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

In re:	)	
Energy Answers Arecibo, LLC	)	
Arecibo Puerto Rico Renewable Energy Project	)	PSD Appeal Nos. 13-05, 13-06, 13-07, 13-08, and 13-09

EPA REGION 2's RESPONSE TO PETITIONS FOR REVIEW

Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Other Authorities

Table of Attachments

Region 2's Excerpts of Record (1-21)

Other Attachments

ATTACHMENT 1: Meteorological Monitoring Guidance for Regulatory Modeling Applications, EPA-454/R-99-005 (cover and page 3-1)

ATTACHMENT 2: Quality Assurance Handbook for Air Pollution Measurement Systems, March 2008 (page 4 of Volume 4, Appendix C)

ATTACHMENT 3: AERMOD Implementation Guide, dated March 19, 2009 (cover and page 8).

ATTACHMENT 4: AERMOD: Description of Model Formulation, EPA-454/R-03-004 dated September 2004 (cover, and page 2, 75-76)

ATTACHMENT 5: User's Guide for the AERMOD Meteorological Preprocessor (AERMET) Addendum, EPA-454/B-03-002, November 2004 (cover and Table B-3b).

ATTACHMENT 6: 40 CFR Part 51, Appendix W, FR Vol. 70, No. 216, November 9, 2005 Sections 8.3, 8.3.3.1, reference 5

ATTACHMENT 7: EPA Guidance for Siting Ambient Air Monitors around Stationary Lead Sources, EPA-454/R-92-009, and August 1997 (cover and page 7).

ATTACHMENT 8: Photo extracted from Petitioner's Quinones' Exhibit 1 NOAA Buoy Center Website for meteorological station AROP4.

ATTACHMENT 9: EPA Region 2 Interim Environmental Justice Policy, December 2000, (cover and section 2.2.2, Table 1 and Table 2, and section 2.2.3)

ATTACHMENT 10: Email from George Bridgers, Air Quality Modeling Group, OAQPS to Annamaria Coulter, Region 2, regarding temporal representativeness of Cambalache meteorological data, dated July 26, 2013.

ATTACHMENT 11: Screening Procedures for Estimating the Air Quality Impact of Stationary Sources Revised, EPA 454/R-92-019, October 1992, (cover and page 2-2 to 2-3.)

INTRODUCTION

The EPA Environmental Appeals Board ("Board") should deny review of the challenges brought by The Coalition of Organizations Against Incinerators (La Coalicion de Organizaciones Anti-Incineracion) ("the Coalition"), Eliza Llenza, Waldemar Natalio Flores Flores & Aleida Centeno Rodriguez ("F&C"), Martha Quinones Dominguez, and Cristina Galan ("Petitioners") to the Prevention of Significant Deterioration ("PSD") permit issued pursuant to Section 165 of the Clean Air Act ("Act" or "CAA") and 40 C.F.R. § 52.21 by EPA Region 2 ("Region 2" or "the Region") on June 11, 2013 ("Final Permit" or "PSD Permit") to Energy Answers Arecibo, LLC ("Energy Answers" or "EA") authorizing construction and operation of the Arecibo Puerto Rico Renewable Energy Project ("the Project"). Final Permit, Attachment 1, Excerpt of Record ("ER") #1. The record fully supports the Region's PSD permit decision for the EA project, including a detailed *Fact Sheet* ("FS" or "ER #2") and *Response to Comments* document ("RTC" or "ER #3"). The Petitioners fail to demonstrate clear error, an abuse of discretion, or an important policy consideration warranting review of Region 2's decision. In addition, each Petitioner fails in some instances to meet the Board's pleading requirements, including demonstrating that issues have been preserved for review, providing adequate specificity, and addressing the Region's RTC.

PETITIONERS' BURDEN ON APPEAL

The Petitioners in this matter must meet threshold procedural requirements such as timeliness, standing, and specificity and have the burden of demonstrating that review is warranted. *See Sierra Pacific Industries* at 19. Each petitioner fails to meet its burden of specificity and preservation of issues in one or more ways.

The Board recently codified a longstanding requirement that petitioners must preserve their issues for review and demonstrate specificity in their petitions. *See* 40 C.F.R § 124.19(a)(4)(ii). Petitioners must:

> demonstrate, by providing specific citation to the administrative record, *including the document name and page number*, that each issue being raised in the petition was raised during the public comment period.

Id. (emphasis added). This demonstration ensures that "any issues and arguments it raises on appeal have been preserved for Board review (i.e., were raised during the public comment period or public hearing on the draft permit), unless the issues or arguments were not reasonably ascertainable at the time." *Sierra Pacific Industries* at 19. As the Argument section of this Response indicates specifically, *infra*, each Petitioner has largely failed to make a demonstration that they have preserved issues for review and, in those instances, Region 2 is not aware of record evidence to support such a demonstration. Each of the Petitioners has also relied on extra-record documents without providing a justification for why the information contained in the documents was not reasonably ascertainable during the public comment period. These documents should not be considered because the record is complete on the date the final permit is issued. *See* 40 C.F.R. § 124.18(c); *In re Inter-Power of New York, Inc.*, 5 E.A.D. 130, 147, n.28 ("Under the rules governing these proceedings, the Board will not consider extra-record evidence, except in extraordinary circumstances.").

In addition, petitioners must:

> provide a citation to the relevant comment and response and *explain why the Regional Administrator's response to the comment was clearly erroneous or otherwise warrants review.*

Id. (emphasis added). For each issue raised in a petition, the burden is on the petitioner to explain why the permit issuer's response was erroneous or otherwise warrants review. *See In re Bear Lake*

Properties, UIC Appeal No. 11-03, slip op. at 5 (EAB June 28, 2012), 15 E.A.D. __ (2012), citing *In re Teck Cominco Alaska, Inc.*, 11 E.A.D. 457, 494-95 (EAB 2004)*; In re Wesborough*, 10 E.A.D. 297, 305, 311-12 (EAB 2002). Federal courts have upheld the Board's requirement that a petitioner must "substantively confront the permit issuer's responses" to the petitioner's prior objections. *In re Bear Lake*, slip op. at 5, 15 E.A.D. __ (2012), citing *City of Pittsfield v. U.S. EPA*, 614 F. 3d 7, 11-13 (1st Cir. 2010), aff'g *In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review) (finding that the petitioner "made no effort in its petition to the Board to engage the EPA's initial response to its draft comments.") (other citations omitted). Where the petitioner does engage the EPA's responses to comments, the petitioner must demonstrate with specificity why the Region's prior response is inadequate. *See In re Knauf Fiber Glass, GMBH*, 9 E.A.D. 1, 5 (EAB 2000).

As the Argument section below indicates, *infra*, each Petitioner fails to explain why the Region's responses to their comments were inadequate and, in many instances, provides virtually no specificity aside from a vague reference to the Region's comments. The Coalition did provide a list of the public comments, hearing testimony, and responses to comments that form the basis of their arguments, but did so in summary fashion at the beginning of the Petition, Pet. at 8-9, without connecting many of their arguments and factual allegations to any specifically alleged error in Region 2's responses. *See Sierra Pacific Industries* at 20 ("The Board consistently has denied review of petitions that merely cite, attach, incorporate, or reiterate comments previously submitted on the draft permit.").

The Petition of Ms. Galan, a *pro se* Petitioner, does not address EPA's Response to Comments and provides only vague statements that do not allege any error by EPA or other basis to warrant review. Although the Board endeavors to liberally construe *pro se* petitions, the

Board's precedent demonstrates that the petitions must nonetheless "provide sufficient specificity to apprise the Board of the issues being raised" and how the permit authority erred. *Sierra Pacific* at 20-21; *See also P.R. Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995) (review denied because "the petition does not even facially demonstrate that the Region's methods or conclusions were wrong.").

ARGUMENT

I. Region 2 Did Not Clearly Err or Abuse Its Discretion by Not Regulating Lead, a Nonattainment Pollutant in Arecibo

At the heart of the Coalition's Petition is the contention that EPA must regulate lead in EA's PSD permit even though lead is a nonattainment pollutant in Arecibo. Joined by Petitioner Llenza in this contention, the Coalition attempts to craft an argument without legal support. The Coalition also attempts to argue that the Board should go beyond its jurisdiction to consider a question about applicability thresholds in nonattainment areas. The Petitioners provide no legal basis to require that EPA regulate nonattainment pollutants or address nonattainment applicability in a PSD permit, and they ignore precedent establishing clear lines between nonattainment and attainment area permitting.

a. The Coalition and Petitioner Llenza Fail to Establish a Legal Basis for Regulating Lead in EA's PSD Permit

It is undisputed that the Arecibo area is designated nonattainment for lead. Llenza Pet. at 1; Coalition Pet. at 4; *see also* 40 C.F.R. § 81.355. The Coalition and Petitioner Llenza[1] nonetheless argue that EPA was required to regulate lead as a nonattainment pollutant in EA's federal PSD permit. To support this specious argument, the Coalition relies incorrectly on language in Section

[1] Petitioner Llenza also indicates that EPA has designated the area as nonattainment for Antimony, which is incorrect. Antimony is not a NAAQS pollutant.

165(a)(4) of the CAA, which states that "the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility." *Id.*, 42 U.S.C. § 7475(a)(4). The Coalition fails to include in its argument that Section 165(a)(4) is preceded by language that states the following: "No major emitting facility on which construction is commenced after August 7, 1977, may be constructed *in any area to which this part applies* unless –." CAA Section 165(a), 42 U.S.C. § 7475(a) (emphasis added). The United States Court of Appeals for the District of Columbia Circuit interpreted this language in *Alabama Power Co. v. Costle* , 636 F. 2d 323 (D.C. Cir. 1980), a case regarding EPA's promulgation of PSD regulations. The Court's decision states in relevant part:

> After careful consideration of the statute and the legislative history, we must accept the contention of the industry petitioners that the phrase "constructed in any area to which this part applies" limits the application of Section 165 to major emitting facilities to be constructed in certain locations…. The plain meaning of the inclusion in section 165 of the words "any area to which this part applies" is that Congress intended location to be the key determinant of the applicability of the PSD review requirements.

