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

In re:	)	
ConAgra Soybean Processing Company	)	PSD Appeal Nos. 98-27 & 98-28
PSD Permit No. CP-129-8541-00039	)	

ORDER DENYING REVIEW

On September 14, 1998, Consolidated Grain & Barge Company ("CGB"), and Valley Watch, Incorporated ("VWI"), filed petitions for review of a federal Prevention of Significant Deterioration ("PSD") permit (the "Permit") issued to ConAgra Soybean Processing Company ("ConAgra") by the Indiana Department of Environmental Management ("IDEM").[1] The Permit would provide pre-construction authorization under the federal PSD program, *see* Clean Air Act § 165, 42 U.S.C. § 7475 ("CAA"); 40 C.F.R. § 52.21, for ConAgra's proposed soybean oil extraction plant. The plant is expected to have a grain-receiving capacity of 3,000 tons per

[1]The Regional Administrator of EPA Region V delegated authority to the State of Indiana to implement and enforce the federal PSD program in Indiana. *See* 46 Fed. Reg. 9580 (Jan. 21, 1981). The permits IDEM issues pursuant to that delegation are considered federal permits subject to review by the Environmental Appeals Board (the "Board") pursuant to 40 C.F.R. § 124.19. *See In re RockGen Energy Ctr.*, PSD Appeal No. 99-1, slip op. at 3 n.1 (Aug. 25, 1999), 8 E.A.D. __; 40 C.F.R. § 124.41 (terms "EPA" and "Regional Administrator" mean the delegate agency when a state exercises delegated authority to administer PSD permit program); 45 Fed. Reg. 33,290, 33,413 (1980).

hour (4,052,912 tons per year), a soybean-crushing capacity of 6,819 tons per day, a planned load-out capacity of grains without processing of 1,500,000 tons per year, and a soybean oil manufacturing capacity of 497,818 tons per year. *See* Permit at 1 (Aug. 14, 1998). It would emit 937 tons per year of volatile organic compounds ("VOCs"), 91 tons per year of particulate matter ("PM_{10}"), 83.6 tons per year of nitrogen oxides ("NO_x"), 155 tons per year of carbon monoxide ("CO"), and 39.8 tons per year of sulfur dioxide ("SO_2"). *See* Permit, Appendix C, *Air Quality Analysis*, at 2, tbl. 1 ("*AQA*").

Petitioners generally seek review of four aspects of ConAgra's Permit, as outlined below. *See* CGB Petition for Review 98-27; VWI Petition for Review 98-28 ("PSD App. 98-27" and "PSD App. 98-28"). Upon receipt of the Petitions for Review, the Board requested responses from IDEM, which were filed on November 2, 1998 ("IDEM Resp. 98-27" and "IDEM Resp. 98-28"). ConAgra also filed responses to the Petitions for Review on November 9, 1998 ("ConAgra Resp. 98-27" and "ConAgra Resp. 98-28"). CGB subsequently sought and was granted leave by the Board to file a reply ("CGB Reply 98-27") to IDEM's and ConAgra's responses.[2]

---

[2]*See* Order Granting Petitioner Leave to File Reply (EAB, Nov. 20, 1998). The Board's Order limited CGB's reply to those issues identified in its motion. *Id.* at 2. CGB's motion identified two issues: 1) IDEM's use of significant impact levels for ozone, and 2) ConAgra's argument to grandfather the permit application with respect to ozone attainment requirements. *See* CGB Motion for Leave to File Reply, ¶ 4 (Nov. 16, 1998). Upon examination of CGB's reply, the Board finds that the Reply also raises new arguments that were beyond the scope of the Order and that were not raised in the Petition for Review. Accordingly, the Board declines to review these new issues that were not

(continued...)

To obtain Board review of a PSD permit decision, a petitioner must, as a threshold matter, have standing to challenge the permit, and must appeal issues that have been properly preserved for review or were not reasonably ascertainable. 40 C.F.R. § 124.19(a). The Petitioners clearly have standing to appeal the permit decision in this case because they filed comments on the draft permit and participated in the public hearing. *See* IDEM Resp. 98-27 at 1; IDEM Resp. 98-28 at 1; ConAgra Resp. 98-27 at 2; ConAgra Resp. 98-28 at 2; PSD App. 98-27 at 2; PSD App. 98-28 at 2. On the record before us, the issues raised in the Petitions for Review were previously raised in comments to IDEM on the draft permit, *see* Permit, Addendum to Technical Support Document ("*ATSD*") (summarizing "significant" comments and providing responses) and thus, are properly before us.[3]

---

[2](...continued)
properly raised on appeal. *See In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 98-3 through 98-20, slip op. at 8 n.9 (EAB, Feb. 4, 1999), 8 E.A.D. __ (new issues raised for the first time at the reply stage of proceedings are equivalent to late filed appeals and must be denied on the basis of timeliness).

