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

IN THE MATTER OF:	)	Appeal No.
	)	
AVENAL ENERGY PROJECT	)	PSD Approval No.
	)	SJ 08-01
	)	

PETITION FOR REVIEW

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INTRODUCTION

Pursuant to 40 C.F.R. section 124.19(a), El Pueblo Para El Aire y Agua Limpio (El Pueblo), petitions for review of the conditions of the Avenal Energy Project Prevention of Significant Deterioration (PSD) Permit Number SJ 08-01, which Regina McCarthy, Assistant Administrator of the Office of Air and Radiation (OAR) for the Environmental Protection Agency (EPA) issued to Avenal Power Center, LLC (APC) on May 27, 2011. The permit at issue authorizes APC to construct and operate a new 600 megawatt natural gas-fired combined cycle power plant in Avenal, California.[1] Because the permit fails to include necessary permit conditions, fails to make necessary findings, is based on erroneous legal interpretations, and raises important policy considerations that the Environmental Appeals Board (Board) should address, review is appropriate pursuant to 40 C.F.R. Part 124.

THRESHOLD PROCEDURAL REQUIREMENTS

El Pueblo satisfies the threshold requirements for filing a petition for review under Part 124. El Pueblo has standing to petition for review of the permit decision because its members live in the communities that will be impacted by the Energy Project's emissions and because it participated in the public comment period on the draft permit and at the public hearing on April 12, 2011. 40 C.F.R. § 124.19(a); Petitioner's Comment Letter (Comments) (Exhibit 2). The issues raised by Petitioners below were raised with EPA during the public comment period, are directly related to EPA's response to public comments, or were not reasonably ascertainable during the comment period. Consequently, the Board has jurisdiction to hear Petitioner's timely request for review. 40 C.F.R. Part 124.

[1] A copy of the final AEP PSD permit is attached as Exhibit 1.

FACTUAL BACKGROUND

Avenal Power Center applied for a PSD permit for the Avenal Energy Project (Energy Project) in February 2008. EPA notified APC that its application was complete on March 18, 2008. On June 16, 2009, Region 9 released a proposed permit and statement of basis for public comment. EPA accepted public comment through October 2009.

On February 9, 2010, during the pendency of the APC permit, EPA established a primary National Ambient Air Quality Standard (NAAQS) for nitrogen dioxide (NO2) based on a 1-hour averaging time (1-hour NO2 NAAQS). The rule became effective April 12, 2010. 75 Fed. Reg. 6474 (Feb. 9, 2010). Thereafter, on June 22, 2010, EPA established a primary NAAQS for sulfur dioxide (SO2) based on a 1-hour averaging time (1-hour SO2 NAAQS), which became effective on August 23, 2010. 75 Fed. Reg. 35,520 (June 22, 2010). Finally, on January 2, 2011, greenhouse gases (GHGs) became "subject to regulation" under the Clean Air Act (CAA). 75 Fed. Reg. 17004, 17019 (April 2, 2010). EPA did not include grandfathering provisions in any of these rules.

On April 1, 2010, EPA issued a memorandum, addressed to all regional administrators, confirming that permits issued on or after April 12, 2010, must be supported by a demonstration that the source will not cause or contribute to a violation of the hourly NO2 NAAQS. *See* Memorandum from Stephen D. Page, EPA Office of Air Quality Planning and Standards, Applicability of the Federal Prevention of Significant Deterioration Permit Requirements to New and Revised National Ambient Air Quality Standards (Apr. 1, 2010) (Exhibit 3).

In response to the NO2 rulemaking and in conformity with the Page Memorandum, on May 6, 2010, EPA requested that APC provide a demonstration that the project would not violate

the 1-hour NO2 NAAQS. APC attempted, but was unable to make the required demonstration. *See* EPA's May 2011, Response to Comments (Response) at 78.

Meanwhile, APC's application had been pending beyond the one-year deadline by which Section 165(c) of the Act requires EPA to grant or deny a PSD application. APC brought suit in Federal District Court to compel EPA to issue a final decision. The Assistant Administrator of OAR submitted a declaration representing to the Court that EPA would issue a final permit decision in accordance with 40 C.F.R. § 124.15 by May 27, 2011. The declaration also announced EPA's intention to grandfather the Energy Project from compliance with the new NAAQS and GHG standards, in a departure from its earlier stance. On March 1, 2011, EPA Administrator, Lisa Jackson, issued a memorandum temporarily re-delegating permitting authority from the Regional Administrator to the Assistant Administrator of OAR.

EPA issued a Supplemental Statement of Basis on March 4, 2011 and held a public hearing on April 12, 2011 to receive public comment.

The United States District Court for the District of Colombia issued an order on May 26, 2011, requiring that EPA "issue a final agency action, either granting or denying [APC's] permit application, no later than August 27, 2011." *Avenal Power Center, LLC v. USEPA et al.*, 2011 U.S. Dist. LEXIS 56251, *2.

EPA approved APC's PSD permit application for the Project on May 27, 2011 without requiring a demonstration that the source will not cause or contribute to a violation of the hourly NO2 and SO2 standards and without requiring the source to meet emission limitations for GHGs. EPA publically announced that it may similarly grandfather 10 to 20 currently pending PSD applications.[2]

[2] EPA Plan to 'Grandfather' Key Air Permit Raises Major Legal, Policy Queries," InsideEPA.Com (March 7, 2011) (available at: http://insideepa.com/Inside-EPA/Inside-EPA-03/04/2011/epa-plan-to-grandfather-key-air-permit-

The Energy Project is proposed to be built and operated in Avenal, California, just a few miles from the communities of Avenal, Huron, and Kettleman City. EPA admits that all three of these communities include "populations of interest" for the purposes of analyzing the impacts of the project on overburdened communities. Supplemental Statement of Basis ("SSB") at 17-18. As EPA acknowledges, these communities have very high (more than 85 percent) people of color populations, are highly linguistically isolated, and are predominately low-income. *Id.* They are also disproportionately impacted by pollution sources. *Id.* at 25.

Even without a new 600-megawatt fossil fuel power plant, these communities are burdened by multiple environmental harms. The San Joaquin Valley is one of the worst-polluted air basins in the nation and suffers from "some of the highest PM2.5 levels in the country." *Id.* at 18. Drinking water in these rural communities is contaminated with high levels of arsenic, benzene, and other pollutants. Response at 82. Toxic pesticides and other agricultural chemicals applied to surrounding agricultural fields can drift into the homes and yards of local residents, many of whom also work in the fields. *Id.*

Additionally, Kettleman City is located adjacent to the Interstate 5 freeway, defunct oil and natural gas extraction operations, a sewage sludge processing operation, and the state's largest hazardous waste landfill, which was recently fined $300,000 for violations of its PCB handling permit. Letter from Earthjustice (April 12, 2011) at 14. Together, these impacts contribute to, among many other harms, higher-than-average asthma prevalence and asthma-related hospitalizations and emergency room visits. SSB at 22, 24. These communities are plagued by high unemployment and lack of access to health care, making it more difficult to

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raises-major-legal-policy-queries/menu-id-153.html) (reporting that "[Assistant Administrator] McCarthy noted EPA would apply the policy to other permits in similar situations but has not yet identified them, except to say it expects it will affect 10 to 20 permits nationwide."

cope with the health impacts associated with the high levels of pollution in the area. *Id.* at 17, 25.

Recent developments highlight health disparities faced in the communities. In 2008, residents of Kettleman City uncovered an unprecedented spike in birth defects and infant deaths, which officials ultimately determined affected 11 children. Residents estimated that the birth defect cluster affected nearly a quarter of all children born within an 18-month time period beginning in September 2007. Factors that increase risk of birth defects include genetic predisposition, at risk behaviors, and environmental exposures. While a State sponsored survey was unable to determine a common cause for the birth defects, the investigation ruled out the possibility that mothers' health or lifestyle could have caused the birth defects. (California EPA and California Department of Public Health, Investigation of Birth Defects and Community Exposures in Kettleman City, California 60 (December 2010), *available at* http://www.calepa.ca.gov/envjustice/Documents/2010/KCDocs/ReportFinal/FinalReport.pdf).

ISSUES PRESENTED FOR REVIEW

Petitioner respectfully requests that the Board review the following issues:

1. EPA erred by failing to require a demonstration of the 1-hour NO2 NAAQS, 1-hour SO2 NAAQS, and application of the Greenhouse Gas Best Available Control Technology (BACT) requirements.

