

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

In re:)	
)	
Avenal Power Center, LLC)	PSD Appeal Nos. 11-02, 11-03,
)	11-04 & 11-05
PSD Permit No. SJ 08-01)	
)	

**RESPONSE TO PETITIONS FOR REVIEW
BY EPA OFFICE OF AIR AND RADIATION**

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INTRODUCTION

The Board should deny review because Petitioners have failed to demonstrate clear error in the decision of the Assistant Administrator for the Office of Air and Radiation (“OAR”) to grant a Prevention of Significant Deterioration (“PSD”) permit to Avenal Power Center, LLC (“APC”) under section 165 of the Clean Air Act. That decision is fully supported by the record, including a detailed Response to Comments document (“RTC”). Four Petitioners in this matter have raised an array of issues, many of which overlap. Petitioners are El Pueblo Para El Aire y Agua Limpio (“El Pueblo”), Sierra Club and Center for Biological Diversity (“Sierra Club and CBD”), Robert Simpson (“Simpson”), and Greenaction for Health and Environmental Justice (“Greenaction”).

BACKGROUND

Petitioners seek review of a PSD permit issued by OAR under 40 C.F.R. § 52.21 to authorize APC to construct the Avenal Energy Project (“AEP” or “Project”) in Kings County, California. The AEP will consist of two natural-gas fired GE 7FA combustion turbine generators, two heat recovery steam generators, one steam turbine generator, and associated equipment designed to generate a total of approximately 600 MW of electricity. Given the statements of facts in the Petitions, this response will not repeat a full chronology of events resulting in the final APC PSD Permit, except as follows.

EPA’s review of this permit application was time-consuming and led to litigation by the permit applicant to compel a final decision on its PSD permit application on the basis of section 165(c) of the Clean Air Act. 42 U.S.C. § 7475(c). On May 26, 2011, the United States District Court for the District of Columbia issued an order that requires that EPA “issue a final agency action, either granting or denying plaintiff’s permit

application, no later than August 27, 2011.” Exhibit A; *see also*, Sierra Club and CBD Exhibit 12.

On June 21, 2011, OAR issued an administrative permit amendment to address certain errors in the permit that were inconsistent with OAR’s clearly expressed intention elsewhere in the record. Administrative Record Index No. (“AR”) 300; *see also*, Sierra Club and CBD Exhibit 1. None of the issues raised in the petitions for review specifically concern permit conditions affected by the amendment.

STANDARD AND SCOPE OF REVIEW

Petitioners bear the burden of demonstrating that review by the Environmental Appeals Board (“Board”) is warranted on the basis of specific grounds identified in applicable regulations. 40 C.F.R. § 124.19(a). Petitioners must show that OAR’s permitting decision is based on a “finding of fact or conclusion of law which is clearly erroneous” or that the permit action involves “an exercise of discretion or an important policy consideration” which the Board in its discretion should review. 40 C.F.R. §124.19(a)(1)-(2).

The Board has repeatedly noted that its review of final PSD permitting decisions is discretionary and the exercise of such discretion is circumscribed. In promulgating 40 C.F.R. Part 124, EPA stated that “most permit conditions should be finally determined at the Regional level,” and therefore the power of review will only be employed “sparingly.” *See* 45 Fed. Reg. 33,412 (May 19, 1980); *accord In re Zion Energy, L.L.C.*, 9 E.A.D. 701, 705 (EAB 2001). Accordingly, the Board typically defers to Regional permitting authorities in its review of permit appeals, especially on matters of a technical nature. *See, e.g., In re Three Mountain Power Co., LLC*, 10 E.A.D. 39, 54 (EAB 2001).

Since the Office of Air and Radiation has issued the APC permit decision in accordance with the procedures applicable to Regional Administrators, the deferential nature of the Board's review should apply equally here. With respect to statutory interpretation, the Board's review does not apply the doctrine of administrative deference applicable under the two-part test established by the Supreme Court in *Chevron U.S.A. v. NRDC* because the Board serves as the final decisionmaker for EPA. *In re Ocean State Absestos Removal, Inc.*, 7 E.A.D. 522, 543 n. 22 (EAB 1998). *In re Lazarus, Inc.*, 7 E.A.D. 318, 351 n.55 (EAB 1997).

