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Attorneys for J.R. Simplot Company

IDAHO BOARD OF ENVIRONMENTAL QUALITY

J.R. SIMPLOT COMPANY,

Petitioner,

v.

THE IDAHO DEPARTMENT OF
ENVIRONMENTAL QUALITY, a Political
Subdivision of the State of Idaho,

Respondent.

Docket No. 0101-13-02

J.R. SIMPLOT COMPANY'S
PETITION FOR CONTESTED CASE
HEARING AND DECLARATORY
RULING

J.R. Simplot Company ("Simplot"), by and through its attorneys of record, respectfully petitions the Idaho Board of Environmental Quality (the "Board") for a contested case hearing and a declaratory ruling. This Petition is submitted in accordance with Idaho Code §§ 39-107(5), 67-5232, and 67-5240, and IDAPA 58.01.23 *et seq.* (the "Administrative Procedure Rules"). Simplot seeks review of an August 20, 2013 action by the Idaho Department of Environmental Quality ("IDEQ"), which determined Simplot's application for a Permit to Construct ("PTC") was incomplete. IDEQ's incompleteness determination is contrary to the Rules for the Control of Air Pollution in Idaho, IDAPA 58.01.01 *et seq.* (the "Air Pollution Rules"), prevents Simplot

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from timely receiving a PTC, results in IDEQ's refusal to evaluate Simplot's PTC application within required timelines, and prevents Simplot from achieving significant emissions reductions proposed to resolve a pending enforcement action initiated by the United States Environmental Protection Agency ("EPA").

The administrative record demonstrates that Simplot submitted a complete PTC application to IDEQ in accordance with all applicable requirements in the Air Pollution Rules. IDEQ's subsequent action to declare the application incomplete was therefore in excess of its statutory authority, arbitrary, capricious, and an abuse of discretion. Simplot asks the Board to: (1) initiate a contested case proceeding and find Simplot's application for a PTC complete; (2) issue a declaratory ruling that IDEQ's incompleteness determination was issued erroneously and contrary to the Air Pollution Rules; and (3) order IDEQ to expeditiously find the application complete and to initiate the process to issue the PTC immediately.

I. BACKGROUND

Simplot owns and operates an existing fertilizer manufacturing plant in Pocatello, Idaho (the "Don Plant"). In January 2009, EPA issued a notice of violation to Simplot alleging Clean Air Act violations related to historic permitting projects at the Don Plant. Since that time, Simplot has been in discussions with EPA and IDEQ to settle those allegations (although Simplot believes them to be without merit). In May 2011, in the course of settlement discussions with EPA, Simplot proposed significant reductions in sulfur dioxide (SO₂) emissions from the Don Plant's two sulfuric acid plants. Identified as the #400 and #300 Sulfuric Acid Plants, these plants produce sulfuric acid from elemental sulfur. Related to its proposal to reduce SO₂ emissions, Simplot also renewed earlier requests to increase sulfuric acid production at the Don

Plant. EPA accepted Simplot's proposal, and advised Simplot to permit the emissions reductions and production increase with IDEQ.

In the past five years, however, Simplot has unsuccessfully sought IDEQ's approval of sulfuric acid production increases at the Don Plant. EPA's influence on IDEQ, an agency delegated full permitting authority under the Clean Air Act, stymied IDEQ's approval under the Air Pollution Rules. For instance, in December 2011, Simplot submitted an application to IDEQ for a PTC to modify the #400 Sulfuric Acid Plant to achieve the proposed SO₂ emissions reductions and a production increase. In early 2012, EPA began to scrutinize IDEQ's emission calculation methods and questioned whether the proposed production increase could increase emissions in downstream operations, which would constitute "debottlenecking." Despite EPA's questions, IDEQ was sufficiently satisfied with Simplot's application materials and developed a draft permit for public comment in April 2012. EPA's continued oversight delayed issuance of a permit, despite IDEQ's intent to proceed with issuance. EPA's questions were left unresolved because as a condition of a Consent Order executed by IDEQ and Simplot in May 2012, Simplot agreed to withdraw that application and resubmit a new application in 2013 that included additional review of estimated emissions from the proposed changes.