2. EPA created illegal grounds for grandfathering facilities from substantive PSD requirements.

3. EPA's actions violate the Administrative Procedure Act (APA) and Due Process Clause of the United States Constitution.

4. EPA's removal of the Regional Administrator's approval authority over the permit is unlawful without a rulemaking.

5. EPA abused its discretion by failing to identify disproportionate human health and environmental effects in its environmental justice analysis.

6. EPA abused its discretion by failing to address disproportionate cumulative impacts in its environmental justice analysis.

STANDARD OF REVIEW

The Board reviews a permitting authority's final permit decision if the decision is based on "a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review." *In re N. Michigan Univ.*, PSD Appeal No. 08-02, slip op. at 10 (EAB Feb. 18, 2009) (*citing* 40 C.F.R. § 124.19(a)). As part of its review, the Board determines "whether the permit issuer 'duly considered' the issues raised in the comments and whether the approach ultimately adopted by the [permit issuer] is rational in light of all information in the record." *In re Shell,* 13 E.A.D. 357, 386 (EAB 2007) (*quoting In Re Gov't of D.C. Mun. Separate Storm Sewer.,* 10 E.A.D. 323, 342 (EAB 2002)). The rationale for the decision must be "adequately explained and supported in the record." *Id.* at 386 (*citing In re City of Moscow, Idaho,* 10 E.A.D. 135, 142 (EAB 2001); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567-68 (EAB 1998)). Furthermore, "two differing explanations" render the rationale for the permit determination unclear and subject to remand. *In re Austin Powder Co.,* 6 E.A.D. 713, 719-20 (EAB 1997) (*citing In re GSX Servs. of S. Carolina, Inc.,* 4 E.A.D. 451, 454 (EAB 1992) (holding that the administrative record must reflect the "considered judgment" necessary to the support the permit determination)). Lastly, OAR's interpretations of statutory or regulatory provisions are not entitled to any deference. *See, e.g., In re Lazarus, Inc.*, 7 E.A.D. 318, 351 n.55 (EAB 1997) (noting the general rule that agencies may not advance "the doctrine of administrative deference . . . because the Board serves as the final decisionmaker for EPA in cases within the Board's jurisdiction").

ARGUMENT

OAR, in approving the Energy Project's permit without requiring compliance with new federal air quality standards, attempts to rewrite the rules in order to permit the construction of this major new power plant in one of the most polluted environmental justice communities in the country. EPA's proposed action violates the plain language of the Clean Air Act, undermines clear Congressional intent in adopting the PSD program, has no rational factual basis, ignores public health impacts in nearby communities, and discriminates against Latino residents in Kettleman City, Huron and Avenal. OAR's decision is based on clearly erroneous finding of facts and conclusions of law, and also involves important matters of policy and discretion that this Board should carefully review.

I. EPA ERRED BY FAILING TO REQUIRE A DEMONSTRATION OF THE 1-HOUR NO_2 NAAQS, 1-HOUR SO_2 NAAQS, AND APPLICATION OF THE GHG BACT REQUIREMENTS.

OAR's decision to allow the Avenal Power Center to construct a power plant without demonstrating that the facility will not cause or contribute to violations of NO2 and SO2 national ambient air quality standards ("NAAQS") in place at the time of approval is a violation of law. The agency also erred when it relieved APC from its obligation to apply best available control technology for greenhouse gases.

The agency's actions violate the plain language of the statute which requires a demonstration of compliance with all NAAQS in place at the time the permit is approved. To support its decision, EPA must clear three distinct hurdles: it must demonstrate that 1) the language of the act is ambiguous; 2) Congress has authorized EPA to exempt facilities from the statute's requirements; and 3) the five factors that EPA has chosen to support its grandfathering

determination are factually and legally valid as applied to the Energy Project. EPA fails to make any of these demonstrations.

A. EPA Violated Plain Language of the Act.

To receive a permit, sources must demonstrate that they "will not cause, or contribute to, air pollution in excess of any . . . national ambient air quality standard," and that they are "subject to the best available control technology for each pollutant subject to regulation . . . ." CAA §§ 165(a)(3) and (4). The statutory language is unambiguous – a new source cannot cause or contribute to a violation of any NAAQS and must be subject to best available controls for all regulated pollutants. Unless the source can meet these criteria, it may not be built. *See* CAA § 165(a) (prohibiting the construction of major emitting facilities that do not comply with the applicable permitting requirements where "construction is commenced after the date of the enactment of this part."). EPA has no statutory authority to waive these requirements.

During public comment, El Pueblo and others objected to EPA's proposal to issue a PSD permit in violation of the plain language of the statute. Comments at 2 (*citing* 42 U.S.C. § 7475(a)(3)-(4)). EPA argues that despite the plain language of the Act, it has "discretion" based on a need to read the sections that require a demonstration of compliance with NAAQS (CAA § 165(a)(3)-(4)) in conjunction with the section that requires EPA to make a decision on a permit application within one year of the date EPA deemed the application complete (CAA §165(c)). Response at 56. EPA explains that "where a strict reading of section 165(a)(3) would frustrate Congressional intent that EPA act in a timely manner, the Agency has discretion to interpret the reach of section 165(a)(3)." *Id.* However, EPA cites no authority to support its contention that a statute's plain language ceases to control when an agency perceives it to conflict with another statutory provision. *See id.*

In fact, the Supreme Court rejected this very proposition in *General Motors Corp. v. United States*, 496 U.S. 530 (1990). The Court held that delay on the part of EPA does not affect the ability or obligation of EPA to enforce other requirements of the Act, unless Congress has provided some express authority or direction for EPA to ignore otherwise applicable requirements when EPA misses a deadline for acting on a permit. *Id.* at 535, 540. The Board should reject EPA's attempt to carve out an exception to well-established law dictating that the plain language of a statute shall control.

EPA's argument fails factually as well. Sections 165(a) and 165(c) are not in conflict. Section 165(c) requires EPA to act, not approve, within one year. Should the statutory deadline approach and a project cannot be shown at that time to comply with federal air quality standards and best available control technology, then EPA must disapprove the project. APC's remedy for delay is a deadline action under section 304(a)(2) to compel action; it is not entitlement to approval by avoiding compliance with substantive portions of the statute.[3] EPA's grandfathering scheme did not remedy EPA's failure to meet the one-year deadline; it merely caused EPA to violate an additional statutory obligation.

B. Congressional Intent Is Not Relevant, Nor Does It Support EPA's Action.

EPA requests that the Board look beyond the plain language of the Act to infer Congressional intent in support of its action. Response at 55-56. However, the Board should not defer to the agency's interpretation of legislative intent when a statute's language is plain on its face. *In re Rochester Pub. Utils.*, 11 E.A.D. 593, 603-08 (EAB 2004) (Board generally will give effect to unambiguous regulatory language); *see also In re Arecibo & Aguadilla Regional*

[3] CAA § 304(a)(2) ("[A]ny person may commence a civil action on his own behalf-- against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.").

Wastewater Treatment Plants, 12 E.A.D. 97 n.60 (EAB 2005) (A fundamental canon of statutory construction is that if language is plain and unambiguous it must be given effect.).

Even if the Board looks beyond the unambiguous language of the statute itself, the Act's legislative history does not support EPA's interpretation. To infer congressional intent, EPA cites a Report of the Committee on Public Works, which states "nothing could be more detrimental to the intent of this section and the integrity of this Act than to have the process encumbered by bureaucratic delay." Response at 56, *citing* S. Rep. No. 94-717, at 26 (1976). This argument is absurd since requiring adherence to substantive statutory requirements for air quality standards cannot be the "bureaucratic delay" Congress envisioned. The Committee stated that the "chief tool to be used in implementing the no significant deterioration requirements [would be] the permit" and explained that State and Federal agencies must act "responsibly on . . . permit applications and those studies necessary to judge the impact of an application." S. Rep. No. 94-717, at 26 (1976). The Committee did not find that avoidance of bureaucratic delay should take precedence over the responsible review of permit applications and "those studies necessary" to evaluate project impacts. *Id.*

Additionally, EPA cites a House Committee Report stating that the Committee "authorized extensive grandfathering of both existing and planned sources" in order to avoid construction and permitting delays. Response at 59, *citing* H.R. Rep. No. 95-294, at 171 (1977). Again, EPA excerpts only those portions of legislative history which appears to support its position, without providing relevant context. A complete reading of the Report demonstrates that the House Committee sought to prevent undue delays in possible land reclassifications as a result of the 1977 Amendments. H.R. Rep. No. 95-294, at 172 (1977). The report concludes that

the grandfather provisions supplied by Congress, in section 165(b) would be sufficient to "assure that no moratorium" on current development would result from the 1977 Amendments. *Id.*

In fact, the statute's legislative history supports El Pueblo. In adopting the PSD program in 1977, Congress foresaw a need to grandfather some sources from new PSD permit requirements and provided specific relief to these sources in section 168(b). Congress provided no further authority to EPA to waive or grandfather additional sources from PSD requirements. Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980); *see also NRDC v. EPA*, 489 F.3d 1250 (D.C. Cir. 2007).