Id. at 365.

In direct response to the *Alabama Power* decision, EPA promulgated an exemption at 40 C.F.R. § 52.21(i)(2) that explicitly removes nonattainment pollutants from consideration in PSD permits. EPA explained the meaning of this exemption in the preamble to the final rule:

> Once a source applicant has determined that proposed construction falls under PSD based on the above size and location tests, it must then assess whether the pollutants the project would emit are or are [sic] subject to PSD. *If a new major stationary source emits pollutants for which the area it locates in is designated nonattainment then the source is exempt from PSD review for those pollutants.* These sources must, however, meet the applicable requirements of NSR [nonattainment new source review] for each nonattainment pollutant.

45 Fed. Reg. 52676, 52677 (Aug 7, 1980) (emphasis added). Citing to this 1980 Preamble language, the D.C. Circuit accepted this embodiment of *Alabama Power* in *Coalition for Responsible Regulation v. EPA*, 684 F. 3d 102, 132-33 (D.C.Cir. 2012) (quoting 45 Fed. Reg. at 52711-12). EPA crafted the exemption in 40 C.F.R 52.21(i)(2) to state explicitly that paragraphs (j) through (r) of Section 52.21 shall not apply to a major stationary source with respect to pollutants for which an area is designated nonattainment.

Nevertheless, and ignoring *Alabama Power* and the very purpose underlying EPA's promulgation of the exemption, the Coalition argues that EPA did not create a "complete" exemption from PSD regulation because "this regulatory language only creates an exemption from paragraphs (j) through (r)." Pet. at 11. However, all of the substantive permitting requirements for Best Available Control Technology ("BACT") and air quality analyses, which form the centerpiece of the preconstruction requirements in Section 165(a) of the Clean Air Act, 42 U.S.C. §7475(a), are found in 40 C.F.R. §52.21(j) through (r). Implicit in the Coalition's argument is that the exemption does not cover paragraphs (a) through (i).

An examination of Sections 52.21 (a) through (i) reveals that EPA's decision not to include those sections in the exemption was not founded on an intention to preserve a portion of the PSD program for nonattainment pollutants, but for other practical reasons. Section (a) addresses applicability of § 52.21 in areas without approved plans and applicability of permitting requirements to sources. Section (b) provides definitions that have effect as the terms are applied in the context of other sections. Sections (c) and (d) define the PSD increments and ambient air ceilings, which could not apply to nonattainment pollutants since the National Ambient Air Quality

Standards ("NAAQS") are already exceeded.[2] Sections (e) and (g)[3] address Class I areas and redesignations within attainment areas, and involve actions taken outside the permit process. Section (h) relates to stack heights, which is the same regardless of the attainment designation. Finally, section (i) contains exemptions. Therefore, the Coalition's argument misconstrues the regulations because EPA could not possibly impose conditions in a PSD permit for a nonattainment pollutant based solely on sections (a) through (i).

By reinterpreting EPA's regulations in a manner at odds with precedent, the Coalition attempts to confer jurisdiction on the Board where none exists. The Board has been clear that "[t]he Board is a tribunal of limited, not general, jurisdiction" and "such jurisdiction does not encompass issues that are not governed or implemented by the federal PSD program." *In re Hess Newark Energy Center*, PSD Appeal No. 12-02 (Nov. 20, 2012), Slip. Op. at 4 (citing additional Board decisions addressing this topic). As the Board stated in *Hess*, a nonattainment pollutant cannot be regulated in a PSD permit:

> Although a single geographic area may be designated as attainment or unclassifiable for one or more of the six criteria pollutants… and as nonattainment for the others, the PSD permitting requirements will only apply to the attainment/unclassifiable pollutants in that geographic area. *In re Sutter Power Plant*, 8 E.A.D. 680, 682 n.2 (EAB 1999).

Id. at 2, n.2; *See NSR Workshop Manual* at 4; *See also In re Indeck-Elwood, L.L.C.*, 13 E.A.D. 126, 129 (EAB 2006). The Board therefore declined to exercise jurisdiction over nonattainment NSR claims, stating that 40 C.F.R. 124.19 limits the Board's scope of review to PSD permits and does not extend to nonattainment areas. *See Hess* at 4-6. The Board also declined jurisdiction over the

[2] There is no increment for lead, so there would be no such requirement even if Arecibo were an attainment area for lead.
[3] Section (f) is reserved.

nonattainment aspects of a PSD permit even for states that issue combined federal PSD and state Nonattainment NSR permit. *See id*. at 2.

In the instant case, there are clear lines drawn between the federal and state permit programs. EPA disapproved the PSD program in Puerto Rico and issues federal permits there. *See* 40 C.F.R. § 52.2729; 43 Fed. Reg. 26410 (June 19, 1978, as amended). Since lead is a nonattainment pollutant in the Arecibo region of Puerto Rico, it is subject to regulation via a State Implementation Plan ("SIP"). *See* 76 Fed. Reg. 72097 (Nov. 22, 2011). Thus, the Commonwealth of Puerto Rico courts have jurisdiction to address the Coalition's lead nonattainment concerns.

The Coalition seeks to use this proceeding to address lead impacts in Arecibo by invoking a misplaced reading of Section 165 of the CAA while, in fact, other sections of the Act provide appropriate mechanisms to deal with lead impacts. Precisely because of the kinds of concerns Petitioners raise, EPA has already designated parts of Arecibo as a nonattainment area, pursuant to CAA Section 107(d), 42 U.S.C. § 7407(d). *See* 76 Fed. Reg. 72097 (Nov. 22, 2011). As a result, Puerto Rico must develop a SIP that provides for attainment of the lead NAAQS by December 31, 2016. *See id*. at 72098. Sections 110 and 172 of the CAA provide specific requirements that Puerto Rico must include in its SIP including an attainment demonstration, control strategies, and an inventory, among other things. *See* CAA Sections 110 and 172, 42 U.S.C. §§ 7410 and 7502.

Even if one were to apply the Coalition's misconstrued interpretation of the Clean Air Act and 40 C.F.R. § 52.21, Petitioners would still fail on the merits. New major sources are subject to PSD regulation for a particular pollutant only if it has the potential to emit significant amounts of the regulated NSR pollutant. Even without applying the exemption in 52.21(i)(2), EPA's regulations are explicit that "a new major stationary sources shall apply BACT for each regulated NSR pollutant that it would have the potential to emit in significant amounts." 40 C.F.R.

52.21(j)(2). EA's emissions of lead are projected to be 0.31 tons per year ("tpy"), well below the significant emissions rate of 0.6 tpy for lead. *See* 40 C.F.R. § 52.21(b)(23)(i); *Revised Air Quality Modeling* , July 2011 (" ER #6", page 38). Therefore, even under the Coalition's view of the law, EPA would not have clearly erred or abused its discretion by declining to apply BACT requirements to lead.

b. The Coalition's Challenge To Nonattainment NSR Applicability Requirements is in the Wrong Forum and Long Overdue

Petitioners request that the Board compel Region 2 to change its observation that this facility is not subject to nonattainment NSR requirements for lead is clearly made in the wrong place and at the wrong time. There are multiple grounds for the Board to deny review of the issue raised in Section IV of the Coalition's petition. First, as discussed above, *infra*, Section I(a), nonattainment NSR permitting requirements are outside the scope of the Board's jurisdiction, and Section 124.19 of EPA's regulations provides no authority for the Board to review whether EA must obtain a nonattainment NSR permit based on its level of lead emissions. Second, Petitioners fail to demonstrate how Region 2's statement about nonattainment NSR applicability has any relevance to the terms and conditions of the PSD permit that the Board does have jurisdiction to review. Third, EPA regulations expressly contradict Petitioners view of nonattainment NSR applicability requirements. Fourth, the Board cannot overturn regulations the Administrator promulgates, which reflect EPA's interpretation of the Clean Air Act.

Petitioners fail to show how Region 2's observation that this source would not be subject to nonattainment NSR permitting requirements has any relevance to the conditions of the PSD permit issued to EA or Region 2's basis for the conditions in that permit. The Coalition Petition merely quotes Region 2 statements regarding NSR applicability with which the Petitioners take exception. The Coalition Petition provides no description of the context in which Region 2 made such

statements and does not establish any nexus between these statements regarding nonattainment NSR applicability and the terms and conditions of the PSD permit at issue here.

The Coalition's view of nonattainment NSR applicability is inconsistent with the express language of EPA's nonattainment NSR regulation. Section 51.165(a)(2)(1) states directly and unequivocally that a nonattainment NSR permitting program under sections 172(c)(5) and 173 of the Clean Air Act "shall apply to any new major stationary source or major modification that is major for the pollutant for which the area is designated nonattainment." 40 C.F.R. 51.165(a)(2)(1). EPA adopted this requirement over 30 years ago. *See* 45 Fed. Reg. 31307, 31312 (May 13, 1980).[4] Shortly after enactment of this regulation, EPA stated clearly that "[m]ajor sources are subject to review under … section 173 … only if they emit in major amounts the pollutant(s) for which the area is designated attainment." 45 Fed. Reg. 52676, 52711 (Aug. 7, 1980). EPA went on to explain the statutory basis for this requirement as follows:

> The basic rationale for these restrictions is that section 110(a)(2)(I), which contains the construction moratorium, restricts the construction moratorium to pollutants for which the source is major and for which the area is designated nonattainment. Since there is no requirement similar to the one in section 165(a) that subjects a source to review for all regulated pollutants it emits once it is subject to review for one pollutant, preconstruction review under … section 173 is restricted in the same manner as the construction moratorium.