[3]However, VWI and CGB filed a number of additional motions seeking leave either to reply to IDEM's and ConAgra's responses, or to supplement replies filed which would raise additional issues not preserved for review. *See, e.g.*, VWI's Motion Seeking Leave to File a Reply (Dec. 1, 1998) (denied without prejudice by Order dated December 11, 1998, Order Denying Petitioner Leave to File Reply (EAB, Dec. 11, 1998)); VWI's Amended Motion Seeking Leave to File a Reply (Jan. 14, 1999); CGB's Motion Seeking Leave to Supplement Reply (Apr. 30, 1999); VWI's Motion Seeking Leave to Supplement Amended Motion (May 10, 1999). Both IDEM and ConAgra filed motions in opposition.

Upon consideration of these motions, we deny those motions filed by Petitioners which have not already been ruled on by
(continued...)

To obtain review on the merits, a petitioner must demonstrate that the permit, or, more precisely, a permit condition, is based on:

> (1) A finding of fact or conclusion of law [that] is clearly erroneous; or
>
> (2) An exercise of discretion or an important policy consideration [that] the Environmental Appeals Board should, in its discretion, review.

40 C.F.R. § 124.19(a); *accord, e.g.*, *In re AES Puerto Rico L.P.*, PSD Appeal Nos. 98-29 through 98-31, slip op. at 6 (EAB, May 27, 1999), 8 E.A.D. __; *In re Hawaii Elec. Light Co.,* PSD Appeal Nos. 97-15 through 97-23, slip op. at 8 (EAB, Nov. 25, 1998), 8 E.A.D. __; *In re EcoElectrica, L.P.,* PSD Appeal Nos. 96-8 & 96-13, slip op. at 7 (EAB, Apr. 8, 1997), 7 E.A.D. __. The Board's power of review is discretionary, and the Board is guided by the preamble to section 124.19 which states that the Board's power

---

[3](...continued)
separate order. The rules governing petitions for review do not contemplate further briefing by petitioners, except when the Board grants review of a petition. *See* 40 C.F.R. § 124.19(c). Although the Board will exercise its discretion to allow additional briefing in appropriate cases prior to deciding to grant review, in this instance the Board has determined that the supplemental briefing does not aid in its deliberation of the Petitions for Review. *See In re Kawaihae Cogeneration Project*, PSD Appeal Nos. 96-9 through 96-11, 96-14 & 96-16, slip op. at 7 n.8 (EAB, Apr. 28, 1997), 7 E.A.D. __. In addition, as noted above, these motions raise several additional issues that were not raised in the Petitions for Review, and Petitioners have failed to provide adequate justification for the late date at which they have attempted to raise them. *See supra* note 2.

of review "should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional [State] level * * *." 45 Fed. Reg. 33,412 (May 19, 1980); *accord AES Puerto Rico,* slip op. at 6, 8 E.A.D. __.

The burden of demonstrating that review is warranted rests with the petitioner challenging the permit decision. 40 C.F.R. § 124.19(a); *accord, e.g., AES Puerto Rico,* slip op. at 7, 8 E.A.D. __; *Hawaii Elec. Light Co.*, slip op. at 8, 8 E.A.D. __; *Ecolectrica,* slip op. at 7, 7 E.A.D. __. We have explained that in order to establish that review of a permit is warranted, section 124.19(a) requires that a petitioner both state the objections to the permit that are being raised for review and explain why the permit issuer's previous response to those objections (*i.e.*, the decision maker's basis for the decision) is clearly erroneous or otherwise warrants review. *See Kawaihae Cogeneration Project,* slip op. at 10, 7 E.A.D. __; *see also In re Puerto Rico Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995); *In re Genesee Power Station, L.P.*, 4 E.A.D. 832, 866 (EAB 1993).

We address each of the Petitioners' contentions, and IDEM's and ConAgra's responses, in the paragraphs below.