Further, Congress's intent appears in the Act itself. Congress outlined the purposes of the PSD program in section 160 of the Act:

> (1) to protect health and welfare from any actual or potential adverse effect which may be reasonably anticipate[d] to occur from air pollution . . . not withstanding attainment and maintenance of all national ambient air quality standards;
> (2) to preserve, protect, and enhance air quality in national parks . . . and other areas of special . . . value;
> (3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;
> (4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and
> (5) to assure that any decision to permit increased air pollution . . . is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

42 U.S.C. § 7470. EPA's stated reasons for exempting the Avenal facility from NAAQS compliance, including equity and fairness concerns, find no support in the language of the Act. EPA's proposed approach also undermines the fundamental policy choices that Congress made in adopting the PSD program: (1) that it is preferable to prevent air pollution from becoming a

problem in the first place; and (2) that controls should be installed when new sources are being constructed rather than as retrofits on existing sources. *See* S. Rep. No. 95-127, at 11 (1977). Thus, the Board should review OAR's violation of the unambiguous statutory requirements.

C. EPA's Sudden Change in Interpretation Is Not Entitled to Deference.

EPA's new interpretation directly contradicts EPA's prior guidance and is not entitled to much deference. As recently as April 2010, EPA publicly announced its interpretation that each final PSD permit decision must reflect consideration of any NAAQS in effect at the time the permitting agency issues a final permit. Page Memo at 2 (citing extensive case law establishing that permitting decisions of regulatory agencies must reflect the law in effect at the time the agency makes a final determination on a pending application.).[4]

El Pueblo challenged EPA's proposal to grandfather the Energy Project based on EPA's own interpretation that the "meaning of the phrase 'subject to regulation' in the PSD provisions and associated regulations covered any NAAQS in effect at the time of a final permit decision." Comments at 2. EPA responded that its "overall interpretation of the phrase 'subject to regulation' . . . is unchanged by this decision to grandfather the Avenal permit." Response at 80. EPA's rationalization is inconsistent and flawed. In fact, EPA admits that "[i]n ordinary circumstances, [grounds for denying a permit would] clearly include failing to show a source will not cause a violation of the NAAQS or meet the BACT requirement for each pollutant subject to regulation." Response at 65.

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[4] *See also* "Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs." 75 Fed.Reg. 17004 (2010). EPA Administrator Stephen Johnson Memorandum (December 18, 2008); *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (EAB Nov. 13, 2008) (Board remanded a PSD permit because of flawed assertions by EPA relating to the phrase "subject to regulation"); *In re Phelps Dodge Corp.* 10 E.A.D. 460, 478 n.10 (EAB May 21, 2002) (Board held "applicable requirements" of the Clean Water Act and its regulations to "include all statutory requirements that take effect prior to issuance of permit...").

EPA simply carves out a narrow exception to its interpretation of "subject to regulation," for this project. EPA's new and inconsistent interpretation, even so narrowly defined, is not entitled to deference. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonesca*, 480 U.S. 421, 446 n. 30 (1987); *see also Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1457 (9th Cir. 1992) (No deference to the agency's "expertise" when the agency position has fluctuated); *Sierra Club v. Martin*, 168 F.3d 1, 4 (11th Cir. 1999) (Agencies must scrupulously follow the regulations and procedures promulgated by the agency itself).

EPA fails to support its new interpretation of its regulation with relevant law or analysis. In fact, EPA's only rationale for deviating from the standard is the "extraordinary circumstances present" whereby "denying this permit on the basis for the 1-hour NAAQS for NO2 and SO2 and the BACT requirement for GHGs would frustrate Congressional intent." Response at 65. First, as detailed above, denying the permit would not frustrate congressional intent. Second, EPA has no discretion to deviate from a consistently held agency position based solely on vague and imprecise references to Congressional intent. *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03, at 62 ("[A]n agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required . . . in the first instance.") (*quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)).

The Board should not afford the agency any deference for its sudden departure from well-established interpretations of its PSD permitting obligations and the Board should review OAR's clearly erroneous conclusions of law.

D. EPA's Grounds for Grandfathering the Energy Plant Are Legally and Factually Flawed.

Congress did not include any grandfathering provision in the statute. Notwithstanding, EPA creates five factors which it used to justify grandfathering the Avenal Energy Project from demonstrating compliance with otherwise applicable NAAQS. These factors include: (1) emissions from the proposed facility, (2) permit timing, (3) unanticipated challenges, (4) addressing NO_2 caused the additional delay, and (5) legal precedence. SSB at 6. EPA cannot simply create exceptions to its statutory obligations, no matter how many criterion it establishes to justify itself. *NRDC v. EPA*, 489 F.3d 1250, 1260 (D.C. Cir. 2007) ("EPA may not, consistent with *Chevron*, create an additional exception on its own."). The Board should reject EPA's attempt to grandfather the Avenal Energy Project.

Even if the agency could develop such criteria, each of the five factors is legally and factually flawed as applied to the Avenal Energy Project. Since EPA relies on these factors in combination to exempt the Energy Project from new standards, the Board should remand if even one of the factors is based on an erroneous finding of fact or conclusion of law as discussed below.

(1) *Emissions from the Proposed Facility*: El Pueblo commented that EPA applied the wrong standard when it proposed to exempt the Avenal facility based on its finding that the facility would not violate any NAAQS previously in effect. Comments at 3. The facility's compliance with outdated requirements is not an indicator that the project will preserve public health. *Id.* This is especially true in light of the agency's own finding that the previous NO2 NAAQS was insufficient to protect public health with an adequate margin of safety against adverse respiratory effects. SSB at 14. Moreover, the facility's compliance with annual NO2 standards is not indicative of whether it will satisfy hourly NO2 standards, since the new

standard measures accounts for short-term fluctuations in NO2 levels ignored by the annual standard. In fact, multiple modeling attempts revealed the Energy Project could not meet the hourly NO2 standard. Response at 78.

In response, EPA argues that "when the expected air quality is balanced against the amount of time that EPA has been considering this permit application and the impact this delay had on the permit applicant, EPA believes grandfathering is justified." Response at 74.

This does not address El Pueblo's argument but instead creates a new criterion for grandfathering the permit not present in the statement of basis, one of balance. However, "an agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *In re Deseret Power Electric Cooperative* at 62 (*quoting Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42). EPA fails to support the inclusion of a new factor.

(2) *Permit Timing*: El Pueblo commented that EPA did not cause any delay beyond the one-year statutory deadline since a required endangered species analysis "did not conclude until August 2010, well after the statutory one-year period had ended." Comments at 4; *see also* Letter from Susan K. Moore, U.S. Fish and Wildlife Service, to Gerardo C. Rios, EPA (Aug. 9, 2010). Since EPA did not cause delay beyond the statutory deadline for agency action, EPA's legal authority to justify grandfathering the permit does not apply.

EPA responded that judicial decisions recognize it may be appropriate to apply retired legal standards regardless of the cause of the delay. However, in each of cases cited by EPA, the decisionmaking agency caused the delay. *See, e.g., Application of Martini*, F.Supp.395, 401 (S.D.N.Y. 1960); *Mitchell v. Overman*, 103 U.S. 62, 64-65 (1880). EPA cites no legal authority

to support its position that an agency may rely on out-dated legal standards when the agency did not cause the delay. *See* Response at 64-65.