Petitioners are obliged to raise arguments in a manner that is both specific and substantiated. *New England Plating*, 9 E.A.D. 726, 737 (EAB 2001). Mere allegations of error are not sufficient to obtain review. *Id*; *see also, In the Matter of Hadson Power 14 – Buena Vista*, 4 E.A.D. 258, 294 n. 54 (EAB 1992). The Board has made clear it will deny petitions that simply repeat assertions that were raised in comments on the proposed action, absent a full explanation of how the permitting authority's response was inadequate. The Board has stated the following:

To obtain review, a petitioner must clearly and specifically identify the basis for its objection(s) to the permit, and explain why, in light of the permit issuer's rationale, the permit is clearly erroneous or otherwise deserving of review. In order to carry this burden the petitioner must address the permit issuer's responses to relevant comments made during the process of permit development; the petitioner may not simply reiterate comments made during the public comment period, but must substantively confront the permit issuer's subsequent explanations.

In Re Peabody Western Coal Co., 12 E.A.D. 22, 33 (EAB 2005) (extending standard of review to Title V permits) (internal citations omitted); *see also In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000) ("Petitions for review may not simply repeat objections made during the comment period; instead they must demonstrate why the

permitting authority's response to those objections warrants review."); *In re BP Cherry Point*, 12 E.A.D. 209, 217 (EAB 2005).

A petitioner who possesses standing to appeal is only permitted to raise issues that have been preserved for appeal through public comments or that were not reasonably ascertainable during the comment period. Under applicable regulations, "all reasonably available arguments" that support a position advocated by the petitioner must have been raised during the public comment period. *See* 40 C.F.R. §124.13; *In re: BP Cherry Point*, 12 E.A.D. 209, 219 (EAB 2005) ("It is not an arbitrary hurdle, placed in the path of potential petitioners simply to make the process of review more difficult; rather, it serves an important function related to the efficiency and integrity of the overall administrative scheme.")

The Board has recently reaffirmed these principles in its April 19, 2011 Order Governing Petitions for Review of Clean Air Act New Source Review Permits.

Paragraph 7 of this order states the following:

For each issue appealed, to satisfy the requirements of 40 C.F.R. § 124.19(a), the petition must demonstrate, by citing with specificity to the record, including the applicable documents and page numbers, that any issues being raised were either raised during the public comment period or were not reasonably ascertainable, as provided in 40 C.F.R. § 124.13. Where a comment was previously raised, the petition must also demonstrate with specificity, by citing the applicable documents and page numbers, where in the response to comments the permit issuer responded to comments and must explain why the permit issuer's response to comments is inadequate. The Board may decline to consider issues that do not comply with these requirements.

Finally, a petitioner challenging a fundamentally technical decision bears an especially heavy burden. *In re: Carlota Copper Co.*, 11 E.A.D. 692, 708 (EAB 2004). The Board

articulated its reason for assigning a heavy burden to petitioners on technical decisions, stating:

This demanding standard serves an important function within the framework of the Agency's administrative process; it ensures that the locus of responsibility for important technical decisionmaking rests primarily with the permitting authority, which has the relevant specialized expertise and experience.

See *In Re Peabody Western Coal Co.*, 12 E.A.D. at 33 (EAB 2005). The Board further explained:

In other words, where a permit decision pivots on the resolution of a genuine technical dispute or disagreement, the Board prefers not to substitute its judgment for the judgment of the decisionmaker specifically tasked with making such determinations in the first instance. Thus, as we explained in *NE Hub*, the Board typically will not grant review where the record demonstrates merely "a difference of opinion or an alternative theory regarding a technical matter." *Id.* at 567. Instead, where "the views of the Region and the petitioner indicate bona fide differences of expert opinion or judgment on a technical issue," deference to the Region's decision is generally appropriate if "the record demonstrates that the Region duly considered the issues raised in the comments and if the approach ultimately selected by the Region is rational in light of all of the information in the record." *Id.* at 567-68.