1. National Ambient Air Quality Standard for Ozone

First, Petitioners generally allege that ConAgra's Permit was improperly issued by IDEM because it fails to demonstrate

that the proposed facility will not cause or contribute to an exceedance of the National Ambient Air Quality Standard ("NAAQS") for ozone.[4] *See* PSD App. 98-27 at 4-18; PSD App. 98-28 at 4-5. In response, IDEM and ConAgra contend that the proposed facility will not cause or contribute to an exceedance of the ozone NAAQS because the source impact analysis conducted predicts a maximum one part per billion increase in the ambient air concentrations of ozone **B** an amount that IDEM considers *de minimis* or insignificant. *See* IDEM Resp. at 5-6; ConAgra Resp. at 3, Att. 1 at 13-16.

The NAAQS are "maximum concentration ‹ceilings'" for particular pollutants, "measured in terms of the total

---

[4]At the time ConAgra applied for a PSD permit in May 1997, Posey County, the proposed location for this facility, was designated attainment/unclassifiable for ozone under a one-hour standard (set at 0.12 parts per million ("ppm") (or 120 parts per billion ("ppb")), with a 1-hour averaging time). *See* 40 C.F.R. § 81.315 (1997). In July 1997, EPA issued a new ozone NAAQS ("8-hour standard") of 0.08 ppm (or 80 ppb) with an 8-hour averaging time. *See* 62 Fed. Reg. 38,856, 38,858 (July 18, 1997).

Litigation involving EPA's promulgation of the 8-hour standard is ongoing. On May 14, 1999, a divided panel of the United States Court of Appeals for the D.C. Circuit rendered a decision in *American Trucking Association v. United States Environmental Protection Agency*, 1999 WL 300618 (D.C. Cir.), remanding the 8-hour standard for EPA's review. However, the Court did not vacate the 8-hour standard, although it found it to be unenforceable "by virtue of Clean Air Act § 181(a), 42 U.S.C. § 7511(a)." *American Trucking Assoc.*, 1999 WL 300618, *27 (D.C. Cir.). On June 28, 1999, EPA sought *en banc* review by the D.C. Circuit. The matter is pending before the D.C. Circuit.

Irrespective of the status of the ozone NAAQS, Petitioners have not met their burden of identifying clear error on the part of IDEM in issuing the Permit in this case.

concentration of a pollutant in the atmosphere." U.S. EPA Office of Air Quality Planning, New Source Review Workshop Manual ("Draft Manual")[5] at C.3. NAAQS have been set for six criteria pollutants: sulfur oxides,[6] particulate matter,[7] NO_2, CO, ozone, and lead. *See* 40 C.F.R. §§ 50.4-.12. An air quality analysis, conducted pursuant to the regulatory requirements of 40 C.F.R. § 52.21(k), (l) and (m), is the principal means for determining at the preconstruction stage whether the NAAQS or a PSD increment[8] will be exceeded by a new major stationary source.[9] The requirements of preventing violations of the NAAQS and the applicable PSD increments, and the required use of best available

---

[5]The Draft Manual was issued as a guidance document for use in conjunction with new source review workshops and training, and to guide permitting officials with respect to PSD requirements and policy. Although it is not accorded the same weight as a binding Agency regulation, the Draft Manual has been considered by this Board as a statement of the Agency's thinking on certain PSD issues. *See, e.g., Hawaii Elec. Light Co.,* slip op. at 9 n.7, 8 E.A.D. __; *EcoElectrica,* slip op. at 5 n.3, 7 E.A.D. __; *In re Masonite Corp.*, 5 E.A.D. 551, 558 n.8 (EAB 1994).

[6]Sulfur oxides are to be measured in the air as SO_2. *See* 40 C.F.R. § 50.4(c).

[7]For purposes of determining attainment of the NAAQS, particulate matter is to be measured in the ambient air as particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers. *See* 40 C.F.R. § 50.6(c).

[8]A PSD increment is the maximum allowable increase in pollutant concentration over a baseline concentration. 40 C.F.R. § 52.21(c).

[9]*See* Draft Manual at C.1-C.2 ("the analysis will involve (1) an assessment of existing air quality, * * * and (2) predictions, using dispersion modeling, of ambient concentrations that will result from the applicant's proposed project and future growth associated with the project.")

control technology ("BACT"), to minimize emissions of air pollutants, *see* 40 C.F.R. § 52.21(j)(2), are the core of the PSD regulations.[10] *See* Draft Manual at 5; *accord AES Puerto Rico*, slip op. at 4, 8 E.A.D. __.

