

startup, malfunction and breakdown that violates EPA policy; and (5) contain language that violates EPA policy requiring a permit to be practically enforceable.

On March 25, 2005, the Administrator issued orders partially granting and partially denying the petitions. The orders explain the reasons behind EPA's conclusion that the IEPA must reopen the permits to: (1) Address Petitioner's significant comments; (2) include periodic monitoring in compliance with 40 CFR § 70.6(a)(3)(i)(B); (3) remove the note stating that compliance with the carbon monoxide limit is inherent; (4) explain in the statement of basis how it determined in advance that the permittee had met the requirements of the Illinois State Implementation Plan (SIP) or to specify in the permit that continued operation during malfunction or breakdown will be authorized on a case-by-case basis if the source meets the SIP criteria; (5) remove language which is not required by the underlying applicable requirement or explain in the permit or statement of basis how this language implements the meaning and intent of the underlying applicable requirement; (6) remove "established startup procedures," include the startup procedures in the permit, or include minimum elements of the startup procedures that would "affirmatively demonstrate that all reasonable efforts have been made to minimize startup emissions, duration of individual startups and frequency of startups;" (7) require the owner or operator of the sources to report to the agency "immediately" or explain how the phrase "as soon as possible" meets the requirements of the SIP; (8) remove "reasonably" and "reasonable" from relevant permit terms or define or provide criteria to determine "reasonably" and "reasonable" that meet the requirements of the SIP; (9) remove the term "reasonable" from the relevant permit conditions in accordance with the language in Part 70, Section 504 of the Clean Air Act or Section 39.5 of the Environmental Protection Act; (10) remove the ability to waive the testing requirements or explain how such a waiver would meet the requirements of part 70; (11) define "extraordinary circumstances" in a manner consistent with the requirements of the SIP or remove the language from the permit; and (12) remove "summary of compliance" from the permit or clarify the term such that the reader understands what a "summary of compliance" must contain and how the summary relates to the control measures. The orders also

explain the reasons for denying Chicago Legal Clinic's remaining claims.

Dated: April 19, 2005.

**Norman Niedergang,**

*Acting Regional Administrator, Region 5.*

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## ENVIRONMENTAL PROTECTION AGENCY

[MI 86-01; FRL-7907-9]

### Notice of Final Determination for the Final Determination for the Indeck-Niles Energy Center, L.L.C. located in Niles, MI

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of final action.

**SUMMARY:** This notice announces that on September 30, 2004, the Environmental Appeals Board (EAB or Board) of the United States EPA denied a petition for review of a Federal Prevention of Significant Deterioration (PSD) permit issued to Indeck-Niles L.L.C. (Indeck) by the Michigan Department of Environmental Quality (MDEQ).

**DATES:** The effective date for the EAB's decision is September 30, 2004. Pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. 7607(b)(1), judicial review of this permit decision, to the extent it is available, may be sought by filing a petition for review in the United States Court of Appeals for the Sixth Circuit within 60 days of May 4, 2005.

**ADDRESSES:** The documents relevant to the above action are available for public inspection during normal business hours at the following address: Environmental Protection Agency, Region 5, 77 West Jackson Boulevard (AR-18J), Chicago, Illinois 60604. To arrange viewing of these documents, call Laura L. David at (312) 886-0661.

#### FOR FURTHER INFORMATION CONTACT:

Laura L. David, Environmental Protection Agency, Region 5, 77 W. Jackson Boulevard (AR-18J), Chicago, Illinois 60604. Anyone who wishes to review the EAB decision can obtain it at <http://www.epa.gov/eab/orders/indeck2004.pdf>.