Id. at 34.

ARGUMENT

Petitioners do not satisfy their burden of demonstrating that OAR's permitting decision constituted clear error, an abuse of discretion, or involves an important policy consideration that the Board should review. Many portions of the Petitioners' arguments merely repeat portions of their public comments and thus fail to satisfy the Board's minimum standards for review. In the instances where the Petitions substantively confront OAR's responses to comments, they generally address only an isolated statement or section of those responses without considering the full extent and context of

the responses provided. Considering the full record and responses to comments, the Petitioners fail to make the required showing to obtain review.

I. Petitioners Do Not Demonstrate Clear Error in OAR’s Decision to Grandfather this Permit Application from Requirements That Became Effective More Than Two Years After the Permit Application Was Complete and After the Proposed Permit Was Issued

A. OAR Provided a Reasoned Basis and Legal Justification for Grandfathering the Permit Application and Refining Earlier Interpretations

Petitioners casually gloss over and minimize over 20 single-spaced pages of thoughtful analysis in the record that establishes a reasoned basis and legal justification for OAR’s decision to grandfather the APC permit application from the one-hour NAAQS and greenhouse gas requirements. Petitioners make many sweeping charges regarding alleged deficiencies in OAR’s basis for grandfathering this permit, such as EPA “cites no authority” (El Pueblo at 8); “fails to support its new interpretation” (El Pueblo at 13); “is obligated to supply a reasoned analysis for the change” (El Pueblo at 13); “does not contend this statutory language is uncertain or ambiguous” (Sierra Club and CBD at 10); “fails to identify any authority in the statute” (Sierra Club and CBD at 10); and “has engaged in a complete change of course ... without proffering any reasoned explanation for it [sic] about-face.” (Simpson at 9). But the record shows that OAR provided extensive and carefully considered reasoning to support its decision. On the subject of grandfathering alone, OAR provided nearly six pages of reasoning in the Supplemental Statement of Basis (pages 5-11) and at least 15 pages of reasoning across 30 pages (pages 53-82) of the Response to Comments document (if one generously discounts these pages by half to reflect the summaries of comments). Sierra Club and CBD Exhibit 11 (“SSB”); Sierra Club and CBD Exhibit 5 (“RTC”). OAR also summed

up its final basis for grandfathering across three pages in the introduction to its response to comment document. RTC at 7-9. In these 20-plus pages, OAR explains how multiple provisions of the Clean Air Act, legislative history, prior EPA regulations that authorize grandfathering of pending permit applications, and several judicial precedents support OAR's decision. Petitioners may disagree with OAR's reasoning and legal justification, but they cannot sustain their various charges that OAR has failed to provide any.

OAR said clearly in the Supplemental Statement of Basis that it was proposing, in the context of this permit, to narrow two categorical statements (both made in April 2010) regarding the permissibility of grandfathering permits from new requirements absent an express EPA regulation. SSB at 3-5, 11. OAR also provided detailed reasoning to support the change in position regarding grandfathering in the absence of an EPA regulation. SSB at 5-11. OAR described how the analysis required to demonstrate compliance with the one-hour NO₂ NAAQS was consuming more time than EPA had expected when it previously determined that grandfathering was not necessary for the one-hour NO₂ NAAQS and GHG requirements. SSB at 8. OAR explained that the AEP would have low emissions and a relatively small impact on air quality. SSB at 6-7. Further, OAR explained that because of the extended delay with this permit application, EPA was now in a position where it had to reconcile and balance competing requirements of the Clean Air Act. SSB at 10-11. OAR then provided thorough and detailed responses to all public comments that raised concerns with OAR's basis for changing course. RTC at 53-82. These included a specific response to comments objecting to EPA's change in direction, RTC at 80-81 (No. 20), and responses that amplify and clarify the reasoning OAR had provided in the supplemental statement of basis. RTC at 8, 73.