Additionally, EPA argues that the applicant experiences the effects of delay regardless of which agency is responsible. Response at 64-65. However, as noted in public comment, the delay has largely been to Avenal's benefit since it allowed Avenal to supplement its application to support compliance with the Clean Air Act and the Endangered Species Act. *See, e.g.*, Letter from Gary Rubenstein, Sierra Research, to Gerardo Rios, EPA (May 11, 2010) (outlining Avenal's responses to outstanding BACT and other issues identified by EPA). Had EPA aggressively applied the one-year deadline in section 165(c), EPA would have been forced to deny Avenal's permit application. Letter from Earthjustice (April 12, 2011) at 10. Though this argument completely undermines EPA's reliance on factors based on equity or fairness, EPA ignored this argument in its Response to Comments.[5]

(3) *Unanticipated Challenges*: EPA argued APC's "unanticipated challenges" related to new modeling techniques for the annual NO_2 standard should serve as part of EPA's basis for grandfathering. SSB at 6. However, EPA's response to comments referenced APC's modeling results and its finding that "Avenal could not show that its impact alone would be less than the significant impact level for 1-hour NO_2 concentrations reflected in EPA guidance." Response at 78. EPA "determined that [APC's] submission did not meet applicable EPA guidelines." Response at 77-78. In this context, it appears that APC was not challenged by the modeling techniques so much as it was challenged by its inability to demonstrate NAAQS compliance.

EPA's response not only proves that application of the "new" modeling techniques was possible, but that EPA had grounds to deny APC's permit based on these guidelines.

[5] The agency's failure to duly consider issues raised in comments is sufficient grounds for remand. *See Gov't of D.C Mun. Separate Storm Sewer*, 10 E.A.D. at 342.

(4) *Addressing NO2 Caused the Additional Delay*: EPA claimed that, but for the challenge encountered in supplementing the APC permit to address short-term NO2 emissions, the hourly SO2 NAAQS and GHG requirements would not have become applicable. EPA argued that grandfathering this application is an equitable approach to avoid further delays in completing action on this permit in contravention of Congressional intent. Response at 79.

With this response, EPA seeks to justify grandfathering on the grounds of equity. Congressional intent in creating the PSD program, as set out in section 160, is to protect health and welfare and improve air quality. 42 U.S.C. § 7470. The Act and its legislative history make no mention of equity or fairness to the applicant over public health as a policy objective. *See* S. Rep. No. 94-717 (1976); H.R. Rep. No. 95-294 (1977). EPA's creation of new precedential policy based on the tenant of equity is, therefore, not supported by law or congressional intent.

Moreover, with this argument, EPA ignores its ability to deny the permit if the applicant is unable to demonstrate compliance with the new standards. Denial of the permit would also "avoid further delays in completing action on the permit," without violating substantive requirements of the act.

(5) *Legal Precedence*: As the final factor in grandfathering the Energy Project from NAAQS compliance, EPA argues that case law supports its ability "to issue a permit decision based on the legal requirements that were applicable at the time the Agency should have taken action. SSB at 10, *citing Mitchell*, 103 U.S. at 64-65 (1880); *Martini*, 184 F.Supp. at 401-402, *Fassilis v. Esperdy*, 301 F.2d 429, 434 (2d Cir. 1962).

El Pueblo argued that EPA's reliance on the dicta in *Martini* was misplaced because "[t]he court did not...afford the agency authority to fashion and administer it's [sic] own remedy." Comments at 6, (*citing Martini*, 184 F. Supp. at 399-402). EPA responded that the

court extended the principle of 'the act of that court shall prejudice no man' to the act of an administrative agency (not just the act of the court) in order to effectuate Congressional intent with respect to individuals like Martini." Response at 62 (*citing Martini,* 184 F. Supp. at 400).

EPA misrepresents *who* has authority to remedy unlawful delays. *Martini* held that "it is the duty of the *court* to see that the parties shall not suffer by the delay." *Id.* at 402 (emphasis added). Further, EPA references to *Fassilis* are unavailing as the case supports El Pueblo. In *Fassilis*, the Court notes that Congress elected not to "enact a savings clause to protect pending administrative proceedings" and thus found that Congress intended a new rule to apply to pending actions. *Fassilis*, 301 F.2d at 433; *see also Zifftin v. United States*, 318 U.S. 73 (1943) (where governing statute is amended after applicant submits his permit application but before agency renders its decision, the agency is "required to act under the law as it existed" at the time of its decision rather than at the time of application); *State of Alabama v. EPA*, 557 F.2d 1101, 1110 (5th Cir. 1977) (appropriate standards to be applied to a permit are those in effect at time of initial permit issuance)). None of the cases referenced in *Fassilis* address the power of an agency to fashion a remedy for its own delay. *Fassilis*, 301 F.2d 429.

EPA's response to comments fails to provide authority to support its argument that it has the power "to issue a permit decision based on the legal requirements that were [previously] applicable" much less to support the factors EPA employs in doing so. SSB at 10. Thus, the Board should review OAR's clearly erroneous conclusion of law.

II. EPA'S ACTIONS VIOLATE THE ADMINISTRATIVE PROCEDURE ACT AND DUE PROCESS CLAUSE

EPA creates two contradictory explanations as to the precedent it sets in allowing the Energy Project to escape compliance with the standards in place at the time it issues the permit. On the one hand, EPA explains that "this decision in the context of Avenal should not be viewed

as establishing a general rule or precedent applicable to any other permit application." Response at 69. On the other, EPA also explains that it "has made clear that we intend to enable similarly situated permit applications to receive the same treatment as Avenal." Response at 72. EPA cannot have it both ways. If the agency intends its new interpretation on grandfathering to apply more generally, it must comply with the Administrative Procedures Act. If EPA intends its interpretation to apply only to Avenal, it violates the Equal Protection Clause by singling out one facility for disparate treatment.

A. The Administrative Procedure Act Applies to EPA's New Interpretation

An agency must satisfy the APA's formal rulemaking requirements when it fundamentally changes the agency's interpretation of a substantive regulation. *See Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) ("Once an agency gives its regulations an interpretation, it can only change that interpretation as it would modify the regulation itself: through notice and comment rulemaking."). An agency engaged in rulemaking under the APA must publish the proposed rule in the Federal Register; provide notice of the proposed rulemaking and hearing; provide an opportunity for interested persons to participate; receive and consider comments from all interested parties; and publish the rule as adopted in the Federal Register, incorporating a statement of its basis and purpose. 5 U.S.C. § 553 (b)-(d).

Here, El Pueblo challenged EPA's adoption of a new interpretation of the Clean Air Act and its regulations without engaging in a formal rulemaking process. Comments at 6-7, *citing* SSB at 1, 6; *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87 (1995). This new interpretation contradicts EPA's previous interpretation of the Act and changes existing rights and duties. Assuming that EPA is allowed to reinterpret the plain language of the Clean Air Act requirements regarding NAAQS compliance, because it intends to use its new interpretation to

exempt 10 to 20 facilities from compliance[6], EPA must first comply with Administrative Procedure Act (APA) rulemaking requirements.

While EPA admits to changing its "prior interpretation" of the regulation, EPA argues that this action need not conform with APA requirements because it is an interpretive rule. Response at 70-71 (*citing Miller v. California Speedway Corp.* 536 F.3d 1020, 1032-33 (9th Cir. 2008)). In *Miller*, the Court found that a technical assistance manual explaining ambiguous regulatory language one year after an agency issued the regulation did not require a notice and comment rulemaking. *Id.* The Court reached this conclusion because the manual did not change the agency's prior understanding, and therefore was "interpretive," rather than "legislative." *Id.* at 1033. EPA's action here is legislative, as it changes the agency's prior understanding and application of law. *See* Response at 70 (EPA admits that it "no longer subscribes to the strict reading of 40 CFR 52.21(k)").

Further, in *United States v. Magnesium Corp. of America*, 616 F.3d 1129, 1138-1142, the Court determined that APA rulemaking applies to an agency's reinterpretation of previously definitive agency interpretations as opposed to previous temporary or unclear interpretations. Here, EPA issued previous final definitive guidance that newly issued permits must comply with standards in effect at the time issued with no equivocation. Page Memo at 2. Therefore, EPA's new interpretation is subject to the APA.

EPA also claims that its change in interpretation should be considered an "ad hoc adjudication to formulate standards of conduct" as recognized by the Supreme Court in *SEC v. Chenery Corp.* 332 U.S. 194, 199-203 (1947). However, *Chenery* also stated that where an agency has the ability to make new law prospectively through the exercise of its rule-making

[6] *See* footnote 2, *supra.*

powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct. Most importantly, the Court recognized an agency's ability to make case by case determinations only in the absence of statutory and regulatory authority. *Id.* at 202-204. Here, unlike in *Chenery*, there is clear statutory and regulatory authority that a permit must comply with standards that in effect at the time of issuance. *Id.*

EPA's failure to comply with APA rulemaking results from a clearly erroneous conclusion of law subject to Board review.