45 Fed. Reg. 52711. Although Congress has since removed the construction moratorium from the Act, this did not repeal section 51.165(a)(2)(i) of EPA's regulations or SIPs that have been approved as meeting this requirement.

This regulatory history demonstrates that Petitioners are plainly mistaken that the controlling language in section 51.165(a)(2)(i) is merely intended to refer to major source thresholds lower than 100 tpy that apply in ozone, carbon monoxide, and PM_{10} nonattainment areas

with particular classifications. These lower major source thresholds were not adopted into section 51.165(a) (2) until 2005, twenty-five years after the relevant language was originally adopted into EPA regulations. *See* 70 Fed. Reg. 71612, 71698 (Nov. 29, 2005). The statutory foundation for these requirements in Subparts 2-4 of the Part D of Title I of the Clean Air Act was not created until the 1990 amendments to the Clean Air Act. *See* 70 Fed. Reg. at 71672-6; 61 Fed. Reg. 38250, 38297-305 (July 23, 1996). Given this chronology, it is obvious that EPA could not have intended for 51.165(a)(2)(i) to have the meaning that Petitioners have subsequently attached to it.

Given the plain language of the requirement described above in EPA's regulations, the relief requested by the Coalition cannot be granted without amending or overturning EPA's regulation. The Administrator has not delegated such authority to the Board. Consistent with the Board's recognition that it is a tribunal of limited jurisdiction, the Board does not entertain challenges to regulations. *See Sierra Pacific* at 29-30; *In re Tondu Energy Co.*, 9 E.A.D. 710, 716 n.10 (EAB 2001) (the permit appeals process is not the appropriate venue to challenge Agency regulations). The Board's jurisdiction under section 124.19 extends only to permitting decisions and does not include challenges to nationally applicable regulations promulgated under the Clean Air Act. The latter are subject to review only in the United States Court of Appeals for the District of Columbia Circuit. *See* 42 U.S.C. § 7607(b)(1). The time for challenging section 51.165(a)(2)(i) of the regulations under this provision of the statute has long since past.

[4] This language was initially placed in section 51.18(j) of EPA regulations, but then moved to section 51.165(a) (2) in 1986. *See* 51 Fed. Reg. 40656, 40672 (Nov. 7, 1986).

c. The Coalition Fails to Establish Clear Error or an Abuse of Discretion Based on Lead Emissions and Impacts in Arecibo

The Coalition challenges Region 2's conclusions on lead emissions and impacts and asks the Board to reject EPA's conclusion that EA's lead "emissions" would be essentially zero. Coalition Pet. at 12. As a threshold matter, the Coalition has not demonstrated that Region 2's characterization of EA's lead emissions has any bearing on the adequacy of the PSD permit since lead is not regulated in the PSD permit. Moreover, the Coalition's argument misstates the facts and ignores the PSD regulatory requirements.

i. The Coalition's Petition Mistakes Lead Impacts for Lead Emissions

The Coalition's Petition misapprehends Region 2's statement about lead by claiming that "EPA cannot justify its conclusion that lead emissions from the Facility would be essentially zero." Coalition Pet. at 17 (emphasis added). EPA indicated that lead impacts, not emissions, would be essentially zero. RTC 108; ER #6 at 38. The lead NAAQS is expressed out to two decimal places after the decimal point, as 0.15 ug/m3. *See* 73 Fed. Reg. 66713, 66963 (Nov.12, 2008). EA's modeled impact is 0.00056 ug/m3. ER #6 at 38. The model therefore displayed a value of 0.00ug/m3. Although EA was not required to perform a modeling analysis for lead, it nonetheless did so as part of the environmental justice analysis.[5] The modeling results demonstrate that EA's maximum impact for lead is close to EA's fence-line and is 200 times less than the NAAQS. *Environmental Justice Evaluation*, ER #7, at 20. In the area of the Battery Recycling facility, which is of concern to the Coalition and other Petitioners, EA's impact was 3000 times less than the NAAQS. *See id.* The Coalition has not demonstrated any flaws in the modeling analysis.

[5] *See* section II, *infra*, for discussion of lead in the context of the environmental justice analysis.

ii. Region 2 Went Beyond the Regulatory Requirements in its Consideration of Lead Impacts and Emissions

Petitioner Llenza references several sources in Arecibo that emit lead. Pet. at 3. EA went beyond the regulatory requirements by performing a modeling analysis of its own lead impacts; EA was certainly not required to model other sources' lead impacts in a non-attainment area for lead. EA also went beyond the PSD requirements by conducting a Human Health Risk Assessment ("HHRA")[6] for several pollutants, including lead. They also agreed to install a lead monitor. RTC at 104-05. The monitor will provide more detailed information to address community concerns about lead impacts. In addition, by designating the area nonattainment for lead, the CAA requires Puerto Rico to take stringent measures to mitigate the nonattainment. *See* CAA § 110 and 172. Those measures include controls at existing facilities outside this PSD permit process. However, EA's lead emissions will nevertheless be controlled by pollution control equipment required by the PSD permit for the pollutant "municipal waste combustor metals," which includes lead. FS at 13-14; *see* 40 C.F.R. § 52.21(b)(23)(i).

The lead emissions expected from EA are more than 53 % lower than the Maximum Achievable Control Technology (MACT) standards for Municipal Solid Waste ("MSW") combustion facilities, and compliance with MACT standards provides assurance that the public health is protected. RTC 61-64. Emissions from Municipal Waste Combustor ("MWC") facilities decreased by a factor of twenty because of EPA's MACT standard. *See id*. A comparison between 1990 US MWC facilities' emissions and 2005 US MWC facilities' emissions indicates a reduction of dioxin/furan emissions by 99%, lead emissions by 97%, and mercury, cadmium, and particulate matter emissions by 96%, hydrogen chloride by 94%, SO_2 by 88%, and NO_x by 24%. RTC at 62.

[6] Details provided in Argument Section 2(a), *infra*.

iii. The Coalition's Comparison Between EA and Battery Recycling Does Not Establish Clear Error or an Abuse of Discretion and Fails to Recognize the Legal Requirements for a PSD Permit

The Coalition's Petition also provides a lengthy mathematical comparison between emissions from EA and Battery Recycling for the first time on appeal. Coalition Pet. 13-18. The Coalition fails to meet its burden under 40 C.F.R. § 124.19(a)(4)(ii) because there were no comments during the public comment period comparing the amount of emissions from Battery Recycling with emissions from EA, no comments on the emission rates from Battery Recycling, and no comments indicating that EA will cause more lead pollution than Battery Recycling. Therefore, these issues were not preserved for review.

Notwithstanding, the Coalition's comparison is flawed because it ignores one of the fundamental purposes and mandates of the PSD regulations, which is that EPA must evaluate whether the emissions of a PSD permit applicant will cause or contribute to a violation of any NAAQS or increment. *See* 40 C.F.R. § 52.21(k). Even though this provision does not apply to lead in this instance, EPA performed this evaluation and concluded that EA meets this requirement. FS at 18. Moreover, the Coalition's emissions comparison does not present the whole picture because emissions are not proportional to impacts.[7] In particular, the Coalition's comparison does not consider the extent of the impacts from the two facilities. The designation of the Arecibo lead nonattainment area is characterized as an area within four kilometers around Battery Recycling because that facility is largely responsible for the nonattainment problem. *See* 40 C.F.R. § 81.355. However, as previously noted, EA's impacts are very small compared to the NAAQS.

[7] While the Coalition's emissions comparison is misplaced, and the appropriate inquiry should be about impacts, they also mischaracterize the upper limit of EA's lead emissions, which is 613.2 lbs/year, not 665.76 lbs/year. Petition at 16. EA cannot exceed a maximum of 613.2 lbs/year (0.31 tpy) because of a heat input rate limit in the PSD permit of 500 MMBTU/hr. PSD Permit, Condition VII.A.5.b-h, at 9-11, and Condition XIII.E.1 and 2, at 50.

In addition, the Coalition's emissions comparison ignores important differences in parameters like stack height and fugitive emissions. EA's stack, which is within good engineering practice height, is 95 meters. *Air Quality Modeling Analysis Amendments (*ER #8). By comparison, Battery Recycling stack height is 23.9 meters. ER #6, App. D, Offsite Source Inventory. Moreover, the Coalition has not taken into account the impacts from fugitive emissions produced by Battery Recycling, which are not well dispersed ("Attachment 7"). On the other hand, EA's PSD permit has robust conditions to limit fugitive emissions (including fugitive ash emissions).[8] Thus, the Coalition's comparison, based solely on emissions,[9] is flawed and ignores the requirement of 40 C.F.R. § 52.21(k) (assuming this provision could apply to a nonattainment pollutant).

II. Petitioners Environmental Justice, Public Participation, and Title VI Arguments Fail to Establish Clear Error or An Abuse of Discretion

Petitioners Llenza and the Coalition argue that Region 2 failed to consider or violated Executive Order ("E.O.") 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (Feb. 11, 1994), in issuing the PSD permit to EA. Coalition Pet. at 18; Llenza Pet. at 4. However, the Petitioners fail to establish error or abuse of discretion because (1) Petitioners fail to meet their burden under 40 C.F.R § 124.19(a)(4)(ii); (2) they raise issues beyond the scope of the permit action; and (3) Region 2 carried out its responsibilities under E.O. 12898 and the public participation procedures of 40 C.F.R. Part 124 in a rigorous fashion. The Board has recognized that the E.O. "imparts considerable leeway to federal agencies in determining how to comply with the spirit and letter of

[8] Lead emissions from EA are largely from the combustion process, emitted through the stack, rather than from fugitives. *See* FS at17- 18 for a description of sources of fugitive emissions. *See* PSD Permit at.13-14, and 29 for Ash handling conditions, and PSD Permit at 19-21, for fugitive emissions conditions.

the Executive Order" as to environmental justice ("EJ") generally. *In re Avenal Power Center, LLC*, PSD Appeal Nos. 1-02, 11-03, 11-04 & 11-05, Sl. op. at 24 (Aug. 18, 2011). And as to an EJ analysis, there is no requirement "to reach a determinative outcome prior to issuing a permit," *id.*, but petitioners bear the burden to make a "specific showing… contrary to the Region's conclusion" that the facility will not have a disproportionately high and adverse impact. *See In re Ecoelectrica,L.P.*, 7 E.A.D. 56, 69 (EAB 1997). The Petitioners cannot meet this burden because Region 2 has provided a thorough environmental justice analysis and incorporated environmental justice elements into the permit decision. *See In re AES Puerto Rico*, 8 E.A.D. 324, 352 (EAB 1999).

a. EPA Addressed Lead Concerns Pursuant to E.O. 12898 Even Though Lead is a Nonattainment Pollutant in the Arecibo Area

The EJ claims of Petitioner Llenza and the Coalition do not comply with 40 C.F.R. 124.19(a)(4)(ii). They do not acknowledge the preservation requirement, contain no citations to the comments, and make no showing that the EJ issue being raised in the petition was raised during the public comment period. The Board should, therefore, deny the EJ arguments in the Petitions.