B. Petitioners Have Not Demonstrated that the Clean Air Act Precludes Any Grandfathering of Pending PSD Permit Applications

OAR's action to grandfather this permit is consistent with EPA's long-held position that grandfathering of pending PSD permit applications is authorized under the Clean Air Act. RTC at 54 (citing 45 Fed. Reg. 52676, 52683 (Aug. 7, 1980)); 40 C.F.R. 52.21(i)(1)(x); 40 C.F.R. 52.21(i)(9)-(10). Petitioners do not demonstrate error in the comment responses (RTC at 53-67) that explain why EPA has statutory authority to grandfather a PSD permit under the Clean Air Act in appropriate circumstances. Petitioners assert that EPA must strictly read certain provisions of the Act and place particular goals and purposes of the Clean Air Act above all others, but they fail to demonstrate that it is clearly erroneous for EPA to read these provisions in context and to strike a balance between various goals reflected in provision of the Act when faced with the circumstances present in this case. RTC at 55, 57, 59-60; *Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy").

Petitioners repeat arguments from their comments that sections 165(a)(3) and 165(a)(4) of the Clean Air Act are plain and unambiguous and that OAR's reading of the Act is precluded, but do not demonstrate that the plain language of these provisions precludes grandfathering in any circumstance. Sierra Club and CBD at 10-11; El Pueblo at 8. Petitioners do not, and indeed cannot, show where Section 165(a)(3) expressly says that a permit applicant must demonstrate "that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any ... national ambient air quality standard" in effect on the date of the final permit decision without

regard to whether the one year deadline in section 165(c) has passed. Likewise, section 165(a)(4) does not say that a proposed facility must be “subject to best available control technology for each pollutant subject to regulation under this chapter” as of the date of the final permit decision regardless of the time limitation in section 165(c). In accordance with *Ziffrin v. United States*, 318 U.S. 73, 78 (1943), and other precedent, OAR recognizes that, in most circumstances, these provisions in the Act should be read to apply to all NAAQS in effect and all pollutants that are regulated on the date of a final permit decision. However, the language in the Act does not preclude EPA from recognizing exceptions when grandfathering is supported by the circumstances present in the case of this permit, the context of other provisions in the Clean Air Act, and the reasoning applied in *Application of Martini*, 184 F.Supp. 395, 401-402 (S.D.N.Y. 1960).

Petitioners do not demonstrate clear error in OAR’s response that sections 165(a)(3) and 165(a)(4) cannot be read in isolation and must be considered in context with section 165(c). RTC at 55; *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (a “cardinal rule” of statutory construction is “that a statute is to be read as a whole ... since the meaning of statutory language, plain or not, depends on context.”). Petitioners do not confront or show error with EPA’s prior practice of grandfathering to strike a balance between what can sometimes be competing goals of the Clean Air Act. RTC at 54, 59.

OAR in no way disputes or overlooks the goals and purposes of the Clean Air Act that are emphasized by Petitioners, but instead responds by articulating reasons why it is appropriate to balance those goals and purposes with other relevant considerations that are behind section 165(c) of the Act. RTC at 59. OAR’s citation of legislative history does not seek to override the Congressional intent behind sections 165(a)(3) and

165(a)(4), but serves only to illustrate the Congressional intent embodied in section 165(c) of the Act that should also be considered and balanced against other provisions of the Act in the circumstances presented here. OAR expressly rejects arguments by some commenters that the language of section 165(c) is paramount. RTC at 57-58. Petitioners may disagree with OAR's contextual reading and where it has struck the balance in this case, but this does not demonstrate that it is clearly erroneous for OAR to attempt to strike such a balance (consistent with prior EPA actions to grandfather permits) after considering the full context of section 165 and Congressional intent behind all relevant provisions. As Petitioners point out "a fundamental canon of statutory construction is that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." Sierra Club and CBD at 12 (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). Petitioners have not demonstrated that OAR's effort to do just that is clearly erroneous and precluded by the terms of sections 165(a)(3) and 165(a)(4).