B. EPA Violates the Equal Protection Clause.

If EPA's decision on APC's permit does not apply to any other similarly situated facility, then EPA has violated the Due Process Clause of the U.S. Constitution. The Due Process Clause prohibits the Federal government from taking intentional action to treat similarly situated individuals differently. EPA, in exempting the Energy Project from requirements applicable to all other PSD permit applicants, treats similarly situated applicants differently. Comments at 7. EPA confirms this disparate treatment by explaining that its "decision in the context of Avenal should not be viewed as establishing a general rule or precedent applicable to any other permit application." Response at 69.

In light of this statement, EPA's contradictory response that it "intend[s] to apply the same transition policy to others who are in a similar situation to Avenal," is disingenuous. *See* Response at 72. In fact, EPA admits that it "has not yet determined the exact form or scope the action that we intend to take to more precisely define similarly situated sources." *Id.* Thus, while EPA's denies treating similarly situated applicants differently from APC, it provides no support for its denial.

EPA's action also treats similarly situated individuals differently. El Pueblo commented that:

> EPA proposed to exempt an emission-causing power plant from applicable emission reducing regulations in an area already bearing a disproportionate brunt of the environmental load with an 85% minority population, 34% of whom are linguistically isolated. Meanwhile, EPA applies current standards to other PSD applicants, whose projects are not located in a disadvantaged and already decimated region, without grandfathering them.

Comments at 8.

In response, EPA argues that commenters failed to meet the requirements for a procedural due process claim since they "have not identified a property interest that has been affected by EPA's action or explained how this action would deprive anyone of such a property interest without adequate procedural rights." Response at 72, *citing Hahn v. Star Bank*, 190 F.3d 708, 716 (6th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000).

While it can be inferred from El Pueblo's comments that individuals near the proposed Energy project site seek to protect their interests in safe housing and enjoyment of residence free from harmful pollution, to preserve an argument for review, a comment need only be raised with a reasonable degree of specificity. *See In re New Eng. Plating Co.*, 9 E.A.D. 726, 732 (EAB 2001); *see also In re Westborough*, 10 E.A.D. 297, 304 (EAB 2002).

EPA's response fails to recognize that local residents, as opposed to applicants, also have equal protection rights. This is especially true in light of the demographic information provided by EPA which demonstrates that populations nearest the site are over 85 percent Latino. Latino residents near the proposed project site will not be treated similar to individuals located around other proposed facilities that EPA has not grandfathered from applicable requirements.

Furthermore, instead of providing a rational basis for EPA's differential treatment in its response to comments, EPA responds that it will develop a rational basis to distinguish applications sometime in the future. Response at 72. Not only does this "assurance" demonstrate that EPA is currently acting without a "rational basis," any future attempts to establish a "rational basis" will be nothing more than a post hoc rationalization to support action already taken. This is a clearly erroneous conclusion of law and is an important matter of policy that warrants the Board's consideration.

III. EPA'S REMOVAL OF THE REGIONAL ADMINISTRATOR'S AUTHORITY IS UNLAWFUL.

PSD permitting regulations only authorize the Regional Administrator to issue a final permit decision. 40 CFR § 124.15; *see also* 40 C.F.R. §124.19(f)(2) (reiterating that the "final permit decision shall be issued by the Regional Administrator. "). However, on March 1, 2011, EPA Administrator Lisa Jackson issued a memo temporarily delegating permitting authority to the Assistant Administrator for OAR. The Administrator cannot simply rewrite applicable regulations governing issuance of such PSD permits without first conducting notice and comment rulemaking under the APA. 5 U.S.C.A. § 553; *see also* Section III above.

El Pueblo challenged Administrator Jackson's delegation of authority. Comments at 8.[7] In response, EPA asserts that the delegation of authority in this case was not unlawful because "a

[7] El Pueblo also challenged EPA's delegation based on the fact that OAR has no established PSD permit processing procedure, no historical or systematic practice of application evaluation and no regular staff designated to review and issue PSD permits. Comments at 8. EPA's response to comments lacked any reasoning or detail demonstrating that OAR has established a regular, fair, and systematic approach to permit review. See Response at 71. For example, EPA's allusions to OAR's "experience with PSD permits" provides no reference to any established and systematic practices of evaluation. *See In re Amerada Hess Corp. Port Reading Refinery*, 12 E.A.D. 1, 19 (EAB 2005) ("Ultimately, the failure to *reasonably* respond to significant comments is itself sufficient grounds for remanding the Permit." (emphasis added) (*citing In re Washington Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 586, 589-90 (EAB July 24, 2004)).

one-time delegation of this nature is a procedural rule."[8] Response at 71. In its memorandum in support of this position, EPA cites *James V. Hurson Assocs., Inc. v. Glickman* to assert that re-delegation is procedural. 229 F.3d 277, 281 (D.C. Cir. 2000). *Glickman* is not analogous. In *Glickman*, the Court held that the agency could do away with one of three methods for receiving requests for the approval of food labeling since the change would not have a "substantive impact." *Id.* at 281. However, in *Home Health Agencies*, the case relied on in *Glickman*, the Court held that re-delegating decision-making authority to a different staff member was a substantive issue. 690 F.2d at 951. This situation is analogous to *Home Health Agencies*, because here the Agency has re-delegated authority from Region 9 staff to Headquarters staff. Thus, re-delegation is a substantive change.

Further, an agency decision is not considered procedural if it "narrowly limits administrative discretion or establishes a binding norm" or if it "is inconsistent with or amends an existing legislative rule." *Sacora v. Thomas,* 628 F.3d 1059, 1067 (9th Cir. 2010) (finding a subsequent agency document to be procedural where it merely provided clarifying guidance to agency officials). In contrast to *Sacora*, here EPA is not merely clarifying existing procedure, but adopts new policy that is inconsistent with an existing regulation.

In another case relied upon by EPA, *United States v. Gonzales & Gonzales Bonds and Ins. Agency, Inc.*, the Court held that delegation of authority was procedural because the statute expressly provided the agency with the authority to delegate as it saw fit. 728 F.Supp.2d 1077, 1084 (N.D.Cal. 2010). Here, 40 C.F.R. § 124.15 has specifically designated the Regional Administrator as having sole authority to issue final permit decisions. Since the re-delegation of

[8] While APA does not apply to rules of agency organization, procedure, or practice, procedural rules do not include "any action which goes beyond formality and substantially affects the rights of those over whom the agency exercises authority." *Pickus v. United States Parole Board* 507 F.2d 1107 (D.C. Cir. 1974).

authority was not merely procedural, the APA requires EPA to comply with notice and comment rulemaking before delegating permit authority.

Since EPA failed to follow APA rule-making requirements before re-delegating approval authority, OAR's permit approval is invalid.

IV. EPA Failed to Identify Disproportionate Human Health and Environmental Effects In its Environmental Justice Analysis.

OAR approved APC's PSD permit without identifying the disproportionate human health and environmental effects of its decision. In so doing, EPA ignored all available evidence which demonstrated that approving the permit would cause a disproportionate impact.

EPA's action violates Executive Order 12898 and Board precedent requiring the identification of disproportionate impacts prior to issuing a permit. To avoid identifying impacts, EPA 1) relies on an inappropriate application of agency discretion; 2) makes unsupported and contradictory conclusions; 3) withholds available and germane information demonstrating disproportionate impacts; and 4) ignores all evidence in the administrative record demonstrating disproportionate impacts. These actions are a clear abuse of the agency's discretion and demonstrate a fundamental disregard for the Board's commitment to the fair and equitable treatment of all.

A. Factual Background on EPA's Environmental Justice Analysis.

EPA prepared an Environmental Justice Analysis as part of its supplemental statement of basis to address the facility's potential disproportionate impacts on low-income and minority populations. SSB at 12. EPA focused primarily on short-term NO2 concentrations because of its decision to grandfather the facility from demonstrating 1-hour NO2 NAAQS compliance coupled with its determination that the annual NO2 standard alone is insufficient to protect public health with an adequate margin of safety against adverse respiratory effects associated

with short-term exposures to NO2. SSB at 14. The EPA also included an analysis of the project's ozone and fine particle emissions, prepared during the state permitting and certification process. SSB at 12.