The RTC does not indicate that any commenter challenged the adequacy of the EJ analysis, as opposed to the permit decision itself. And even if there had been such a challenge it would fail on the merits because EPA complied with the EJ executive order by reviewing an analysis submitted by EA in accordance with EPA guidance. *Region 2 Interim EJ Policy* ("Attachment 9"). The analysis was found acceptable by Region 2, which reasonably determined that the permit "will not result in disproportionately high and adverse human health or environmental effects on minority and low-income populations." RTC at 104. EA's consideration of EJ is voluminously documented in the administrative record and covers some 260 pages, including a comparative demographic analysis of the area near the source and a 24-page "EJ Evaluation." RTC at107

(describing demographic analysis in EA's EJ document supporting the conclusion that"there is no adverse or disproportionately high impact"). Moreover, EA's maximum impacts, which are 200 times less than the NAAQS, do not occur in low income areas. However, since there were some low income areas nearby, such as Tanama and others, Region 2 requested a more detailed EJ assessment.[10] *See Letter from EPA to EA*, 10/1/11 ("ER 9").

The Coalition objects specifically to the mapping data, and EA's alleged failure to do an adequate "qualitative assessment of toxic air emissions in the surrounding area." Pet. at 19. This issue may have been raised in a general way by comments that "asked whether certain air toxics were evaluated." RTC at 108. But it cannot establish clear error because, as the RTC notes, "air toxics are not regulated under PSD," *id.*, and an EJ analysis need not consider emissions beyond the scope of the permit action. See *In re Shell Gulf of Mexico, Inc*. OCS Appeal Nos. 11-02, 11-03, 11-04 & 11-08 slip op at 41, (Jan. 12, 2012) (no error in failure to consider mobile source emissions in assessing NAAQS compliance).

The Coalition implies that the qualitative assessment performed using TRI data and the National Scale Air Toxics Assessment represented the entire air toxics analysis. Ms. Galan also provided a generalized concern about toxics. Galan Pet. at 1. As noted in the RTC, mapping was just one of multiple parameters Region 2 used to assess air toxics. RTC at 108-110. The Region considered authoritative data and concluded that the area of the site "is estimated to have a relatively low risk with respect to exposure to air toxics." RTC at 109. It also concluded that "both the cancer and non-cancer risks in the subject area" were lower than the level identified as

[10] The *Region 2 Interim Environmental Justice Policy*, at http://www.epa.gov/region2/ej/poltoc.htm (last updated Oct. 13, 2010), indicates that minority status thresholds are not established in Puerto Rico because every community is classified as Hispanic. *Interim EJ Policy* at 2.2.2, Table 1 and 2.3.1. With respect to income, the *Interim EJ Policy* uses a reference threshold of 52% of the population below the poverty level as the screening level to trigger more detailed EJ assessments. Id. at 2.2.2, Table.

"acceptable" and the cancer risk for people in the area is lower than that for the population nationwide, in Puerto Rico, and in Arecibo. RTC at 109-110. Petitioners F&C attempt to demonstrate error with respect to toxics based on a largely obsolete screening procedures document.[11] F&C Pet. at 15. The models that the document is based on have been replaced by AERMOD which is the preferred EPA model today. EA used the AERMOD model in accordance with 40 CFR Part 51, Appendix W. However, certain elements described in the "screening procedures" are still acceptable and were indeed used in this case. (*See*, *e.g.*, plume merging in "Attachment 11").

While lead is not directly regulated in the permit, it does fall within the emission limits for MWC metals, FS at 13, which are included in the PSD permit. PSD Permit at 34-35. The control equipment required by the PSD permit will also control lead emissions. RTC at 61-64. In addition, there are a limited number of toxics that are subject to PSD regulation -- specifically, dioxin/furans (in MWC Organics), hydrogen chloride (in MWC acid gases), and fluorides -- and they are all included in the PSD permit conditions. FS at 13; PSD Permit at 34-35. Therefore, air toxics were considered in a robust fashion in issuing the final PSD permit to EA, and Petitioners have not provided a legal basis for requiring specific conditions for air toxics in the permit, beyond the existing permit conditions.

The Coalition and Petitioners Llenza and F&C claim that EPA should have addressed cumulative impacts from the proposed facility and other facilities in the area. Coalition Pet. 19; Llenza Pet at 3; F&C Pet. at 14 and 17. Petitioner Galan also provided a generalized concern about

[11] Contrary to Petitioner F&C's assertion, EPA did not indicate that Petitioner Centeno failed to submit TRI data. EPA possesses the TRI data and used it in its qualitative assessment. Rather, Region indicated to another commenter who referenced 14 specific air toxics that the commenter did not provide the Agency with the list and, therefore, the Region could not ascertain whether EA emits any of the 14 toxics. RTC at 51-52.

the air quality already existing in the area. Galan Pet. at 1. Some of the Petitioners indicated particular concern about the Battery Recycling facility. Region 2 did perform a cumulative source impact analysis of the one-hour NO_2, one-hour SO_2, and $PM_{2.5}$ NAAQS, RTC at 106-07 and 95-97, pollutants more typically associated with asthma than lead. This analysis included Battery Recycling and other facilities[12] not raised during the comment period but referenced by Petitioners Llenza and F&C. ER #4, ER #6, RTC 94-96. The cumulative analysis did not include lead as none was required due to the nonattainment status of lead in the area. An EJ analysis need not consider matters, such as emissions of other sources in the TRI, beyond the scope of the permitting action. *See Shell.* Moreover, as discussed earlier, the RTC reflects that the permit applicant went beyond PSD requirements by agreeing to install an ambient lead monitor to address public concerns over the high lead levels at Battery Recycling and by performing a health and ecological risk assessment. RTC at 105, 108 and 109. This assessment evaluated a number of pollutants, including lead, and concluded that adverse effects on human health are not expected. RTC at 112 and 117. In addition, studies of other MWCs showed that cancer and non-cancer risks are below EPA benchmarks. RTC at 116. The Petitioner did not address these additional actions and studies, which were described in the RTC. See *Shell* at 41 (petitioner must explain why response is insufficient).

With respect to Battery Recycling, the evidence supports the RTC's conclusion that "while the battery recycling facility caused high lead concentrations, EA could not be said to pose a disproportionate or adverse impact even if EPA had authority to regulate it under the PSD permit." *Id*. This is due to the fact that the EA lead impacts are 3000 times less than the NAAQS in the vicinity of Battery Recycling. ER#7, RTC at 108.

[12] Except for Safetyclean, whose impacts are part of background, all the referenced sources were included in the

Finally, there are some generalized claims in the Coalition's Petition that residents of Puerto Rico have higher asthma rates than persons on the mainland, and the residents of Arecibo suffer disproportionately from asthma in comparison with most Puerto Ricans. Petition at 20-21. Region 2's RTC addressed comments related to asthma. RTC at 59-60 and 116. The petitioner provides no explanation why the Region's RTC on this point was inadequate. The documents provided in support of the Petitioners claims are extra-record evidence and do not demonstrate a link between lead exposure and incidence of asthma in general or with respect to specific impacts from EA in Arecibo. In addition, based on modeled and monitored data, all of the PSD applicable health-based NAAQS will be met. RTC 96-97, FS Table. Moreover, the primary NAAQS are designed to protect the public health of "sensitive" populations, including asthmatics, with an adequate margin of safety. RTC at 81. Thus, EA's modeling demonstration, which shows compliance with the NAAQS for all criteria pollutants under the CAA, as well as the modeled impacts of EA's lead emissions, which are very small in comparison to the NAAQS, leads to the conclusion that EA's facility will not impair sensitive populations, such as asthmatics.[13]

b. Petitioners Fail to Demonstrate Clear Error or an Abuse of Discretion in EPA's Implementation of 40 C.F.R. Part 124

Petitioners Llenza and Quinones challenge Region 2's procedures in issuing the PSD permit. However, Region 2 rigorously followed the procedures of 40 C.F.R. Part 124 and went beyond its requirements to provide the public with ample opportunity to participate in the permit process. Region 2 also included in the record all relevant information to support its permit decision in a transparent manner. Petitioners' arguments fail because they ignore the record, fail to address Region 2's RTC and raise new issues on appeal.