The Draft Manual provides that a source can demonstrate that it does not "cause or contribute" to a violation of a NAAQS in one of three ways:

> 1. The proposed new source or modification will not cause a significant ambient impact anywhere.
>
> 2. The proposed new source or modification, in conjunction with existing sources, will not cause or contribute to a violation of any NAAQS * * *.
>
> 3. The proposed new sources or modification, in conjunction with existing sources, will cause or contribute to a violation, but will secure sufficient emissions reductions to offset its adverse quality impact.

Draft Manual at C.51-C.52.

IDEM and ConAgra argue that the air quality analysis that ConAgra conducted shows the proposed facility meets the first of these compliance demonstration mechanisms because the maximum modeled impact for ozone is 1 ppb -- substantially less than the 3 ppb level chosen by IDEM as "significant." *See* IDEM Resp. 98-27 at 5; ConAgra Resp. at 98-27 at 9; *AQA* at 7 ("The impact * * * from ConAgra was insignificant with the maximum impact modeled at 1.0 ppb."). CGB argues that IDEM's use of significant impact

[10]We note that Petitioners do not challenge on appeal IDEM's BACT determinations.

levels for ozone is inappropriate because EPA has not identified one for ozone. *See* PSD App. 98-27 at 8-9; CGB Reply at 3. We are unpersuaded by CGB's argument.[11] The mere fact that EPA has not set a significant impact level for ozone does not, without more, demonstrate clear error or an abuse of discretion on the part of IDEM in using significant impact levels for ozone in the context of this case. *See In re Old Dominion Elec. Cooperative,* 3 E.A.D. 779, 782 n.6 (Adm'r 1992) (no clear error shown in light of state findings and fact that EPA has not issued any final guidance that would contravene state policy); *In re Hadson Power 14 - Buena Vista*, 4 E.A.D. 258, 269-70 (EAB 1992) (clear error is not established where no EPA guidance contravenes state policy and no showing was made that state's policy was inconsistent with federal law); *see also AES Puerto Rico*, slip op. at 33-34, 8 E.A.D. __ (absence of guidance in setting PM_{10} BACT limit does not indicate clear error; Region's approach was reasonable under the circumstances). Furthermore, Petitioners have not presented any other reasons for questioning IDEM's explanation and selection of a 3 ppb significant impact level. Nor have Petitioners demonstrated any reason to believe that the use of a 3 ppb significant impact level in this case, as devised by IDEM, would cause or contribute to an exceedance of the ozone NAAQS.

[11]We note that VWI, unlike CGB, does not directly take issue with IDEM's use of a 3 ppb significance level. Rather, VWI merely concludes that "the voluminous VOC/Hexane emissions * * * will cause or contribute to violations of the NAAQS in Vanderburgh County's Air Quality Control Region." PSD App. 98-28 at 5.

Petitioners merely make conclusory statements that IDEM and ConAgra "clearly failed" to demonstrate that the facility will not cause or contribute to a NAAQS violation. *See e.g.*, PSD App. 98-27 at 9.[12] This is simply insufficient to obtain review by the Board, accordingly, review is denied as to this issue. *See In re Maui Elec. Co.*, PSD App. 98-2, slip op. at 19 (EAB, Sept. 10, 1998), 8 E.A.D. __ (denying review for Petitioner's failure to show why response to comments were inadequate).[13]

VWI also asserts that IDEM failed to adequately address the impacts of the Permit on the ozone maintenance plan[14] approved for Vanderburgh County, Indiana, and that the Permit will allow emissions of VOC/hexane that will cause or contribute to a violation of the NAAQS for ozone in Posey County and in the downwind counties of Vanderburgh and Warrick, Indiana. PSD App. 98-28 at 4-5. VWI's issues on appeal simply mirror comments it made on the draft Permit. VWI states on appeal that "Vanderburgh

---

[12]We note that IDEM provided a summary of the significant ozone NAAQS comments received, including comments related to the effect of the Permit on regional ozone levels, and responses thereto, upon issuing the Permit on August 14, 1998. *See ATSD* at 16-19.

[13]On the record before us, we have concluded that IDEM's finding that ConAgra "will not violate any established emission standards for * * * ozone," *see ATSD* at 21, was not shown to be clearly erroneous under these circumstances. Should circumstances change, or EPA develop guidance in responding to these or similar situations in the future, our deference here is in no way intended to preclude EPA from diverging from the policy choices made by IDEM in this case.