**SUPPLEMENTARY INFORMATION:** In the Board's September 30, 2004 Order Denying Review, the Board made the following findings. On November 2, 2000, Indeck-Niles, L.L.C. applied to MDEQ for permission to construct a new 656-MW simple-cycle natural gas-fired electrical generating facility, to be transformed into a 1,076-MW

combined-cycle facility approximately twelve to eighteen months after startup of the simple-cycle facility. Indeck proposed to site the new facility (Indeck-Niles Energy Center) in the southwestern corner of the State of Michigan, in Cass County, northeast of the City of Niles, Michigan, and not far from South Bend, Indiana. That portion of the State was designated as attainment or unclassifiable for carbon monoxide (CO), nitrogen dioxide (NO<sub>2</sub>), sulfur dioxide (SO<sub>2</sub>), ozone (measured as volatile organic compounds (VOCs)), and particulate matter (PM) at the time of permit issuance.

In the first phase of the project, Indeck proposed to install four natural gas-fired combustion turbines for operation in simple-cycle mode. In the second phase, Indeck proposed to convert the four simple-cycle turbines into combined-cycle units through the addition of heat recovery steam generators and natural gas-fired duct burners to increase steam output. The conversion would take place within twelve to eighteen months after operation of the simple-cycle turbines commences. The steam produced would be piped to two steam condensing turbines to produce additional power. In this configuration, the proposed facility has the potential to emit NO<sub>x</sub>, CO, VOCs, and PM in quantities sufficient to trigger the requirement for emissions limitations reflecting Best Available Control Technology (BACT). Accordingly, as part of the permit application process, Indeck conducted BACT analyses for the relevant pollutants and proposed BACT emissions limits for the pollutants of concern.

In December 2001, MDEQ approved Indeck's analyses and issued a permit to the company for the proposed facility (New Source Review Permit to Install No. 364-00). However, a number of individuals timely petitioned the Board for review of that permit, which prevented the permit from going into effect at that time. On March 11, 2002, the Board issued an order denying the individuals' petition for review and the permit therefore became final on that date. Notably, however, Indeck failed to commence construction of its new facility within eighteen months of issuance of the final PSD permit. Under the State of Michigan's air pollution control regulations (which are based on the Federal PSD rules), such a lack of action within the prescribed time frame renders the permit void (Mich. Admin. Code r. 336.1201(4)).

A year and a half later, in June 2003, Indeck requested that MDEQ reissue the PSD permit for the proposed Indeck-

Niles Energy Center, largely as originally conceived. Indeck did not revise or supplement its initial BACT analyses, performed in November 2000, but instead relied on the information contained therein as the best available information for the permit review. One difference between the original permit and the present one relates to the NO<sub>x</sub> control technology. In its original permit application, Indeck had proposed to equip each of the four natural gas-fired combustion turbines with dry low-NO<sub>x</sub> burners and a selective catalytic reduction system to achieve a NO<sub>x</sub> BACT emissions limit, during combined cycle operations, of 3.5 parts per million dry volume at 15% oxygen averaged over a twenty-four hour rolling time period. Those proposals became part of the original permit. In the new permit, those air pollution control measures are still included; however, Indeck has also agreed to install a catalytic oxidation system on each of the four combustion turbine/dry low-NO<sub>x</sub> burner pairs, which is a more stringent technology option than previously proposed, in order to achieve the BACT limits for CO and VOCs emissions.

MDEQ subsequently reviewed and approved Indeck's BACT analyses. Accordingly, MDEQ issued a draft PSD permit to Indeck in January 2004, containing proposed terms and conditions to regulate the proposed power plant. MDEQ also published a notice inviting public comment on the draft permit and establishing a 30 day comment period. On February 25, 2004, MDEQ held a public hearing on the draft permit at the Niles High School Auditorium in Niles, Michigan. The Department received approximately sixty written and twelve oral comments on the draft permit from interested parties, including comments from Mr. Douglas Meeusen ("Petitioner"). After reviewing the public comments on the draft permit, MDEQ issued a final permit (Permit to Install No. 364-00A) on April 21, 2004, for Indeck's construction of the Niles Energy Center, along with a document responding to the comments on the draft permit.