---

modeling.

i. Petitioner Quinones' Claim that Region 2 Did Not Include Relevant Information In the Draft Permit Administrative Record Fails to Establish Clear Error or an Abuse of Discretion

Petitioner Quinones asserts that she could not properly participate in the public hearing due to EPA's failure to include information in the administrative record reflecting the Agency's evaluation of EA's documents on contaminants and site identification. Quinones Petition at 4. However, Region 2 satisfied the requirements of 40 C.F.R. §124.9, which requires that the administrative record of the draft permit include the application for the permit, the draft permit, a fact sheet or statement of basis, and other documents contained in the supporting file for the draft permit. EPA included a lengthy fact sheet when it issued the draft permit. The fact sheet included among other things, a project description and location, estimated emissions of PSD-regulated pollutants and non-regulated pollutant, a description of BACT, and an ambient air quality analysis. FS at 3, 9, 13-14, 10-18, and 19-21. Maps included in the application show the location of the facility and proposed equipment. *PSD Permit Application*, Feb. 2011, Figures 1-2 and 2-3 (ER # 10). In addition, Region 2 had extensive communications with EA that were included in the administrative record of the draft permit, and these communications reflect Region 2's analysis of a broad range of issues. Region 2 provided information about these communications in the RTC, at 71-72, but Petitioner failed to address the Region's response.

Petitioner Quinones' claim that she couldn't properly participate in the public hearing appears to be specifically focused on ash handling, fugitive emissions, the site for ash disposal, and the water intake source for the cooling tower and the fugitive emissions at the pump station located at the water intake source. The fact sheet directly addressed the ash handling system and the fugitive particulate emission sources. FS at 16-18. The Materials Separation Plan ("MSP"), which

[13] EPA generally views the other criteria pollutants as more significant factors.

was available before the public hearing, addresses the potential landfills for ash disposal. *Final Materials Separation Plan*, April 2012 ("ER #11), at 22-23, Appendix 8. The draft permit includes numerous conditions for the ash handling system (including fugitive ash emissions at the source) and fugitive emissions. *Draft Permit*, Enclosure I, at 12-13 and 18-20 ("ER #12"). It also has conditions for particulate emissions from the cooling tower. *Id*. at 17-18. The PSD application and letters in the draft permit record between EPA and EA reflect EPA's analysis of EA's PSD application on ash handling via control equipment and fugitive emissions. *Supplemental to Application*, June 2011("ER #13), at 38-42; *Letter from EPA to EA*, 3/31/11 ("ER #14") at 4 and 6; ER #10 at 2-17 to 2-21. The PSD application describes briefly the water intake source for the cooling tower. ER #10, at 2-21. The MSP provides information about the location of the water intake source. ER #11 at 21, Appendix 8.

Petitioner Quinones argues that EPA should have evaluated fugitive emissions from ash[14] deposited at the landfill location but provides no explanation why the RTC on this point was inadequate. RTC at 79-80. In Region 2's RTC, the Agency indicated that ash disposal, sampling, and beneficial use are not implemented through the PSD permit but rather through the Puerto Rico Environmental Quality Board's permitting authority. RTC at 80. Disposal practices and controls at landfills are not governed by the Clean Air Act. *See Knauf Fiber Glass* at 164. While Petitioner Quinones made no reference in her petition to "secondary emissions" as defined in 40 C.F.R. §52.21(b)(18), and did not demonstrate that secondary emissions at the landfill were raised in the comments, the Board has opined that secondary emissions can be considered only if they are "specific, well-defined, quantifiable, and impact the same general area as the stationary

[14] Petitioners F&C also raise the fugitive ash issue but in the context of applicability, citing to 40 CFR § 52.21(b)(iii). However, they do not indicate which pollutants, if any, EPA should have included in the PSD permit based on their assertion.

source…undergoing review." *Knauf Fiber Glass*, at 166. Petitioner Quinones has presented no record evidence to demonstrate that this standard has been met. In fact, Petitioner Quinones acknowledges that the landfill location has not yet been chosen. Quinones Petition at 7, citing MSP at 22. Therefore, it is impossible to determine whether the impacts will be in the same general area as EA. In addition, the draft and final PSD permit contemplate that the ash characterization study plan will not take place until closer to the date of startup. Final Permit at 13, Condition VII.B.5. Thus, Region 2 does not yet have specific, well-defined, and quantifiable information about potential fugitive emissions at the landfill.

Region 2 did consider the particulate emissions associated with the cooling tower at the facility and included conditions in the PSD permit. PSD Permit at 38. In Region 2's Response to Comments, the Agency indicated that the water resource use (e.g., water intake source for the cooling tower) is not implemented through the PSD permit but rather through other federal and Commonwealth permits. RTC at 76. The petitioner provides no explanation why the RTC on this point was inadequate.

Petitioner Quinones raises for the first time in her Petition a question about fugitive emissions at the pump station, which is not part of EA's facility. The Petition provides no specifics about the type of fugitive emissions or whether the pump station would even impact the same general area as EA. It also does not present any information to demonstrate that there will be emissions increases associated with EA at the pump station, and that those emissions will be specific, well defined, and quantifiable. Therefore, the Board should reject Petitioner's claims regarding the pump station.

ii. The Board Should Reject Petitioners Llenza's Claim that EPA Erred in its Public Participation Process and Violated Executive Order 12898 By Not Informing the Public that Lead Would Not be Regulated in EA's PSD Permit

Petitioner Llenza claims that EPA failed to inform the public that there were no requirements for lead in EA's PSD permit. Pet. at 3-6. However, in accordance with 40 C.F.R §124.8 and §124.9,[15] EPA provided a Fact Sheet for the Draft Permit. In the Fact Sheet, EPA included a list, and estimated emissions of, the "PSD-Regulated Pollutants from the proposed project" and lead is not on the list. FS at 9, Table 1. EPA also included a description of the pollutants for which EA was required to apply BACT, and lead is not included. *See id*. at 10. EPA also indicated that MWC metals are measured using particulate as a surrogate for the metals, but that the individual metals themselves are not PSD pollutants. FS at 13. Region 2 also noted that lead is a PSD pollutant "but it is not included in this permit because the applicant proposes to locate the source in a nonattainment area." *See id*. at 13 n. 1. EPA also included a list with non-regulated PSD pollutants, and lead is on the list. *Id.* at 13-14.

Not only was EPA transparent about which pollutants were and were not regulated, but EPA went beyond the usual public participation procedures in 40 C.F.R Part 124 in order to carry out the Executive Order on Environmental Justice, E.O. 12898. For example, EPA held two informal public availability sessions that were not required by law. The first public availability session was held upon receipt of the PSD application in order to listen to public concerns at the outset so that they may be addressed to the degree practicable in the permit process. RTC at 106. The second public availability session was held specifically for the purpose of responding to questions and clarifying issues to enable interested parties to submit comments in a more informed manner. *See id*. Moreover, the public comment period was open for 105 days instead of the

regulatory minimum of 30 days. Region 2 conducted six public hearing sessions and provided extensive Spanish translation of permit-related documents and the public hearing sessions. *See id.*

Notwithstanding Petitioner Llenza's claims that the public hearings allowed for only three minutes per person and that the public comments were not made available,[16] Pet. at 9, Region 2 did respond to the contentious initial public hearing by scheduling five additional public hearing sessions affording each speaker ten minutes plus additional time at the end of the sessions for people to speak again. RTC at 66; *Letter from Enck to Gonzalez et al*., 8/22/12 ("ER #15"). Region 2 also made all the written public comments and the hearing transcripts, both in Spanish and English, available upon issuance of the final permit. These documents were available at EPA's offices in Guaynabo, Puerto Rico and New York. *EPA News Release*, 6/11/13 ("ER # 16"); ER #5. Petitioner Llenza's claim that EPA didn't make available all the administrative record documents is simply incorrect. EPA indicated in the Notice of a Final Decision letter to interested parties that while some documents are available on-line, all documents in the administrative record are available in Guaynabo and New York. ER #5. These documents are all contained in the Certified Index to the Record filed on July 26, 2013, in compliance with the *Board's Revised Order Governing Petitions for Review of Clean Air Act New Source Review Permits* (March 17, 2013). Therefore, EPA's expansive public participation procedures and transparency provided for robust public participation.

[15] Petitioner Llenza cites to requirements in 40 C.F.R § 25.5, which does not apply to Clean Air Act matters. The relevant procedures are at 40 CFR Part 124.

[16] The Petitioner has attached Annex I, which she claims is not in the record. The document is unfamiliar to Region 2 and it is difficult to determine whether it, in fact, is in the record because Petitioner does not provide sufficient identifying information for Region 2 to determine whether it is in the record or if it was provided to the Region.

iii. Petitioners Llenza and F&C Fail to Establish A Violation of Their First Amendment Rights

Petitioners Llenza and F&C argue, for the first time on appeal, that EPA's alleged failure to provide information about lead and the Battery Recycling facility resulted in a violation of their First Amendment rights. Llenza Pet. at 5 and 9-10; F&C Pet. at 5. Petitioners F&C's argument is outside the scope of this proceeding because their argument relates to the permitting of Battery Recycling, not EA. Although the basis for Petitioner Llenza's First Amendment claim is not entirely clear, it appears that she relies, in part, on *United States v. City of Jacksonville Florida*, Civ. Action No. 308-CV-257 (J-2OTEM), a settlement under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), as a basis for arguing that EPA had knowledge of the effects of incineration ash. Petitioner's claim related to this CERCLA site was not raised during the public comment period and is not preserved for review.[17] In addition, Petitioner Llenza has not addressed the RTC, which states that the permit contains conditions to control and minimize emissions associated with the ash from the project, including fugitive ash emissions. RTC at 46. Petitioner also cites to a document, "Waste to Energy: A Possibility for Puerto Rico," and implies that the document influenced Region 2's decision. Pet. at 5-6. However, Petitioner raises this document for the first time on appeal, it is not in the administrative record, and EPA did not rely on it in issuing the PSD permit to EA. In fact, Region 2 made clear in the RTC that it leaves waste management decision-making to the local communities. RTC at 53-54. Moreover, the *Waste to Energy* document does not stand for the proposition that Petitioner Llenza asserts. RTC at 53-54. Finally, Petitioner Llenza does not indicate how the document

[17] Petitioners F&C also raised this site to argue for more frequent dioxin/furan testing but failed to raise it during the comment period.

would violate her First Amendment rights even if EPA had considered the document in reviewing EA's permit.