[14]The ozone maintenance plan for Vanderburgh County was approved as a State Implementation Plan revision on December 2, 1997. 62 Fed. Reg. 64725, 64736 (Dec. 9, 1997).

County's total industrial VOC emissions are less than 3,000 tons per year. If this plant were built just a mile and one half to the east, it would add nearly 33% to that figure." PSD App. 98-28 at 5. VWI's comments on the draft Permit stated, "Total stationary source emissions of VOC in Vanderburgh County are at a level of approximately 2,800 tons per year. This plant, just over the county line, will add a full one-third (33%) to that figure even if ConAgra's data is correct. *See* PSD App. 98-28, Exh. 2 at ¶ 4 (June 12, 1998). Although VWI has asserted additional VOC emissions "will devastate efforts of Vanderburgh County * * * to comply with the ozone NAAQS," they do not specifically allege that the ConAgra VOC emissions would actually violate the ozone maintenance plan. *See* PSD App. 98-28 at 5. VWI concludes that while they have "asked IDEM to address this problem, * * * all we have gotten is lip service." PSD App. 98-28 at 5. VWI has merely restated comments raised during the public comment period without explaining how IDEM's response[15] to those comments is either clearly erroneous or otherwise warrants review. *See Kawaihae Cogeneration Project*, slip op. at 10, 7 E.A.D. __. Accordingly, Petitioners have failed to carry their burden and we cannot find that IDEM clearly erred in concluding that ConAgra's facility would not cause or contribute to an exceedance of the NAAQS for ozone. Thus, review is denied as to Petitioner's challenge of IDEM's ozone NAAQS determination.

[15]*See supra*, note 12.

Petitioners also challenge operating Condition No. 38 of the Permit. Condition No. 38 provides in pertinent part:

> Pursuant to 326 IAC 2-2-5, 40 C.F.R. 52.21(k) and 326 IAC 2-1-3(i)(8), the Permittee shall obtain creditable reductions in the emissions of ozone precursors equivalent to their VOC emissions during the months of May through September. * * * A plan to obtain these creditable reductions on an ongoing, annual basis shall be submitted to the department at least 60 days prior to the operation of the plant and updated annually as needed.

Permit at 41.

VWI primarily claims that the basis for emissions offsets in Condition No. 38 is "outside the realm of any EPA rule or the Clean Air Act." PSD App. 98-28 at 10-13. VWI also asserts that Condition No. 38 "will cause a legal, ethical, enforcement and regulatory morass * * * turn[] the PSD program * * * upside down and * * * confusion would reign * * *." *Id.* at 11. Condition No. 38 of the Permit clearly states the authority it rests upon as both state (326 IAC 2-2-5 (Air Quality Impact Requirements); 326 IAC 2-1-3(i)(8) (Construction Permit Review Requirements)) and federal (40 C.F.R. 52.21(k) (Source Impact Analysis)) PSD regulations. IDEM's *ATSD* summarizes the comments regarding its authority for the condition, *see ATSD* at 17, and provides in response that:

> the condition is not established pursuant to the nonattainment permit rules and isn't intended to implement those provisions, * * *. The condition is intended to be consistent with whatever future air quality planning efforts are necessary to ensure the

> State Implementation Plan is adequate to attain and maintain air quality in compliance with the revised NAAQS for ozone.

Id. at 19. IDEM's response to VWI's appeal counters that this provision results in a "PSD permit that is more stringent than what is required by federal law and is supported by Indiana law." IDEM Resp. 98-28 at 10. As such, IDEM argues, the Board should not exercise jurisdiction over Condition No. 38. *Id*.