On May 20, 2004, Petitioner filed PSD Appeal No. 04-01 with the Board. In his appeal, Petitioner raised concerns about the startup and shutdown frequency of the proposed facility's combustion turbines. Under Indeck's PSD permit, each turbine is allowed to operate in startup/shutdown mode a maximum of 500 hours per twelve-month rolling time period, as determined at the end of each calendar month, or a total of 2,000 hours for the four turbines annually. The Petitioner challenged special condition 5.8 of the permit which provides that

Indeck must prepare a plan ("emission minimization plan") to minimize air pollutant emissions during startup and shutdown periods, as well as malfunction periods, and obtain MDEQ's approval of this plan prior to initiating operation of the combustion turbines and duct burners. The Petitioner pointed out that, in his comments on the draft version of the permit, he had asked MDEQ to provide for public scrutiny of the emissions minimization plan and to follow all the directives given to MDEQ by the EAB in a previous decision regarding Tallmadge Energy Center, Order Denying Review in Part and Remanding in Part (PSD Appeal No. 02-12, EAB May 21, 2003), regarding a similar emissions minimization plan. The Petitioner argued that MDEQ ignored the Tallmadge requirements and, as a consequence, the plan called for in Indeck's PSD permit lacks the requisite degree of specificity to allow for meaningful comment by Petitioner and other members of the public.

At the request of the Board, MDEQ submitted a response to the merits of the petition for review on June 25, 2004. In response, MDEQ distinguished the factual circumstances of this case from those in Tallmadge Energy Center. First, MDEQ noted that the Tallmadge permit explicitly exempted that facility from complying with all BACT emission limits during startup, shutdown, and malfunction periods and instead made the facility's operations contingent on the permittee's submittal of a plan describing how it would minimize emissions during those periods. Indeck's permit, MDEQ noted, does not contain such explicit exemption from all BACT limits. To the contrary, MDEQ observed that Indeck's permit incorporates annual BACT emission limitations (expressed in terms of tons per year) that must be met at all times, including during startup, shutdown, and malfunction periods, and it also contains restrictions on the amount of time the turbines can be in startup/shutdown mode and sets forth a minimum load requirement of ninety percent that defines when startup is completed. Second, MDEQ responded to any latent concerns that might exist about the Indeck permit's exclusions of the facility from short-term (*i.e.*, hourly, daily) BACT concentration limits during startup and shutdown periods. Specifically, MDEQ explained that due to the nature of operations during startup and shutdown, involving lower and inconsistent combustion temperatures, the proposed facility will not be capable of always meeting the

short-term concentration limits in those periods. In addition, MDEQ stated that, unlike the situation in Tallmadge, Indeck's permit does not "rely on a startup, shutdown and malfunction plan to establish permitting requirements in lieu of emission limits that satisfy BACT." In MDEQ's view, the permit required Indeck to submit a plan to minimize emissions during these periods. MDEQ, however, did not consider that plan a substitute for the BACT limits contained in the permit. Since Indeck's PSD permit does not completely exempt startup/shutdown from BACT limitations, the Board declined the basis for invoking Tallmadge Generating Station and Rockgen Energy Center (an electric power generating case out of the State of Wisconsin and cited as precedent in Tallmadge). The Board remanded the PSD permits in both of those cases because the permits contained blanket exemptions from BACT emissions limits during startup and shutdown periods, contrary to the directives of the Clean Air Act (CAA), as interpreted by EPA policymakers. In the Indeck case, however, the PSD permit explicitly establishes BACT emissions limits for NO<sub>x</sub>, CO, VOCs, and particulate matter, on a tons per twelve-month rolling time period basis (as determined at the end of each calendar month), including all periods of startup, shutdown, and malfunction. The permit also has a provision limiting total startup/shutdown event time to 2,000 hours per year (500 hours per individual turbine) and defining "startup" as "the period of time from initiation of combustion firing until the unit reaches steady state operation (loads greater than 90 percent)." In these circumstances, EAB determined that it would be inappropriate to construe Tallmadge and Rockgen as establishing bright-line rules for every case in which the PSD permit contains a startup/shutdown emissions minimization plan.

On September 30, 2004, for the foregoing reasons, the Board denied the petition for review of PSD Permit No. 364-00A.

Dated: April 22, 2005.

**Norman Niedergang,**

*Acting Regional Administrator, Region 5.*

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