EPA analyzed an area encompassed by a 25-kilometer radius from the proposed facility, including the communities of Avenal, Huron, and Kettleman City. SSB at 17. EPA concluded that all three communities include "populations of interest" for the purposes of analyzing the impacts of the project on overburdened communities based on very high (more than 85 percent) minority populations, high linguistic isolation, and low-income levels. SSB at 17-18.

EPA reported the closest 1-hour NO2 monitoring data available, collected in both Visalia and Hanford, at 61.3 ppb and 50.0 ppb (61% and 50% of the 1-hour NO2 NAAQS, respectively). SSB at 18. EPA did not rely on this data to assess local impacts, but merely used the data to determine that "background levels at the monitors closest to the facility are on par with measured levels of NO2 statewide." SSB at 26. The agency did not determine whether the monitoring data was representative of the area around the proposed project site. Response at 91.

Operational emissions from the facility will result in a maximum 1-hour NO2 impact of 82.43 µg/m3 (44 ppb), which represents 44 percent of the standard (188 µg/m3 or 100 ppb). SSB at 27. APC was unable to demonstrate that the proposed project's impact alone would be less than the significant impact level for 1-hour NO2 concentrations after five months of modeling. Response at 78.

B. EPA Has Affirmative Duty To Identify Disproportionate Impacts.

Section 101 of Executive Order 12898 states, in whole:

> To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse

human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.

The Board requires the agency to consider environmental justice issues in connection with the issuance of PSD permits pursuant to Executive Order 12898. *In Re Shell Gulf of Mexico, Inc. and Shell Offshore, Inc.*, OSC Appeal Nos. 10-1 to 10-4, Slip Op at 63-4 (EAB 2010) ("Shell"); *In re Knauf Fiber Glass GmbH*, 8 E.A.D. 121, 174-75 (EAB 1999); *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 67-69 (EAB 1997).

El Pueblo's comments challenged EPA's failure to identify and address disproportionate human health impacts as required under Executive Order 12898 and past Board decisions. Comments at 9. Specifically, El Pueblo argued that EPA had an affirmative duty to identify whether or not the project would disproportionately impact poor and minority populations before issuing a permit. *Id.*

EPA contends that "where available data is limited, and where EPA has determined that it is appropriate to grandfather this permit from demonstrating that the source will not cause or contribute to a violation of the 1-hour NO2 NAAQS, EPA does not read the Executive Order to call for EPA to reach a definitive determination that the Project will not result in disproportionate adverse impacts with respect to short-term NOx emissions." *Id.*

However, in implementing Executive Order 12898 in the context of PSD permitting, the Board has interpreted its obligation to "make achieving environmental justice part of [the agency's] mission" "to the greatest extent practicable" to *require each Region* to identify and address disproportionate impacts when there is any 'superficially plausible' claim that a minority or low-income population may be disproportionately affected by a particular facility." *In re EcoElectrica, L.P.*, 7 EAD 56, 69. EPA has thus established an appropriate benchmark for when each Region shall follow the Executive Order's directive to identify and address disproportionate

impacts. The Board has not exempted the agency from this requirement when EPA grandfathers a source from demonstrating compliance with NAAQS. In fact, the Board has held just the opposite. The Board recently remanded a permit for its inadequate environmental justice analysis where EPA did not require compliance with new 1-hour NO2 NAAQS and instead relied on compliance with outdated standards to find no disproportionate impacts. *See Shell*, OSC Appeal Nos. 10-1 to 10-4, Slip Op at 63-4 (EAB 2010).

In its Response to Comments, the agency attempts to explain its deviation from the Board's established standard arguing that the Order's use of "to the greatest extent practicable" language provides the agency with "considerable discretion . . . in determining how to address any impacts that we may identify in light of uncertainties regarding those impacts."[9] Response at 87. Given the context, EPA is presumably using this argument to apply discretion not only to how it addresses impacts, but also to limit when it must identify impacts. However, the Board has not recognized the discretion of the agency to avoid identifying impacts based on difficulty alone.[10] Since the Board has already determined when it is appropriate to comply with Executive Order 12898, the agency may not simply supersede the Board's determination based on its own discretion. *See In re Lazarus, Inc.*, 7 E.A.D. 318, 351 n.55 (EAB 1997) (noting the general rule that agencies may not advance "the doctrine of administrative deference . . . because the Board serves as the final decisionmaker for EPA.").

[9] Additionally, the language "to the greatest extent practicable and permitted by law" applies to the Order's directive for each Federal agency to "make achieving environmental justice part of its mission," not the Order's directive to meet this standard by "identifying and addressing" disproportionate impacts. *See Hough*, 239 B.R. at 415 ("Under the canon reddendo singula singulis, "[w]here a sentence contains several antecedents and several consequents they are to be read distributively. The words are to be applied to the subjects that seem most properly related by context and applicability.") (quoting 2A Norman J. Singer, Sutherland Stat. Constr. § 47:26 (5th ed. 1992)).

[10] *See Shell*, OSC Appeal Nos. 10-1 to 10-4, Slip Op at 63-4 (EAB 2010). Since EAB did not require a demonstration of compliance with recently adopted NO2 NAAQS, presumably EAB recognized that EPA should rely on other methods for determining impacts. *Id.*

Even in the face of imperfect information, EPA must use its best judgment and available data to formulate an informed opinion on the likelihood of disproportionate impacts. Instead, here, EPA simply throws its hands up. The Board should review this clearly erroneous interpretation of law and as an important matter of policy.

C. EPA Fails to Support Its Environmental Justice Findings

The Board must remand when the agency fails to provide details regarding its environmental justice determination in the administrative record because without such details the Board is unable to judge the adequacy of the agency's analysis. *In re Knauf Fiber Glass*, 8 E.A.D. 121, 174-75 (EAB 1999). ("If an environmental justice issue is unlikely in the context of this proposed project, we need to know the basis for that conclusion.").

Throughout EPA's environmental justice analysis and its response to comments, EPA maintains that it has insufficient information upon which to assess local impacts from short-term NO2 emissions. *See e.g.* SSB at 27 ("EPA cannot reach any definitive conclusion about the specific human health or environmental impacts of short-term exposure to NO2 emissions from the facility on minority and low income populations."). However, EPA contradicts itself in the Introduction to its Response to Comments, stating that "EPA's judgment is that, despite some uncertainties and limitations in available data, emissions from this source are unlikely to add significant environmental harm to the local communities." Response at 5. This conclusion fails for lack of explanation and evidentiary support.

Not only does the agency's finding contradict its own analysis, the record is devoid of any evidence to support the agency's eleventh hour determination that "emissions are unlikely to add significant environmental harm to the local communities." *Id.*

The Board has established that "[w]ithout an articulation by the permit writer of his analysis, we cannot properly perform any review whatsoever of that analysis and, therefore, cannot conclude that it meets the requirement of rationality." *In re Government of D.C. Municipal Separate Sewer System*, 10 E.A.D. 323, 342 (EAB 2002); *see also In re Hawaii Electric Light Company, Inc*, 8 E.A.D. 66, 103-05 (EAB 1998) (rejecting similar attempts by a permitting agency to rely on conclusions not supported by sufficient explanation.).

Since EPA failed to support its finding with an explanation, analysis, or evidence, the Board should reject the agency's unsupported conclusion. Moreover, not only does the agency fail to provide any support for its conclusion, all evidence in the record suggests that the project will, in fact, disproportionately impact local communities. *See* Section D, below.

D. EPA Withheld Relevant Information from its Environmental Justice Analysis

EPA had, but withheld, necessary data to evaluate the impacts of increased short-term NO2 on low-income and minority communities closest to the project site. Moreover, El Pueblo challenged EPA's failure to present any specific information or data in its environmental justice analysis upon which to assess potential short-term NO2 impacts from the project. Comments at 9.

In response, EPA acknowledges that it did not reach any definitive conclusion about the specific human health or environmental impacts of short-term NOx emissions associated with the Project. Response at 87. While EPA argues in its response to comments that "the analysis describes what EPA believes is the best available data concerning the impacts of the project's short-term NOx emissions in the absence of an approved PSD modeling analysis," it references

no specific information to support this contention and El Pueblo is unable to ascertain data that EPA, in fact, relied upon.[11] Response at 87.

EPA acknowledges that "[t]he permit issuer must endeavor to include and analyze in its environmental justice analysis available data that are germane to the environmental justice issue raised during the comment period." *Id.*, *citing In re Shell*, OCS Appeal Nos. 10-1 to 10-4, Slip Op. at 80. Yet, in its Response to Comments, EPA discloses the existence of extensive short-term NO2 analysis and modeling that it withheld from the environmental justice analysis. Response at 78. Information contained in these documents is relevant to determining potentially disproportionate impacts.

