. Currently, there is no EPA-approved model for industrial source permitting to estimate the impacts of secondary aerosols. *See* 40 C.F.R. Part 51, App. W at §7.2.2.C. In addition, the Petitioners failed to come forward with any evidence showing how the outcome of Garnet's modeling analysis would have changed if the impacts of secondary aerosols had been considered. Not only do the Petitioners fail to present specific facts and evidence refuting the accuracy and appropriateness of the modeling data, but the hearing officer must afford discretion to IDEQ in its choice of what data to use in an air dispersion modeling analysis. Therefore, the hearing officer finds that the Petitioners' failed to raise a genuine issue of material fact regarding the accuracy and appropriateness of the modeling data.

C. A Full-Impact Analysis of the Proposed Garnet Facility was not required under the Air Rules and PSD Requirements

The Petitioners next argue that IDEQ should have required Garnet to prepare a full-impact analysis. Garnet conducted a preliminary analysis, which demonstrated that modeled concentrations from the proposed facility would not exceed the SILs. The results of the preliminary analysis were confirmed by IDEQ. As a result, IDEQ did not require Garnet to conduct a full-impact, multi-source analysis. *See In re AES Puerto Rico L.P., supra* 1999 WL 345288 (EAB 1999) (finding a full impact analysis was not required if Project emissions are below significant impact levels), *affirmed by Sur Contra La Contaminacion v. EPA*, 202 F.3d 443, 448 (1st Cir. 2000); *In re Ecoelectrica, L.P.*, 1997 WL 160751, 7 E.A.D. 56 (EPA 1997) (same). The Petitioners failed to offer any specific facts or supporting evidence to refute the evidence submitted by Garnet and IDEQ and thus failed to demonstrate that Garnet's preliminary

analysis was insufficient or unlawful. The Petitioners have failed to raise a genuine issue of material fact as to this claim.

D. The *Idaho Clean Air Force v. EPA* Settlement Agreement is not applicable to the Proposed Garnet Facility

The Petitioners' also argue that the requirements prescribed in a settlement agreement reached in *Idaho Clean Air Force v. EPA*, Nos. 99-70259 and 99-70576 are applicable to the permitting of the proposed Garnet facility. The settlement agreement is codified in IDAPA 58.01.01.204 and 582. Through this argument, the Petitioners argue that lowest achievable emission rate ("LAER") requirements apply to the proposed facility. As mentioned earlier, the proposed Garnet facility is located in Canyon County, an unclassified or attainment area. The unrefuted evidence shows that the settlement agreement in *Idaho Clean Air Force v. EPA* is not applicable to Garnet since the settlement agreement applies only to sources located within the boundaries of the Northern Ada County Nonattainment Area for PM_{10}, and not to the proposed Garnet facility. *See* IDAPA 58.01.01.204 and 582.

E. Water Quality Impacts are not Relevant to a Permit to Construct.

The Petitioners next contend that IDEQ should have considered the water quality impacts of the proposed Garnet facility on the Boise River and its tributaries. Again, the Petitioners have offered no specific facts or evidence to support this contention. The CAA and the Air Rules do not require a permit to construct applicant or IDEQ to consider water quality impacts of air emissions from a proposed facility. As paragraph 8 of the Permit states, "This permit is issued according to the Rules for the Control of Air Pollution in Idaho, Section 58.01.01.200, and pertains only to emissions of air contaminants that are regulated by the state of Idaho . . . ." In addition, the Permit does not release Garnet from complying with other applicable federal, state,

or local laws, regulations or ordinances. *See* Permit ¶ 8(c). Accordingly, water quality impacts are not within the scope of review by IDEQ in the preconstruction permitting process.

F. A Risk Management Plan is not Required

The Petitioners state that a Risk Management Plan ("RMP") is required for the proposed Garnet facility to address the potential accidental release of ammonia. Although RMPs are part of the CAA's accidental release prevention program, CAA § 112(r) (42 U.S.C. § 7412(r)), they are not relevant to the proposed Garnet facility, for RMP compliance is not a preconstruction permitting issue. Compliance with accidental release and RMP requirements is required when a regulated substance is first present at the source above a threshold quantity. 40 C.F.R. § 68.150(b)(3). In addition, the Permit does not release Garnet from complying with RMP requirements when those requirements become applicable. *See* Permit ¶ 8(c). The Petitioners have failed to present a factual bases that would trigger review of this regulatory requirement at this time.

G. IDEQ addressed the Impact of the Proposed Garnet Facility on the Airshed and the Northern Ada County Maintenance Plan.

The Petitioners argue that IDEQ failed to evaluate the air quality impacts from the proposed Garnet facility on the surrounding airshed. The hearing officer previously determined that Garnet and IDEQ have fully complied with permitting requirements in performing the preliminary assessment of ambient impacts at the point of predicted maximum concentration using the ISCST3 model. As explained, the Petitioners have offered no facts or evidence to refute the adequacy and appropriateness of that approach. Accordingly, Garnet and IDEQ properly addressed the ambient impacts on the airshed through applicable and relevant modeling procedures.

H. Stricter Monitoring of the Proposed Garnet Facility is not Required

In their final argument, the Petitioners contend that IDEQ should have required Garnet to continually monitor $PM_{2.5}$, ozone and meteorological data longer than the four year period required in the Permit. *See* Permit § 3.16.4. The Petitioners provide no support for this requirement. The Air Rules state that IDEQ "*may* impose any reasonable conditions" on a permit to construct applicant to provide "[i]nstrumentation for ambient monitoring to determine the effect emissions from the stationary source or facility may have, or are having, on the air quality in any area affected by the stationary source or facility" or "[a]ny other sampling and testing facilities as may be deemed reasonably necessary." IDAPA 58.01.01.211.01(d) and (e) (emphasis added). As required under the Permit, Garnet will perform monitoring. *See* Permit § 3.16. Again, the Petitioners have failed to set forth facts or evidence raising a genuine issue of material fact or argument of law that additional monitoring should be required.

IV. CONCLUSION

For the reasons explained above, summary judgment is granted with prejudice on all of the Petitioners' claims in favor of Garnet and IDEQ. The Petition is therefore dismissed as a matter of law.

Pursuant to Idaho Code Section 67- 5245 and IDAPA 58.01.23.730, this is a preliminary order which will become a final order without further notice unless a petition for review by Board of Environmental Quality is filed with the Hearing Coordinator within fourteen (14) days after the service date of this preliminary order. Pursuant to I.C. § 67- 5245(4), the basis for review must be stated in the petition.

SUBMITTED this 22nd day of February, 2002.

LARRY F. WEEKS
Hearing Officer