Petitioner Llenza also invokes the First Amendment while attempting to paint a picture of partiality by an EPA staff person, Steven Riva, and undue influence by EA in the decision process. However, the Petition relies on misinterpretations of statements by Steven Riva and puts forward new information about EA that is not in the administrative record. In advancing her argument, Petitioner Llenza cites to *Garcetti v. Ceballos*, 547 U.S. 410 (2006), a U.S. Supreme Court First Amendment case, Llenza Pet. at 7, and seems to suggest that Steven Riva, who she describes as "the person in charge of approval of this permit" is not entitled to First Amendment protection for statements made to the public about EA.

Petitioner's argument is without merit for a number of reasons. First, Petitioner does not allege, based on *Garcetti v. Ceballos*, that her First Amendment rights were violated. Rather she appears to argue that EPA can't hide behind First Amendment protections afforded to Mr. Riva. EPA has done no such thing. *Garcetti* is inapplicable here because the Court found that managerial discipline for communications of an employee in the course of his official responsibilities does not violate an employee's First Amendment rights. However, Mr. Riva was not the subject of managerial discipline. In fact, EPA technical and legal staff and senior managers reviewed Mr. Riva's comments at the public availability session referred to by Petitioner, as well as video clips of the session, in response to a letter sent to Region 2 by other interested parties seeking Mr. Riva's removal from the permit matter. *Letter from Enck to Gonzalez et al.*, 7/12/12 ("ER #17). Region 2 found no basis to make changes in the project review team.

Second, contrary to Petitioner's assertion, Mr. Riva is not the person in charge of approving EA's permit. The Division Director of the Clean Air and Sustainability Division, John Filippelli,

signed the final permit decision as he is the delegated responsible official for issuing PSD permits. Third, by the time of the public availability session referred to by Petitioner, Region 2 had already taken a preliminary position, subject to public review, by issuing the draft permit. Therefore, EPA did not "delegate review" of the PSD permit as suggested by Petitioner; rather, the Region had issued a draft permit based on its own decision making process.

Finally, Petitioner relies on *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) to argue that her First Amendment rights were violated. However, *Legal Services Corp*. addresses the constitutionality of an Appropriations Act that the Supreme Court held was in violation of the First Amendment rights of Legal Services Corp. lawyers because it tied their funding to a restriction on welfare reform litigation. The Petitioner is not a recipient of federal funds and Region 2 has not coerced her in any manner to restrict her speech.

Annex 2 of Ms. Llenza's petition contains extra-record evidence of alleged influence by EA in Puerto Rico public schools. No comments were provided on this issue and therefore it was not preserved for review. Moreover, it is not unusual for permit applicants to conduct their own outreach, but they do so independent of EPA's public process. Whether or not the outreach is objectionable is not a measure of the soundness of EPA's decision. The public had more opportunity to engage with EPA in this permit matter than in any prior PSD permit issued by Region 2.[18]

c. Petitioner Llenza Fails to Establish a Violation of Title VI

Petitioner Llenza argues that Region 2 issued the PSD permit to EA in violation of Title VI of the Civil Rights Act. Petitioner failed to raise the Title VI claim during the comment period and therefore the issue was not preserved for review. The Board has denied review to petitioners who

did not raise issues such as equal protection and civil rights during the public comment period. *In re Circle T Feedlot, Inc.*, NPDES Appeal Nos. 09-02 & 09-03 (June 7, 2010).

Petitioner's claim also fails on the merits. Title VI of the Civil Rights Act is not applicable to decisions of EPA; rather, Title VI applies to a "program or activity" of a "department, agency, special purpose district, or other instrumentality of a *State or of a local government*." 42 U.S.C. § 2000d-4a (emphasis added). Programs and activities of federal agencies are not included. EPA's definition of "recipient" also does not include federal agencies and applies to "any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended…." 40 C.F.R. §7.25. Thus, there is no basis in the law for concluding that EPA is subject to Title VI for its decision on the EA permit.

Petitioner Llenza also cites to *New York City Environmental Justice Alliance v. Giuliani*, 214 F. 3d 65 (2d Cir. 2000), as support for her Title VI claim. The case provides no authority for the proposition that federal government agency decisions are subject to Title VI. Even if Title VI did apply to EPA, the decision would undermine Petitioner's argument because it demonstrates that significant evidence is needed to make out a case of impermissible adverse impact on minority communities. The record is devoid of such evidence because Title VI was not even raised during the public comment period.

III. EPA Did Not Clearly Err or Abuse Its Discretion in the Way it Considered Meteorological Data

Petitioner Quinones claims that the modeling analysis failed to use meteorological data representative of Arecibo. Petitioner Quinones, however, misapprehends the manner in which

[18] See Section II(b)(ii), *supra*, regarding EPA's public process.

Region 2 applied the meteorological data. Meteorological data used in modeling a PSD project must be representative of the location of the project. In this case, the data was even more specific than the broader area of Arecibo. It was representative of the specific site within Arecibo where EA is located. The RTC addressed the representativeness of the Cambalache meteorological data, which Petitioner fails to address. RTC at 87-88.

Petitioner Quinones further claims that the meteorological data that was used is too old. *The Guideline on Air Quality Models*, 40 C.F.R. Part 51, Appendix W, Section 8.3, allows for the use of older data, provided that it is temporally representative, and states that temporal representativeness is a function of year-to-year variations in weather conditions. Region 2 provided a detailed explanation in the RTC (pages 87-88) not addressed by Petitioner, which states that while the data was measured over 20 years ago, Region 2 found that the Caribbean is subject to little variability from one year to the next. The wind roses developed for San Juan between 2005 and 2009 confirm this. *Revised Air Quality Modeling Protocol*, April 2010 ("ER #18, B4-B8).

Examination of meteorological data at other Caribbean sites including data measured at the Aguadilla airport and the U.S. Virgin Islands show little variability over a year and over time as well. Additionally, one year of data is also allowed as the length of time for site specific data measured in the continental U.S. where there is greater seasonal variability. Therefore, Region 2 concluded that the one year of site specific surface data at Cambalache while measured 20 years ago is still temporally representative of the project and is preferable over the data that is not spatially representative of Cambalache. RTC 87-88.

The petitioner also claims current data was available from a NOAA site, AROP4. This is new information not raised during the public comment period. However, this data is not spatially

representative of the location of EA in Cambalache because the data was obtained by the NOAA Buoy Center located on the coast of Arecibo that has a very specific land/sea microclimate. *See* photo extracted from petitioner's Exhibit 1 website – "Attachment 8"). EA is not located on the coast of Arecibo. The data from the buoy site would not describe the wind conditions one mile further inland where EA is located. "Attachment 1", ER#18, at 20, Fig 2. Further, while the figure in Petitioner's Exhibit 2 is unclear, it appears that the number of hours of meteorological data processed is less than the minimum 90% data capture requirement for PSD permitting. *See* "Attachment 2." In response to receiving Petitioner's extra-record evidence, Region 2 sought concurrence in this issue from the EPA Modeling Clearinghouse. The Clearinghouse agreed with Region 2's conclusions about the NOAA Buoy Center data. *See* "Attachment 10."

Petitioner asserts that there is no evidence that EA considered the vertical and horizontal profile of turbulence in AERMET when modeling complex terrain. This too is a new issue not raised during the public comment period, and it is incorrect. Furthermore, EA did model the vertical and horizontal turbulence. In fact, EA used direct measurements of these parameters to calculate vertical and horizontal turbulence in AERMET when even less information would have sufficed. *See* "Attachments 3, 4 and 5."

IV. Petitioners Llenza and F&C Fail to Demonstrate Clear Error or Abuse of Discretion in Region 2's Quality Assurance Procedures.

Petitioner Llenza mistakenly claims that quality assurance procedures were not followed by Region 2 and bases her claim on a misapprehension that EPA's Edison, N.J. office was not involved in EA's permit review. As a threshold matter, Petitioner Llenza has not met her procedural burden of addressing Region 2's RTC on EPA Edison's involvement in approving the monitoring data. RTC at 85-86. Moreover, the record refutes Petitioner's claim as EPA's New

York office had regular communications with the Edison office, which is in fact part of Region 2. *Certified Index to Administrative Record* ("AR") VII.13-VII.33. Region 2's NY and Edison offices worked together on meteorological data, monitoring, and modeling for the EA permit. *Id.* For example, a Monitoring Plan and Quality Assurance Project Plan (MP/QAPP) and Standard Operating Procedures (SOP) manual was developed and approved by a coordinated effort of Region 2's New York and Edison offices and included in the administrative record for this project. *Id*. Approved QAPP procedures were followed for ambient monitors. AR VII.34. EPA also performs audits on the monitors and the lab every year and Puerto Rico has been meeting the acceptance criteria which ensure that the monitors are well maintained. AR VII.1-VII.12. Similar quality control procedures were used for modeling. RTC at 82-86; "Attachment 6, reference 5." Thus, the proper quality control procedures were followed.

Petitioners F&C claim that Region 2 was required to have a "QS, QAPP, and QMT." Petition at 11. Region 2 responded clearly in the RTC that the comments on this issue did not demonstrate how additional SOPs and QAPPS would improve the permit conditions beyond the existing quality control procedures referenced above.[19] RTC at 13-14 and 86. The RTC has an entire section devoted to QAPPS, which was not even addressed by Petitioners.[20] RTC at 82-89. In fact, Petitioners have not addressed the RTC in anything other than vague terms except to include reference to PREQB's failure to implement the "EPA Quality Manual for Environmental Programs." The referenced document, raised for the first time on appeal, is very general in nature and not nearly as relevant as the PSD-specific QAPPs, which were used for EA's permit.