EPA explains that:

> EPA first requested that Avenal provide a demonstration that it would not violate the 1-hour NO2 NAAQS in May 6, 2010. Over the course of the next five months, Avenal made four separate submissions of information to EPA. EPA responded with two detailed analyses of Avenal's submissions which identified additional information that was necessary to justify Avenal's conclusions. . . . EPA asked for a second round of modeling which Avenal supplied in the fourth submission on September 13, 2010. EPA determined that this submission did not meet applicable EPA guidelines."

Response at 78. The Response to Comments also references an hourly NO2 analysis conducted by the local air district for a similar project at the same project site. Response at 89.

These statements prove the existence of four separate 1-hour NO2 data submissions by the applicant, two sets of 1-hour modeling data for the proposed project, two detailed analyses from EPA in response to the applicant's submissions, and local air district modeling for 1-hour NO2 for the proposed project. Far from having limited data, the EPA possesses substantial available data, germane to determining local short-term NO2 impacts to local communities, but simply declined to include it in its environmental justice analysis.

[11] For example, EPA did not rely on the *only* monitoring data cited in the analysis to determine short-term NO2 impacts from Avenal Energy Project's emissions, collected in Hanford and Visalia, 28 and 46 miles from the proposed project site, respectively. *See* Response to Comments at 91.

EPA's failure to rely on relevant data to inform its environmental justice analysis is clearly in error subject to Board review.

E. All Data in the Administrative Record Indicate that the Project Will Cause a Disproportionate Impact

The Board has recognized potential for disproportionate impacts when the applicant fails to demonstrate compliance with NAAQS.[12] *See In re Shell*, OCS Appeal Nos. 10-1 to 10-4, Slip Op. at 80. All available data indicates that the project will result in a violation of the 1-hour NO2 NAAQS and therefore presents an unacceptable health risk to local populations. El Pueblo argued that EPA ignored its own data that demonstrated a likely violation of the new hourly NO2 NAAQS. *Id.* at 9-10.

For its analysis of 1-hour NO2 impacts, EPA identifies limited data from monitors in Hanford (50 ppb) and Visalia (61 ppb), approximately 28 and 46 miles away (respectively) from the proposed facility. SSB at 18. The maximum hourly NO2 emissions expected from the plant is 44 ppb. Even assuming the concentrations of NO2 in Hanford or Visalia do not under-represent the background NO2 levels in the project vicinity, the added burden of the project would exceed or very nearly exceed the new 1-hour NO2 standard adopted by EPA.[13] Additionally, all available data demonstrates that these background levels in Hanford and Visalia are lower than what would be expected in the project vicinity. As EPA points out, "NO2 concentrations on or near major roads are appreciably higher than those measured at monitors in the current network . . . and near roadway concentrations have been measured to be approximately 30 to 100% higher than those measured away from major roads." SSB at 19. Kettleman City is directly adjacent to Interstate 5 – one of the State's main commerce freeways –

[12] Since NAAQS represents the minimum level that is protective of human health. *In re Shell*, OCS Appeal Nos. 10-1 to 10-4, Slip Op. at 80.

[13] Using Hanford background levels, the total emissions are likely to be 94 ppb (44ppb +50ppb), and for Visalia backgrounds levels, 109ppb (44ppb+65ppb).

and therefore is reasonably expected to have background levels of NO2 of at least 65 ppb (30 percent greater than Hanford's 50 ppb background level). In a "worst case" scenario, background levels in Kettleman City could be 130 ppb (100 percent greater than Visalia's 65 ppb). In addition, Kettleman City hosts the Kettleman Hills Hazardous Waste Landfill and is impacted by hundreds of trucks passing through and idling near the community each day. Based on even the limited information EPA provides in its environmental justice analysis, there is no reasonable basis for concluding that Kettleman City or the other communities in the vicinity of the proposed project would not be disproportionately impacted by NO2 emissions from the plant.

This finding is supported by data inappropriately withheld from the Environmental Justice analysis. In a letter, EPA informs the applicant that:

> The results from the 1-hour NO2 CAAQS comparison . . . show maximum 1-hour Avenal facility impacts of 190 µg/m3, combined with a background concentration of 137.2 µg/m3 to give a total impact of 327.2 µg/m3. *This cumulative 1-hour NO2 impact is well above the EPA 1-hour NO2 standard [of188 µg/m3].*

Letter from US EPA to Avenal (08/12/10) (emphasis added.).[14]

Despite this evidence, EPA argued that it did not believe that the available data provided sufficient information to determine that the Project's emissions would cause an exceedance of the 1-hour NO2 NAAQS. *Id.* at 89. EPA's argument presumes that to make a finding of disproportionate impacts, EPA is first required to determine that the facility would cause an exceedance of NAAQS based on EPA's highly technical regulatory process. This simply is not the case. EPA has discretion to choose the methodology it will use to determine disproportionate impacts. *See In re Chemical Waste Management of Indiana*, 6 E.A.D. 66 (finding that the selection of method for determining disproportionate impacts is best left to the technical

[14] Also EPA reports in its Response to Comments that "the applicant could not show that the proposed project's impact alone would be less than the significant impact level for 1-hour NO2 concentrations." Response at 78. After attempting to demonstrate compliance for over five subsequent months, the applicant was unable to satisfy EPA that the facility would meet the standard. *Id.*

expertise of the Region.). Where the agency has exempted a facility from compliance with NO2 NAAQS, the agency should use alternative measures for determining whether the facility will exceed pollution levels that impact public health. By failing to use other criteria, EPA essentially engages in circular reasoning: EPA exempts the applicant from demonstrating NO2 NAAQS compliance and then argues that since the applicant did not comply with NAAQS, EPA does not have sufficient information to conclude whether the project will cause disproportionate impacts. This circular reasoning does not constitute a fact-based environmental justice analysis as previously required by this Board.

V. EPA ABUSED ITS DISCRETION BY FAILING TO ADDRESS DISPROPORTIONATE CUMULATIVE IMPACTS.

OAR identified disproportionate cumulative impacts from the Energy Plant when combined with existing pollution sources; however, OAR failed to address the Energy Project's contribution to cumulative impacts.

To avoid addressing impacts from approving the Energy Project, EPA 1) relies on speculative pollution reductions from wholly unrelated activities in the region; and 2) inappropriately withdraws its analysis of nonattainment pollution from the Energy Project without responding to legitimate concerns. These actions violate Executive Order 12898 and require Board review.

A. Factual Background Demonstrating EPA's Failure to Address the Project's Disproportionate Cumulative Impacts.

Communities near the project are burdened by multiple sources of pollution including some of the highest ozone and PM2.5 levels in the Country, drinking water contamination, exposure to pesticides and other agricultural chemicals, near roadway exposure to diesel particulate emissions from the I-5 freeway, defunct oil and gas extraction operations, risk

associated with proximity to a hazardous waste facility, impacts associated with composting and land application of sewage sludge, immuno-compromised health associated with a spike in birth defects and a high number of miscarriages. Response at 82.

EPA recognized that these factors increase vulnerability to the health effects of air pollution, such as emissions from the Energy Project. *Id.* at 82. To address these cumulative impacts, EPA references EPA, State, and local governmental agencies actions around Kettleman City and the region. *Id.* at 5. EPA specifically references a study of potential off-site impacts of PCB disposal at the Chemical Waste Management facility, the State's study on increased birth defect incidences in Kettleman City, EPA's RCRA and TSCA enforcement at the Chem Waste facility, various funding programs for emission reduction projects in the San Joaquin Valley and Kings County, and enforcement activities against Kettleman City based on the Safe Drinking Water Act.

As part of its environmental justice analysis, EPA also included nonattainment emissions from the project as identified in the State's permitting process. *Id.* at 6.

B. EPA Should Not Address Disproportionate Cumulative Impacts of the Avenal Energy Project Through Wholly Unrelated Actions.

El Pueblo commented that EPA failed to account for, not only the local impacts of increased air emissions, but also how these added emissions will contribute to the cumulative impact of all the environmental and social stressors with which these communities are already burdened. Comments at 11. In response, EPA recognized that the existing conditions identified by commenters would increase residents' vulnerability to the health effects of air pollution, such as emissions from the Energy Project. Response at 82. However, EPA failed to address these cumulative impacts in the context of the Energy Project itself. *Id.* at 5.