In this case, we do not find clear error with IDEM's conclusion that the ozone NAAQS will not be violated, as discussed *supra*. Upon our examination of the record, we conclude that the offsets contemplated by Condition No. 38 were not considered in demonstrating that the significant impact level was not exceeded. *See* IDEM Resp. 98-27 at 6 (stating "IDEM did not consider the reductions necessary for ConAgra to meet the demonstration under 40 CFR 52.21(k)."); *see also AQA* at 7; *ATSD* at 19. Furthermore, we find that IDEM has now abandoned federal law as a basis for imposing the condition, and articulated that Condition No. 38 is not intended to demonstrate compliance with 40 C.F.R. § 52.21(k) with respect to the NAAQS for ozone. *See* IDEM Resp. 98-27 at 7; IDEM Resp. 98-28 at 10 (stating that the Board "should not exercise jurisdiction over Condition 38 of ConAgra's permit as it should properly be reviewed under Indiana law, if at all."). However, as noted above, Condition No. 38 of the Permit contains a reference to the federal PSD program as authority for the condition. Since IDEM has abandoned federal

law as a basis for imposing Condition No. 38, IDEM is ordered to strike any reference in the condition to federal law, in particular 40 C.F.R. § 52.21(k). Accordingly, review is denied regarding Condition No. 38.[16]

CGB also argues that Condition No. 38 is intended to "cure" IDEM and ConAgra's failure to demonstrate that the plant's VOC emissions will not cause or contribute to a violation of the ozone standard. PSD App. 98-27 at 11-18. IDEM and ConAgra respond that the emissions offset provision is not required to make the air quality compliance demonstration under the PSD program. *See* ConAgra Resp. 98-27 at 25; IDEM Resp. 98-27 at 7. Because we have found that Petitioners have failed to demonstrate that IDEM's conclusion that the Permit would not cause or contribute to an exceedance of the NAAQS for ozone was clear error, and CGB has provided no additional argument in this section of its Petition for Review as to why the ozone NAAQS is violated, we need not address CGB's contention. Accordingly review is denied as to CGB's claims on this issue.

---

[16]The record reflects that the Permit is also being challenged in state court. *See* ConAgra Resp. 98-27 at 3. This would appear to be the appropriate forum for challenging Condition No. 38 and its basis under state law. *See Kawaihae Cogeneration Project,* slip op. at 5 n.5, 7 E.A.D. __ (Board's jurisdiction extends to review of PSD component of the permit, not other components issued pursuant to state law); *see also Knauf Fiber Glass*, slip op. at 54, 8 E.A.D. __. In denying review here, the Board makes no conclusion as to the merits of Petitioners' claims under state law.

2. Pre-Construction Monitoring

Second, CGB and VWI challenge the Permit on the ground that it fails to satisfy the requirements for pre-construction monitoring for PM_{10}. *See* PSD App. 98-27 at 18-22; PSD App. 98-28 at 6-9. Petitioners argue that the monitoring data relied upon by ConAgra and IDEM do not meet requirements established by EPA's Ambient Monitoring Guidelines for Prevention of Serious Deterioration, EPA-450/4-87-007) (May 1987) ("Monitoring Guidelines"). Specifically, Petitioners claim that the data are not representative of existing air quality because: 1) the data relied upon are from monitors located too far away from the site (15 kilometers), and 2) the data are too old. IDEM responds that the PSD regulations allow for the use of "existing, representative monitoring data" to satisfy the pre-construction monitoring requirement. IDEM Resp. 98-27 at 8; IDEM Resp. 98-28 at 7.

The PSD regulations provide in relevant part:

> Any application for a permit under this section shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants: (a) For the source, each pollutant that it would have the potential to [e]mit in a significant amount.

40 C.F.R. § 52.21(m)(1)(i). The Monitoring Guidelines provide that monitoring data include "the use of existing representative air quality data or monitoring the existing air quality." Monitoring Guidelines at 3. With respect to existing

representative air quality data, the Monitoring Guidelines state that monitor location, quality of data, and currentness of data need to be considered. *Id.* at 6. For the location criteria, the Monitoring Guidelines also provide "[i]n situations where there is no existing monitor in the modeled areas, monitors located outside these three types of areas may or may not be used. Each determination must be made on a case-by-case basis." *Id.* The Monitoring Guidelines contemplate that the permitting authority has discretion to utilize existing data that do not meet the location criterion described in the Monitoring Guidelines.

Here, IDEM compared existing 1989-1991 monitoring data from a PM_{10} monitor that was two miles west of the proposed facility with similarly aged monitoring data from two monitors farther away in Evansville. *See ATSD* at 33. IDEM also evaluated more recent (1995-1997) data from the Evansville monitors with the 1989-1991 Evansville data and found the newer data indicated that air quality was "improving." *Id.* at 34. Accordingly, IDEM concluded that the 1989-1991 Evansville data was conservative and found it was "representative of the area for PM_{10}." *See AQA* at 3. The Evansville data indicated a higher background concentration of PM_{10} than the data from two miles west of the proposed plant, although the monitor within 2 miles of the plant captured emissions from the A.B. Brown Power Plant, the area's largest emitter of PM_{10}. *See* IDEM Resp. 98-27 at 8. IDEM reasoned that the use of the conservative Evansville ambient

background concentration data would serve to limit ConAgra's emissions, thereby decreasing the likelihood of a NAAQS violation. *See* IDEM Resp. 98-27 at 8; IDEM Resp. 98-28 at 7. Accordingly, IDEM did not require pre-construction monitoring.