[19] Note that Region 2 did add recordkeeping/reporting requirements in response to the comment.
[20] The Petition only suggests that Region 2 doesn't know what QS is. Region 2's RTC at 86 indicates that the Region assumed the commenter meant "Quality Specification" because the commenter did not defined his use of the term "QS."

Moreover, the Petition does not discuss how Region 2's more specific procedures were at odds with the manual. Thus, the Board should deny review on this issue.

V. Petitioner's F&C Are Unable to Establish Clear Error or an Abuse of Discretion in the Monitoring Aspects of EA's Permit

F&C's Petition asserts that the ozone ambient monitor is not representative of the ozone concentrations in Arecibo since it is located in Catano which is 60 kilometers away. Pet. at 9. Petitioners have not met their burden of addressing Region 2's RTC, at 93-95, which provides a detailed explanation of why the Catano data is conservative and meets the EPA guidelines. Petitioners also claim that the "natural reserves" in Arecibo create a Class I area. However, there is no designated Class I area in Puerto Rico. *See* 40 C.F.R. § 81.401-437. Moreover, a Class I area cannot be created via a Petition to the Board. There are very specific procedures for such a designation, which are provided in EPA's regulations. *See* 40 C.F.R. §52.21(e) and (g). In addition, notwithstanding Petitioners' claim that the "topography is incorrect," Region 2 used AERMOD, an all terrain model which incorporated the topography. RTC at 91-93.

Petitioners assert that EPA erred by allowing monitoring for dioxin/furan emissions only once a year. Pet. at 12. Petitioners have not met their burden of addressing Region 2's RTC, at 32-33, which states that the PSD Permit requires quarterly, not annual, performance tests, and explains why continuous monitoring was not required. Petitioners also argue that Region 2 should have installed a National Core Multi Pollutants Network. Pet. at 8. Petitioners did not provide comments about this Network, address EPA's RTC on ambient monitoring, or indicate how this Network creates requirements specifically for EA's permit.

VI. Petitioners F&C's Reliance on Inapplicable Law and Permit Processes of Other Sources is Misplaced

Petitioners F&C attempt to argue that Region 2 erred because of alleged defects in the Puerto Rico SIP and Clean Water Act violations. Pet. at 1-4 and 6-8. Petitioners also allege noncompliance of other air sources, seek the Board's review under EPCRA, Pet. at 4-6, and address EPA's closure of a landfill. Pet. at 8. These arguments are beyond the scope of this permit action and the Board's jurisdiction. Moreover, most of Petitioners' arguments are raised for the first time on appeal, relying in part on extra-record evidence and, therefore, were not preserved for review. Petitioners also seek for the first time on appeal regulation of antimony, which is not a PSD pollutant and is not even emitted by EA. FS at12-14.

Petitioners' implication that the hybrid test in 40 C.F.R. Sec. 52.21(a)(2)(iv)(f) required EPA to issue a PSD permit to Safetech ("SCC") and Battery Recycling represents a misreading of EPA's regulations. The hybrid test applies to multiple types of units at one facility. SCC and Battery Recycling are two facilities separate and distinct from EA. There is no indication in the record or in F&C Petition that the facilities "belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under common control." 40 C.F.R. § 52.21(b)(6).

VII. Petitioner's F&C Have Not Demonstrated Clear Error in Region 2's Permit Conditions

Petitioners F&C appear to challenge the PSD Permit conditions on ammonia. Pet. at 10. Region 2 responded to comments on ammonia by increasing the daily and evening number of checks from at least once per day to four. EPA explained in the RTC that there is no basis in the record for increasing the number to the requested eight per day. EPA also added language to the permit to ensure compliance with the 19% by volume ammonia requirement. Petitioners F&C did

not address EPA's changes to the permit or even acknowledge them, and merely restated their comments.

Petitioners disagree with EPA's response on supplementary fuels. However, Petitioners merely repeat the claim made in the comment and do not explain why the rationale in EPA's response is in error. The Petitioners state at one point in their Petition that the "final permit does not establish a limit to SF" but acknowledge at another point the limits EPA set for supplementary fuels ("SF") at page 23-24 of the final PSD permit. Petitioners' raise for the first time on appeal, in the context of SF, comment on measuring fly and bottom ash, and therefore it is not ripe for review. EPA did, however, address the measurement of bottom and fly ash in another context and Petitioners fail to address EPA's response. RTC at 79-80. Petitioners address EPA's response on inspections of parking lots and roadway, by providing new generalized information on Puerto Rico's climate that was available to Petitioners during the public comment period while failing to articulate why daily checks for roadways and weekly checks for parking lots are insufficient. Petitioners also ignore EPA's Response to Comment 10, on sulfur in fuel, which states that suppliers, not EA, provide the certification. RTC at 12; PSD Permit at 27.

VIII. Region 2 Did Not Clearly Err or Abuse Its Discretion With Respect to the Puerto Rican Parrot Recovery Program

Petitioner Quinones argues that Region 2's issuance of a permit to EA is at odds with the Puerto Rico Parrot Recovery Program. Pet. at 8. The Petition states that the project may affect one of the habitats that the Fish and Wildlife Service ("FWS") is using to implement the Puerto Rican Parrot Recovery Program. These issues were raised in comments, which the EPA responded to, RTC at 116-17, but the petitioner has not met her burden to explain why Region 2's previous response to those objections is clearly erroneous or otherwise warrants review.

Petitioner's argument also fails on the merits. In responding to Petitioner's comments, EPA considered adverse ecological impacts on birds within a 10 kilometer radius, including those in Rio Abajo, which comprises some of the Puerto Rican Parrot's habitat, and found that the ecological species, including parrots, "will be protected from adverse effects caused by exposure to the estimated combustors' emissions." Region 2's Response to Comments also stated that the Screening Level Ecological Risk Assessment ("SLERA") ("ER 19") examined both "Woodlands at Rio Abajo State Forest" and the "Reserva Natural Cano Tiburones." RTC at 116-117.

Petitioner states that the SLERA does not include the Rio Abajo Forest, Pet. at 9, and therefore the SLERA did not evaluate impacts on the Puerto Rican Parrot Recovery Program. Petitioner offers no authority for a requirement to specifically evaluate the Recovery Program. However, the record shows that the SLERA explicitly examined the potential impacts on the "Woodlands at Rio Abajo State Forest" (ER #19 at 19, 27, and 34), and that the EPA analyzed and summarized data from the SLERA for the Rio Abajo Forest. *EPA's Summary and Evaluation (SLERA)*, 1/18/13 (ER #20) at 10-11. Moreover, the SLERA specifically considers endangered species including the Puerto Rico Parrot. ER #19, Appendix C Arecibo 1-2. Region 2 considered the impacts on species such as parrots and found that potential levels of pollution in water, soil, and sediment for all sites studied would be over 1-3 orders of magnitude below levels that are meant to protect species including birds such as parrots. ER #20 at 11. In addition, the FWS in Puerto Rico, which Petitioner states is involved in the Parrot Recovery Program at the Rio Abajo Forest, issued a determination that "adverse effects are not anticipated for species under our jurisdiction." ER #13, Appendix D, Letter from Muniz to Santos, 5/4/11.

Petitioner further states that not "one of the documents in the administrative record identify effect on health and welfare of species in Cano Tiburones and their habitats . . . ." Pet. at 9. The

record shows that the SLERA explicitly considered the potential impact on species and the environment in Cano Tiburones. ER #19 at 20, 28, 30, 35. EPA analyzed the potential impact and considered the SLERA's findings on this issue. ER #20 at 10-11.

Petitioner has not established clear error or an abuse of discretion by EPA Region 2 with respect to the Puerto Rican Parrot Recovery Program or the two referenced habitats. The Petition does not allege any failure to comply with the CAA or Endangered Species Act, and the Record does not support the factual information provided in the Petition's arguments. Rather, the record establishes that Region 2 specifically considered the impacts to the Puerto Rican Parrot, the Rio Abajo Forest, and Cano Tiburones.

Petitioner Quinones also argues that ecological impacts were not properly considered in the context of the "complex topography," Pet. at 8, without providing any reference to Region 2's RTC on this issue. RTC at 93. The SLERA assessments were evaluated within a 10 kilometers radius of the facility. RTC at 117. Since the SLERA modeling took the topography and local meteorology into account and was performed in accordance with 40 C.F.R Part 51, Appendix W, the impacts to the parrot habitat and the two different habitats are not expected to have an adverse effect.

IX. It is Premature for Region 2 to Address the Significance for this Permit of the Recent Court Opinion on the Biomass Deferral Rule

At this time, it is premature to respond to the Coalition's argument that the permit should be remanded on the basis of the D.C. Circuit's recent opinion in the challenge to the EPA regulation entitled Deferral for CO2 Emissions from Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration and Title V Programs (" Deferral Rule"). *Center for Biological Diversity v. EPA*, Nos. 11-1101 (D.C. Cir. July 12, 2013); 76 Fed. Reg. 43490 (July 20,

2011). Since proceedings before the D.C. Circuit regarding this rule are not complete at this time, it is premature for Region 2 to provide a response regarding the significance of the Court's opinion with respect to the Energy Answers permit. Region 2 intends to seek leave from the EAB to file a supplemental brief addressing this issue once the Region has more information about whether any parties will be requesting rehearing or other relief from the D.C. Circuit. In the meantime, the Board should continue to consider the other issues raised by all Petitioners and need not hold the matter in abeyance or decline to reach issue V in the Coalition petition at this time.

As the Board has recently noted, the judgment of the D.C. Circuit vacating the Deferral Rule will not become final and effective until such time as the court issues its mandate. *In re: Sierra Pacific Industries*, PSD Appeal No. 13-01, Slip. Op. at 65 (July 18, 2013); Fed R. App. P. 41; D.C. Cir. R. 41. Before the mandate issues, the Agency and other parties in the case have a 45-day window of time (until August 26) in which to evaluate the court's decision and to determine whether to seek rehearing of the decision or other relief. If no such motions are filed, the court's mandate issue seven days after August 26. If EPA or another party were to file a petition for panel rehearing, rehearing en banc, or other relief, the effect of such a petition would be to delay issuance of the mandate until seven days after the disposition of such a motion. Fed. R. App. P. 41(b), (d); D.C. Cir. R. 41(a)(1)-(2); *Sierra Pacific*, Slip Op. at 66 n.39.