In light of these circumstances, on November 29, 2012, Simplot met with IDEQ and EPA to establish a permitting approach for the emission reduction and production increase projects related to the settlement of EPA's nationwide sulfuric acid enforcement initiative. In discussions about the future permitting approach, EPA requested additional information from Simplot on debottlenecking emissions. EPA also questioned whether the proposed changes to the #400 Sulfuric Acid Plant must be evaluated together with future, yet unpermitted, changes to the #300

Sulfuric Acid Plant, such that the two projects must be “aggregated” as a single project for permitting purposes. Simplot responded with analyses on both topics in December 2012.

In March 2013, Simplot submitted a new PTC Application to IDEQ, which again proposed to modify the #400 Sulfuric Acid Plant to reduce SO₂ emissions and increase sulfuric acid production. On April 18, 2013, IDEQ informed Simplot that the new PTC Application was incomplete. Notwithstanding IDEQ’s preparation of a draft permit in 2012 for public comment for the same project, IDEQ found the proposed production increase would constitute debottlenecking. Moreover, IDEQ also concluded that changes to the #400 and #300 Sulfuric Acid Plants must be aggregated as a single project for permitting purposes.¹

That incompleteness determination triggered significant changes to Simplot’s PTC Application. In particular, the conclusion to aggregate projects and the finding that the proposed changes would result in debottlenecking, if accurate, leads to additional Prevention of Significant Deterioration (“PSD”) applicability requirements under IDAPA 58.01.01.205, and submission of additional information. Given the impact of IDEQ’s incompleteness determination, Simplot requested on May 17, 2013, that IDEQ review, reconsider, and respond to relevant materials Simplot previously provided to IDEQ and EPA in December 2012 in response to the issues of aggregation and debottlenecking. Simplot suggested that, following IDEQ’s review of those previously submitted materials, the parties should meet to clarify the information needed by IDEQ, if any, to restart the permitting process.

¹ IDEQ’s incompleteness determination also found that Simplot’s analysis of Best Available Control Technology (“BACT”) for SO₂ was deficient and required further justification. Simplot promptly provided additional information to IDEQ on that issue. On August 20, 2013, IDEQ acknowledged that Simplot’s response satisfactorily addressed the questions regarding BACT and that “no additional information from J.R. Simplot Co. concerning BACT is required at this time.”

IDEQ responded to Simplot's suggestion on June 11, 2013, stating that the agency "is continuing to work with EPA" on the aggregation and debottlenecking issues "so that further clarification can be provided to Simplot." Also on June 11, 2013, Simplot requested that EPA provide a final written determination on that agency's position on aggregation and debottlenecking in response to the December 2012 materials submitted by Simplot.

Prior to any substantive response from IDEQ or EPA, on August 20, 2013, IDEQ issued another incompleteness determination to Simplot, which is the subject of this petition. IDEQ stated that the pending PTC Application remained incomplete and that "[p]ending EPA Region 10's guidance on aggregation and debottlenecking, submission of any requested information will be due within 30 days of receiving EPA's response letter." IDEQ also stated that its review of the PTC Application ceased, and it would resume processing the PTC Application only after Simplot submitted sufficient information as required by EPA.

On August 29, 2013, EPA informed Simplot of its position on aggregation and debottlenecking. According to EPA, the proposed modifications to the #400 Sulfuric Acid Plant must be aggregated with future changes to the #300 Sulfuric Acid Plant, and considered together as a single project for purposes of PSD applicability. In addition, EPA concluded that increasing the production of sulfuric acid from the #400 Sulfuric Acid Plant constitutes debottlenecking, requiring Simplot to evaluate emissions impacts from downstream emission units affected by the project. As a result of those findings, EPA concluded that Simplot must submit additional information to assess if PSD requirements apply to the proposed project. IDEQ's incompleteness determination dated August 20, 2013 was predicated on the subsequent findings of EPA on August 29, 2013.