Our examination of the record indicates that IDEM adequately considered the factors of the Monitoring Guidelines, and made a reasoned judgment that PM_{10} pre-construction monitoring is not necessary in this case. Petitioners make no persuasive argument and point out no data to refute IDEM's judgment. *See Knauf Fiber Glass*, slip op. at 35, 8 E.A.D. __. (stating the Board's inclination to support the permitting authorities technical judgment on the pre-construction monitoring determinations). In these circumstances, IDEM's decision is not clearly erroneous. Thus, we deny review of this issue.

3. PSD Increment Consumption Analysis

Third, Petitioners allege that the Permit was improperly issued because the increment consumption analysis for PM_{10} does not comply with the requirements of 40 C.F.R. § 52.21(c), (k) and (m). PSD App. 98-27 at 25; PSD App. 98-27 at 9. VWI provides no discussion upon which a determination of error in IDEM's increment consumption analysis can be made; thus we deny review because VWI has not met its burden of proving that the Permit was based on clear error or otherwise warrants review. *See Hawaii Elec. Light Co.*, slip op. at 8, 8 E.A.D. __ (denying review where

petition is so lacking in specificity as to why decision was erroneous that no basis for review has been presented).[17]

We now turn to CGB's contentions regarding IDEM's PSD increment consumption analysis. CGB claims there is error because secondary emissions were not included and IDEM failed to support "its assertion that all sources constructed after the minor source baseline date and their actual emissions were properly included in the source inventory." PSD App. 98-27 at 25. CGB raised these issues during the public comment period and IDEM responded to them in the *ATSD. See ATSD* at 34. IDEM pointed out that the source baseline date was established on January 9, 1978, not in 1988 as CGB stated in its comments. *Id.* IDEM also outlined the methodology for maintaining the source inventory and informed CGB that secondary emissions do not significantly contribute to ambient air quality in this case. *Id.* CGB's petition merely restates comments raised and responded to during the permitting process and does not explain why IDEM's response was error. *See In re Encogen Cogeneration Facility*, PSD Appeal Nos. 98-22 through 98-24, slip op. at 11, (EAB, March 25, 1999), 8 E.A.D. __ (review denied where petitioner fails to demonstrate why response to comments were inadequate); *see also Knauf Fiber Glass*, slip op. at 61, 8 E.A.D. __ (review of

[17]We note that VWI merely disagrees with the amount of increment ConAgra's facility is projected to consume, rather than claiming error in IDEM and ConAgra's increment consumption analysis. VWI has not given the Board any basis to review IDEM's judgment in this respect, and we decline to review it *sua sponte.*

petitioner's secondary emissions issues denied for failing to satisfy burden of review). Therefore, we deny review of this issue because the petition identifies neither clear error nor an important policy consideration that justifies Board review.

4. Additional Impacts Analysis

Finally, Petitioners allege that the additional impacts analysis of the proposed project on economic growth, soils, vegetation and visibility required by 40 C.F.R. § 52.21(o) was inadequate. *See* PSD App. 98-27 at 25-29; PSD App. 98-28 at 9-10. IDEM and ConAgra respond that the additional impact analysis was conducted in accordance with the PSD regulations. *See* IDEM Resp. 98-27 at 10-11; ConAgra Resp. 98-27 at 32-34; IDEM Resp. 98-28 at 8; ConAgra Resp. 98-28 at 6.