For reasons similar to those given for the Board's declining to reach the challenge to Region 9's reliance on the Deferral Rule in the *Sierra Pacific* matter, it is premature for Region 2 to address the potential impact of the D.C. Circuit's opinion on the conditions in the Energy Answers Permit. Until Region 2 has more information regarding whether EPA or any other parties will seek rehearing or other relief from the court, it is difficult to forecast when the mandate might issue and whether and when the vacatur of the Deferral Rule will become final and effective.

Furthermore, it is unknown at this time whether EPA or other parties to the D.C. Circuit matter might seek relief from the remedy the court ordered that would influence the extent to which EPA may or may not continue to apply the Deferral Rule to permits such as that issued to Energy Answers. Until it is clear that no motions have been filed or the nature of any such motions is known, it is premature to develop a response to section V of Coalition's argument.

Region 2 expects to have more information soon regarding when the mandate might issue or the nature of any relief that may be requested in any motion filed with the D.C. Circuit. In the interim, Region 2 does not see the need to hold the proceeding in abeyance. Region 2 has not sought an extension of the date for filing its response to the Petitioners for review. To expedite this proceeding, Region 2 seeks to enable the Board to proceed with its evaluation of all other issues in this appeal until more is known about any motions following the D.C. Circuit's decision.

Moreover, there is no need at this time for the Board, without considering the other issues raised in the petitions for review, to decline to reach the issue raised in section V of the Coalition petition and to direct Region 2 to consider the implications of the Biogenic Deferral decision on remand. Unlike the *Sierra Pacific* case, as discussed above, the Petitioners have not met their burden of demonstrating clear error or abuse of discretion by Region 2 or that remand is otherwise appropriate on any other grounds. At the very least, the Board has not yet resolved whether any of these other issues raised by Petitioners have merit. Thus, awaiting more certainty regarding further proceedings before the D.C. Circuit should not unreasonably delay this appeal.

X. The Coalition Has Not Established Clear Error or Abuse of Discretion in Region 2's Handling of the Products of Combustion

The Coalition's analysis intended to demonstrate error in EPA's consideration of the products of combustion fails because it ignores the language in EA's permit, misstates EPA's RTC,

raises new information not submitted during the comment period, and incorrectly assumes that EPA is required to do a material balance analysis ("MBA").

The Coalition argues that Region 2 didn't provide a meaningful analysis of the balance of inputs and outputs to fully determine future air emissions. Pet. 35-36. The Coalition raises this argument for the first time on appeal. There were no comments requesting a MBA or stating that only a MBA can accurately determine or verify emissions, and so the Coalition's argument was not preserved for review. The Coalition's Petition also incorrectly assumes that EPA is required to conduct a MBA, Pet. 35, and provides no regulatory requirement to support their contention.

Region 2 used another widely accepted approach to determine boiler-related emissions regulated in the PSD permit (which are part of the products or outputs of combustion). The Region calculated the boilers' emissions, and established limits based on the following: 1) manufacturer's emissions specifications[21], after application of BACT, or EPA established emission factors; and 2) stack gas flow rate, and heat input rates, which are continuously measured. ER #10 at 5-13, 5-14, 5-20, 5-21, and 5-28; ER #13 at 9 to 10; *Supplemental to Application*, Sept. 2011 ("ER #21), at 2 to 3, 13 to 14, and Appendix B at 2; PSD Permit at 9-12, Conditions VII.A.5, and 8, at 21- 26, Conditions VIII. To verify continuous compliance with emissions limits, the permit requires CEMS, performance tests, continuous monitoring of various operational parameters and fuel usage and composition. Permit at 40-46, Conditions XI and XII.

The Coalition does not challenge any permit limit or compliance verification method, and does not provide any basis for rejecting EPA's method for determining emissions or compliance with the permit limits. The Coalition does not demonstrate that MBA would: 1) be more

[21] And also BACT emission limits at similar MWC facilities

appropriate for estimating the boilers' emissions; 2) supply more accurate emissions estimates; or 3) provide better assurance of the boilers' compliance with the permit limits.

The Coalition also suggests that EA can combust the maximum permitted limit of 2,106 tons per day (tpd) (equivalent to 768, 690 tpy on a 365 days/year basis) of refuse derived fuel (RDF) (i.e., shredded MSW) plus additional amounts of supplementary fuels ("SF"). Pet. 35. This is incorrect. The permit provides that "[i]f any amount of SF is combusted, the RDF consumption rate should be prorated so that the heat input rates limitations established in the permit for each MWC unit, are not exceeded." Permit at 22. Consequently, if 2,106 tpd RDF is combusted, no SF may be combusted that day. The Coalition also failed to meet its burden of addressing EPA's RTC as this issue was specifically addressed in the RTC.

The Coalition also misstates Region 2's meaning in the RTC by claiming that Region 2 suggested that water vapors resulting from hydrogen, moisture, and the biogenic[22] CO_2 would equal 103,630 tpy. Pet. 36. Region 2 did not make such a suggestion. On the contrary, the response clearly states that water vapors resulting from hydrogen, moisture, and biogenic CO_2 represent around 42 % of the total products of combustion of 768, 690 tpy of MSW. RTC at 49.

The Coalition asserts that, "the addition of the SF magnifies the uncertainty regarding the relationship between inputs and outputs." Pet. 36. Not only is this a new claim raised for the first time on appeal, but the Coalition has not explained how this "uncertainty" affects the inputs and outputs or represents clear error or abuse of discretion in the permit conditions.

Finally, the Coalition refers to an "apparent failure" of EPA to consider an oxygen flow input in the combustion process, which allegedly would enlarge the discrepancies of the material balance. Pet. 36. This too is a new claim raised for the first time on appeal. The Petition provides

[22] The RTC, p.49 reads" non-biogenic", which is typographical error

only a vague reference to this alleged failure. Thus, it is unclear what error, if any, the Coalition sees in the permit conditions. The Petition also does not explain how an oxygen flow input would benefit their material balance approach. Regardless, their argument fails because, as noted earlier, Region 2 did not use a MBA because another preferable approach existed. Thus, the Board should deny review of Petitioner's claim with respect to MBA.

XI. Petitioner Galan's Vague Statements About EA's Waste Composition and Malfunctions of Other Incinerators Does Not Demonstrate Error

Petitioner Galan indicates that there is "no knowledge of the real composition of the waste" that will be burned by EA and expresses concern that the permit process did not take account of malfunctions, system failures and breakdowns at other MWCs. Galan Pet. at 1-2. Petitioners generalized claims do not establish clear error or an abuse of discretion. *See Sierra Pacific* at 20-21; *P.R. Elec. Power Auth*. at 255 ("The petition does not even facially demonstrate that the Region's methods or conclusions were wrong."). Petitioner Galan also fails to address Region 2's responses to comments on these issues. EPA responded to a comment on the waste composition by pointing to specific pages in the PSD application that address the issue. RTC at 52. EPA also responded in detail to comments on upset events and alleged violations at existing MWCs. RTC at 31 and 38-39. None of these comments were addressed by Petitioners vague statements. Therefore, the Board should deny review of these claims in the Petition.

CONCLUSION

For all of the foregoing reasons, EPA respectfully requests that the Board deny review of Region 2's final PSD permit for EA.

Date: August 12, 2013

Respectfully Submitted,

Joseph Siegel
Senior Attorney
U.S. EPA Region 2
290 Broadway
New York, New York 1007
Siegel.Josesph@epa.gov
(212) 637-3208

/*S*/

Brian L. Doster
Air and Radiation Law Office
EPA Office of General Counsel
1200 Pennsylvania Ave. N.W. (MC 2344A)
Washington, D.C. 20460
202-564-1932
Doster.Brian@epa.gov

STATEMENT OF COMPLIANCE WITH WORD COUNT

I hereby certify that EPA Region 2's Response to Petition for Review (exclusive of the Table of Contents, Table of Authorities, Table of Attachments, this Statement of Compliance, and the attached Certificate of Service) contains 13,676 words, as calculated using Microsoft Word word-processing software.

/s/

_____

Brian L. Doster

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

In re:	)	
Energy Answers Arecibo, LLC	)	
Arecibo Puerto Rico Renewable	)	
Energy Project	)	PSD Appeal Nos.13-05, 13-06, 13-07, 13-08
	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing EPA Region 2's Response to Petitions for Review and EPA Region 2's Excerpts of Record were served via United States Mail on:

Christopher D. Ahlers
Environmental and Natural Resources Law Clinic
Vermont Law School
P.O. Box 96, 164 Chelsea Street
South Royalton, VT 05068

Martha G. Quinones Dominguez
P.O. Box 8054
Arecibo, Puerto Rico 00613

Eliza Llenza
P.O. Box 9865
San Juan, Puerto Rico 00908

Cristina Galan
Urb Radioville #121
Ave. Atlantico
Arecibo, Puerto Rico 00612

Henry C. Eisenberg
Skadden, Arps, Slate, Meagher & Flom, LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111

Waldemar Natalio Flores Flores
Quality Assurance Officer
Forest Hills B 20, Calle 4
Bayamon, Puerto Rico 00959-5527

Aleida Centeno Rodriguez
25 X 11, Mirador Vista Azul
Arecibo, Puerto Rico 00612

/*S*/
_____
Brian L. Doster
Air and Radiation Law Office
EPA Office of General Counsel
1200 Pennsylvania Ave. N.W. (MC 2344A)
Washington, D.C. 20460
202-564-1932
Doster.Brian@epa.gov