Petitioners do not substantively confront or demonstrate error in OAR's explanation as to why grandfathering is not precluded by the presence of section 168(b) of the Clean Air Act and the Supreme Court precedent in *Andrus v. Glover Construction*, 445 U.S. 608 (1980). On pages 56-57 of the RTC document, OAR explains that the exemption in section 168(b) does not expressly relate to incorporation of a new requirement into the PSD program, under existing statutory authority, when EPA promulgates a regulation that creates such a requirement. El Pueblo does not address or demonstrate error in this response. Sierra Club and CBD tackle OAR's response (pages 15-16), but fail to demonstrate that section 168(b) occupies the field or that a canon of

construction is so inviolate that it applies to any law without regard for the law's particular characteristics. Petitioners' absolutist view does not demonstrate clear error in OAR's path through a landscape that it justifiably construes to be more nuanced.

Likewise, Petitioners do not substantively confront or demonstrate error with OAR's explanation as to why the holding in *General Motors Corporation v. United States*, 496 U.S. 530 (1990) does not preclude grandfathering under the circumstances present here. On page 60 of the RTC, OAR explained that *General Motors* addressed the question of whether the Agency's delay in approving a change in law (a revision of a SIP) barred the Agency from applying the previously applicable law (the earlier version of the SIP). El Pueblo does not acknowledge or address OAR's response to comments regarding this decision. Sierra Club and CBD attack only the first sentence of OAR's response without speaking to the body of the response that explains how the grandfathering decision at issue here does not nullify requirements in effect before the Agency exceeded its statutory deadline.

The reasoning that underlies the opinion in *General Motors* has also been applied in the Sixth Circuit in the specific context of section 165(c) of the Act. *Hancock County v. EPA*, 1984 U.S. App. Lexis 14024, 22 ERC 1714 (6th Cir. 1984). Petitioners do not address this opinion cited by OAR in the Response to Comments. This unreported decision illustrates that, as applied to section 165(c) of the CAA, the same reasoning articulated in the *General Motors* decision extends to support the conclusion that EPA does not lose the power to require that a major stationary source obtain a PSD permit before beginning construction by virtue of the fact that EPA has failed to act on a complete permit application within one year.

However, OAR's reasoning for grandfathering the APC permit application differs from the reasoning rejected in both *General Motors* and *Hancock*. OAR did not grandfather the permit application based on the view that a violation of section 165(c) renders other parts of section 165 inapplicable to the construction of the AEC. Rather than treating a violation of section 165(c) as a jurisdictional bar against enforcement of section 165 of the Act, OAR instead interprets the scope of section 165(a)(3) and 165(a)(4) in context with the requirement of section 165(c) of the Act and the goals and purposes articulated in section 160 of the Act to provide discretion, under these particular circumstances, for EPA to grandfather APC's permit application. OAR explains this on pages 55, 59, and 62-63 of the Response to Comments document. While the Supreme Court and Sixth Circuit declined, absent clear Congressional intent, to bar enforcement of particular laws after EPA exceeded its deadlines, *General Motors* and *Hancock* do not address the Agency's power to interpret the scope of an applicable provision of law where Congress has not spoken to whether that same law (applicable before and after the delay ensued) extends to cover additional regulatory requirements that become effective after a statutory deadline has passed.

Furthermore, OAR does not assert that EPA has the equitable power of a court. RTC at 62-63. OAR interprets EPA's organic authority to allow grandfathering under the circumstances present in the case of this permit. As the response to comments explains, the court's decision in *Application of Martini* was based on a concern that the denial of an application for citizenship would frustrate Congressional intent if based on a change in law that became a factor because of the government's delay in processing the application. 184 F. Supp. at 401; RTC at 62.