The PSD regulations require that "[t]he owner or operator shall provide an analysis of the impairment to visibility, soils and vegetation that would occur as a result of the source . . . and general commercial, residential, industrial and other growth associated with the source." *See* 40 C.F.R. § 52.21(o). EPA's Draft Manual provides that the additional impact analysis is composed of four parts - 1) growth; 2) ambient air quality impact analysis; 3) soils and vegetation impacts; and 4) visibility impairment. *See* Draft Manual at D.3. The Draft Manual states that the purpose of the "growth analysis is to quantify associated growth; that is, to predict how much new growth is

likely to occur to support the source * * * under review, and then to estimate the emissions which will result from that associated growth." *Id.* According to IDEM, ConAgra's additional impact analysis "showed no expected impacts to adversely affect major vegetative cover type and crop lands in the area from existing conditions." *ATSD* at 37.[18]

We cannot find clear error on IDEM's part when the Petitioners have stated only, in the most general of terms, that the additional impact analysis was inadequate. It appears that the concerns expressed in the Petitions were responded to in IDEM's *ATSD.* VWI's claim that IDEM has "accepted ConAgra's analysis of impacts on soil, vegetation and visibility without any attempt to verify or even justify it" was answered by IDEM. PSD App. 98-28 at 10. IDEM explained to VWI in the *ATSD* that "IDEM typically works very closely with applicants * * * to ensure that the application will properly address all applicable requirements. While ConAgra does provide its general design of the plant, the regulatory requirements are provided by, or independently verified by IDEM." *ATSD* at 39. Since VWI has presented no information to refute IDEM's response, we deny review of VWI's claim on this issue since they have failed to demonstrate clear error.

[18]ConAgra's additional impact analysis also included a visibility analysis, as required under the PSD regulations. The petitions for review did not raise any specific objections to the visibility analysis conducted in this case.

CGB challenges the additional impacts analysis on two bases. First, CGB alleges that the vegetation impacts analysis, including the impact on melon crops, was "shallow." PSD App. 98-27 at 25. Our examination of the record indicates that IDEM concluded, based on census data showing increased melon acreage in the area and strong market values, as well as, ozone sensitivity studies on foliage, that no adverse impact on vegetation would result from the facility. *See ATSD* at 37-38. CGB has presented no information that demonstrates to the Board that IDEM has committed clear error in its vegetation impact analysis. Thus review is denied on this issue.

Next, CGB claims that the additional impact analysis was inadequate as to future economic growth in the area. CGB contends that because the facility will cause the area to violate the 8-hour standard for ozone, future economic growth is jeopardized. CGB's contention rests on an assumption that the Permit will cause or contribute to a violation of the NAAQS for ozone. Because we have found, *supra*, that Petitioners have failed to meet their burden with respect to the issue of whether the Permit will cause or contribute to a violation of the ozone NAAQS, we deny review of this issue. CGB has not demonstrated any clear error or raised any policy issue warranting review by the Board. Thus, we deny review of Petitioners' additional impact analysis issues.

For the foregoing reasons, review of Petitions 98-27 and 98-28 is hereby denied. We order IDEM to revise Condition No. 38 of the Permit to strike the reference to 40 C.F.R. § 52.21(k). On all other issues raised and not addressed, review is denied.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 09/08/99

By: /s/

Kathie A. Stein
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of ConAgra Soybean Processing Company, Docket Nos. PSD 98-27 & 98-28, were sent to the following persons in the manner indicated:

By Certified Mail,

Return Receipt Requested:

Elizabeth A Zlatos, Esq.
Indiana Department of Environmental Management
Office of Legal Counsel
100 N. Senate Ave., 13th Floor
P.O. Box 6015
Indianapolis, IN 46206-6015

Michael H. Winek, Esq.
Babst, Calland, Clements & Zomnir, P.C.
Counsel for ConAgra Soybean Processing Company
Two Gateway Center, Eighth Floor
Pittsburgh, PA 15222

John A. Andreason, Esq.
McGrath, North, Mullin & Kratz, P.C.
Suite 400
One Central Park Plaza
222 South Fifteenth Street
Omaha, NE 68102

Paul R. Cort, Esq.
U.S. Environmental Protection Agency
Office General Counsel
401 M Street, S.W. (2344)
Washington, DC 20460

Ann L. Coyle, Esq.
U.S. Environmental Protection Agency Region V
Office of Regional Counsel
77 West Jackson Blvd.
Chicago, IL 60604-3507

John Blair, President
Valley Watch, Inc.
800 Adams Ave.
Evansville, IN 47714

Larry J. Kane, Esq.
Bigham Summers Welsh & Spilman
Counsel for Consolidated Grain and Barge Company
2700 Market Tower Building
10 West Market Street
Indianapolis, IN 47204

Date: 09/09/99

/s/
Mildred Johnson
Staff Assistant