II. PETITION FOR A CONTESTED CASE HEARING

Review of IDEQ's incompleteness determination is proper under Idaho law. Idaho Code § 39-107(5) provides that: "[a]ny person aggrieved by an action or inaction of the department shall be afforded an opportunity for a fair hearing upon request therefor in writing pursuant to [the Idaho Administrative Procedure Act] and the rules promulgated thereunder." The only "fair hearing" provided in the APA is a contested case proceeding. *See* Idaho Code § 67-5240; IDAPA 58.01.23.001.03 ("Section 39-107, Idaho Code, provides the opportunity to initiate a contested case proceeding."). Consequently, IDEQ's action to deem Simplot's PTC Application incomplete on August 20, 2013 renders Simplot an aggrieved person, entitled to review of that decision through a contested case proceeding.

IDEQ's determination that the PTC Application is incomplete is contrary to the law, arbitrary, capricious, and constitutes an abuse of agency discretion. Simplot submitted all of the necessary information and analysis required by IDAPA 58.01.01.202. The PTC Application is complete and suitable for review, pursuant to IDAPA 58.01.01.209.01. In particular, the proposed changes to the #400 Sulfuric Acid Plant are not a major modification, as defined by IDAPA 58.01.01.205.01 and 40 C.F.R. § 52.21(b)(2). Further, Simplot properly identified all emissions units whose emissions could be affected by the project and included those units in its PSD applicability determination, as required by IDAPA 58.01.01.205.01 and 40 C.F.R. § 52.12(r)(6).

IDEQ relies upon EPA's findings on aggregation and debottlenecking to support its incompleteness determination. Under the rules, however, Simplot's PTC Application is complete and ripe for the next stage of review. Moreover, the findings on those particular issues

are unsupported by the facts in this case. Accordingly, IDEQ's incompleteness determination should be vacated by the Board and remanded to the agency with directions to issue Simplot a completeness determination on its PTC Application immediately and to recommence the process to issue the PTC for the #400 Sulfuric Acid Plant.

III. PETITION FOR DECLARATORY RULING

Simplot also has the right to a declaratory ruling. The APA provides that: “[a]ny person may petition an agency for a declaratory ruling as to the applicability of any statutory provision or of any rule administered by the agency.” Idaho Code § 67-5232. IDEQ's Administrative Rules extend the same right. *See* IDAPA 58.01.23.043 -.052; IDAPA 58.01.23.010.04 (defining “Declaratory Ruling” as “[a]n interpretation by the Board, rendered pursuant to Section 67-5232, Idaho Code, as to the applicability of any statute, order, or rule of the Board to a person's circumstances”). Simplot seeks a ruling on the applicability of certain Air Pollution Rules to the permitting of proposed changes to the #400 Sulfuric Acid Plant.

The provisions governing Permit to Construct applications and completeness determinations are set forth in IDAPA 58.01.01.202, .205, and .209. As explained above, Simplot has submitted all information required under the Air Pollution Rules for IDEQ to find Simplot's permit application complete. Simplot requests a declaratory ruling that IDEQ applied the Air Pollution Rules—including PSD requirements set forth in 40 C.F.R. §§ 52.12(r)(6) and 52.21(b)(2)—improperly and should have determined that Simplot's PTC Application is complete. In particular, Simplot seeks a declaratory ruling that proposed changes to the #400 and #300 Sulfuric Acid Plants do not require aggregation or constitute debottlenecking under the Air Pollution Rules and PSD requirements.

IV. REQUEST FOR RELIEF

For the reasons stated herein, the Board should:

- (a) set this matter for a contested case hearing;
- (b) after a hearing or summary judgment proceeding, find Simplot's PTC Application complete;
- (c) issue a declaratory ruling that IDEQ's incompleteness determination was issued erroneously and contrary to the Air Pollution Rules; and
- (d) order IDEQ to find Simplot's PTC Application complete and immediately initiate the process to issue the PTC.

Respectfully submitted this 24th day of September, 2013.

STOEL RIVES LLP

By:



Krista McIntyre

W. Christopher Pooser

Attorneys for J.R. Simplot Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of September, 2013, I caused to be served a true copy of the foregoing via U.S. Mail upon the following:

Hearing Coordinator
Idaho Department of Environmental Quality
1410 N. Hilton
Boise, Idaho 83706-1255

U. S. Mail
 Messenger Delivered
 Facsimile

By: 

Krista McIntyre
W. Christopher Pooser