EPA argues that language in the Executive Order directing federal agencies to identify and address impacts "as appropriate" and "to the greatest extent practicable" afforded considerable discretion to the agency in determining how to address any impacts that it may identify. EPA argues that this discretion includes responding to environmental justice issues within the context of all the actions EPA, state, and local governmental agencies are taking to reduce environmental hazards in the communities potentially affected by emissions from the project. *Id.* at 83.

Executive Order 12898 and the Board require that EPA "identify and address" disproportionate impacts stemming from "*its programs, policies and activities.*" Here, EPA's activity is its approval of a PSD permit for the Avenal Energy Center. Therefore, to comply with Executive Order 12898, EPA must address impacts of approving APC's PSD permit. EPA may not address disproportionate impacts by relying on wholly unrelated actions that may or may not decrease pollution from sources outside its PSD permitting jurisdiction. *See e.g. In re Chemical Waste Management of Indiana*, 6 E.A.D 66 (finding that Executive Order's language requiring Federal agencies to implement the order "consistent with, and to the extent permitted by, existing law" limited EPA's jurisdiction to address disproportionate impacts solely within in its permitting authority.).

Since the agency has determined that approval of the Energy Project may exacerbate existing vulnerabilities when combined with existing pollution sources, the EPA should address cumulative impacts in the context of the PSD permit. Instead, EPA relies on unrelated activities, including inconclusive studies, enforcement actions at existing facilities, and funding opportunities, to address the disproportionate cumulative impacts contributed by the Avenal Energy Project.

As an initial matter, nearly each activity cited by EPA predated the permit approval, and therefore cannot be reasonably said to address the impacts of adding a power plant in the vicinity. Secondly, none of the activities reduce short-term NO2, which is one of the Energy Project's primary contributions to the cumulative impact in the area. Finally, EPA provides no explanation to the Board demonstrating that the activities relied upon by EPA have reduced or will reduce cumulative impacts contributed by the Avenal Energy Project. EPA, therefore, has not provided sufficient information to support its use of activities outside the PSD process to address disproportionate cumulative impacts. *In re City of Moscow, Idaho,* 10 E.A.D. 135, 142 (EAB 2001) (The rationale for a decision must be "adequately explained and supported in the record,"); *In re Austin Powder Co.*, 6 E.A.D. 713, 720 (EAB 1997) (remand due to lack of clarity in permitting authority's explanation). In fact, several of the cited actions are merely inconclusive studies with no associated pollution reductions. Other actions are entirely speculative, such as the future application of funding opportunities over which EPA has no authority to direct.

C. EPA Should Address Nonattainment Pollutants

PSD provisions "assure that any decision to permit increased air pollution . . . is made only after careful evaluation *of all the consequences* of such a decision." 42 U.S.C. § 7470(5) (Emphasis added.). In its Environmental Justice Analysis, EPA included an assessment of nonattainment pollutants that was prepared as part of the State permitting process. This inclusion was appropriate because the facility's emissions of attainment and nonattainment pollutants together will increase local resident's exposure to asthma inducing pollutants.

However, several commenters, including El Pueblo, criticized the State's analysis for relying on the purchase of pollution offsets far removed from the local communities and at

interpollutant exchange rates that failed to avoid local impacts. Rather than addressing the criticism, however, EPA excluded the analysis from further consideration. Response at 94 ("Given the larger context in which the commenters' concerns regarding nonattainment pollutants has been raised, EPA's judgment is that it is not appropriate to address these issues further in the context of this PSD permitting action."). Once EPA considered an issue relevant to its analysis, it should not subsequently refuse to consider the issue based solely on its unwillingness or inability to address commenters legitimate concerns.

As part of its review, the Board determines "whether the permit issuer 'duly considered' issues raised in comments. *In re Shell,* slip op. at 41 (*quoting In Re Gov't of D.C. Mun. Separate Storm Sewer.,* 10 E.A.D. 323, 342 (EAB 2002)). Here, commenters, including El Pueblo, explained the significant problems with the State's analysis which underestimated the local impacts from nonattainment pollutants, including the State's failure to consider local impacts of the emissions, its use of an interpollutant ratio out of line with similar projects in the area and EPA's own guidance, and its use of offsets far removed from the location of the facility. EPA failed to respond to these concerns. This failure to respond to comments is a sufficient basis to remand the permit.

VI. EPA'S ACTIONS ARE DISCRIMINATORY.

In permitting the Energy Project without requiring a demonstration with NAAQS, without identifying and addressing disproportionate impacts, and while actively investigating claims of discrimination for the State's approval process for the Energy Project, EPA is conducting its PSD permitting program in a manner that subjects residents of Avenal, Huron and Kettleman City to discrimination based on their race and national origin.

A. EPA's Approval of the Facility Has a Discriminatory Effect

Under Executive Order 12898, not only must EPA identify and address disproportionate impacts stemming from its programs and activities, EPA must also ensure that it conducts its activities so as to avoid discriminatory effects based on race or national origin. The Order states:

> Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health and the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.

Section 2-2. 59 Fed. Reg. 7629 (Feb. 16, 1994).

Here, EPA is conducting its PSD program in a manner that provides people of color living near the Energy Project with fewer health protections and assurances than those afforded to other communities. First, EPA's decision to grandfather the facility from demonstrating compliance with new NAAQS and greenhouse gas standards fails to provide local communities any assurance that emissions from the Energy Project will not impact their health. Secondly, EPA's failure to identify potential disproportionate impacts leaves local residents uninformed about potential consequences of residing near the project. Finally, EPA's refusal to address emissions that will, in fact, exceed health protective standards, actually exacerbates health risks in the region.

EPA, in full knowledge of the local demographics, health disparities, and existing pollution sources, uses its "discretion" at each step of its analysis to benefit the applicant, to the detriment of local residents, the majority of whom are people of color. Taken together, EPA's actions demonstrate a willful disregard for the health of the local population. The Board should not condone OAR's conduct in this permitting process, because of its discriminatory effect on

Latino residents. Based on EPA's clearly erroneous findings of fact and this important matter of policy, the Board should review and remand APC's permit.

B. EPA Must Resolve Title VI Complaint Prior to Issuing Permit.

El Pueblo questioned the use of information obtained through the State's permitting process since EPA is currently investigating the process for violations of civil rights laws under Title VI. Given the on-going investigation, El Pueblo challenged EPA's role in permitting the activity that it is tasked with policing under its Title VI authority. SSB at 14.

EPA responds that "EPA's Title VI investigation is an administrative process separate from EPA's PSD permit decision, is carried out independently of the CAA PSD permitting program, and pertains to a local permitting process that is also outside the scope of EPA's PSD permit decision action." Response at 90.

However, this is not persuasive. First, the Executive Order 12898 requires all agencies to conduct their programs, policies and activities with respect to environmental justice. Second, EPA uses data from the state process in making its own factual determinations on this project, recognizing that these permitting processes are interrelated. Similarly, EPA relies on other agencies' activities to cure cumulative impacts stemming from this permit. EPA cannot have it both ways. To avoid potential conflicts of interest or the appearances of conflict, EPA should not, as a matter of policy, participate in activities that are currently subject to EPA investigation for civil rights violations. The Board should review this important matter of policy

CONCLUSION

For the reasons stated above, El Pueblo requests the Board review APC's permit and remand the permit back to EPA.

STATEMENT OF COMPLIANCE

I, Ingrid Brostrom, hereby certify that I prepared the foregoing petition for review on behalf of my client, and that the word count for this petition is 12,418, which does not include the cover or tables. This petition therefore complies with Order Governing Petitions for Review of Clean Air Act New Source Review Permits which limits a petition to 14,000 words. I certify that I prepared this document in Microsoft Office Word 2003, and that this is the word count Word 2003 generated for this document.

Dated: June 25, 2011

Ingrid Brostrom
Attorney for El Pueblo

LIST OF EXHIBITS

EXHIBIT 1: PSD Permit Avenal Energy Project

EXHIBIT 2: Comments Submitted by The Center on Race, Poverty & the Environment (CRPE) and El Pueblo Para El Aire y Agua Limpio (El Pueblo), April 12, 2011

EXHIBIT 3: Memorandum from Stephen D. Page, EPA Office of Air Quality Planning and Standards, Applicability of the Federal Prevention of Significant Deterioration Permit Requirements to New and Revised National Ambient Air Quality Standards (Apr. 1, 2010)