C. Petitioners Have Not Demonstrated that Rulemaking Is Required to Grandfather This Permit

Since EPA has a well-established position that the Clean Air Act provides EPA with discretion to grandfather PSD permit applications in appropriate circumstances, the only significant legal or policy question on the topic of grandfathering that is presented by the Petitioners is whether EPA can grandfather a permit through an adjudication without first establishing express authority to do so in the Code of Federal Regulations. Petitions do not demonstrate that OAR has abused its discretion in doing so here or that OAR's actions in this regard are based on a clearly erroneous conclusion of law.

Petitioners do not show that sections 52.21(b)(50), 52.21(k), or 52.21(j) of EPA's regulations must be interpreted, under the circumstances presented here, to apply to NAAQS that become effective or pollutants that become regulated well after the expiration of EPA's one-year deadline for reaching a decision on the permit application. Rather than focus on the terms of the regulations, Petitioners base their attack on the fact that OAR has modified its interpretation of these regulations without a rulemaking process. Petitioners fail to show it was clearly erroneous for OAR to grandfather through an adjudication in this instance after providing an opportunity for public comment.

The Petitions for Review, like the public comments that preceded them, continue to focus on the D.C. Circuit opinion in *Paralyzed Veterans of Am v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) without seriously confronting OAR's responses to comments that describe the evolution of the D.C. Circuit's thinking since that opinion and the fact that the Ninth Circuit does not apply the same reasoning. RTC at 69-71. As OAR explained on page 70 of the RTC, more recent cases since *Paralyzed Veterans* have emphasized that Petitioners must show a "substantial and justifiable reliance on a well-

established agency interpretation.” *MetWest Inc. v. Secretary of Labor*, 560 F.3d 506, 511 (D.C. Cir. 2009) (citing *Alaska Professional Hunters Ass’n v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999)).

Petitioners do not cite to any action prior to April 2010 where EPA clearly established a definitive and controlling interpretation that section 52.21(k) or 52.21(j) could not be read to allow grandfathering without an express exemption in section 52.21(i) of the regulations. While EPA’s actions in 1987 to promulgate a grandfathering provision for the PM10 NAAQS may imply EPA held such a view, this does not meet the standard of proof that the Board applied in *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (EAB Nov. 13, 2008). Absent a showing that EPA has changed a well-established interpretation, the question becomes (if one applies D.C. Circuit precedent) whether Petitioners can show a substantial reliance on EPA’s April 2010 statements and that the opportunity to comment on the change in interpretation provided in the context of the only permit application to which this interpretation is currently applicable is insufficient to protect any reliance interest that can be shown. RTC at 70-71. Petitioners do not show that they relied substantially or detrimentally on EPA’s statements in April 2010 that grandfathering would not be permissible without an express provision in regulations. Even if they could, Petitioners have not shown that it is clearly erroneous or inconsistent with the principles applied in these D.C. Circuit cases for EPA to provide notice and an opportunity to comment on this change in a recent reading of its regulations in the context of the particular adjudication where the modified interpretation is applicable.

Petitioners' attempt to minimize Ninth Circuit opinions addressing this issue is unpersuasive. In *Miller v. California Speedway Corporation*, the Ninth Circuit in fact references the D.C. Circuit's opinion from *Paralyzed Veterans* when explaining the basis for the District Court decision that *Miller* then reverses. 536 F.3d 1020, 1027 (9th Cir. 2008). While the Ninth Circuit does not expressly reference or reject *Paralyzed Veterans* later in the opinion, it is obvious in the result and reasoning of the *Miller* case that the Ninth Circuit does not apply the reasoning of the D.C. Circuit that the District Court had followed. *Miller*, 536 F.3d at 1033 ("even if the DOJ's interpretation constituted a change in the understanding of its original regulations, the DOJ was not required to proceed by notice and comment because both the Access Board's original position (as imputed to the DOJ) and the TAM would constitute interpretive rules"). Indeed, *Miller* reviewed what appears to be the same change in interpretation regarding lines of sight in sporting venues that was at issue in *Paralyzed Veterans*. If this is not clear enough, the precedent cited in this portion of the *Miller* opinion is explicit. *Erringer v. Thompson*, 371 F.3d 625, 632 (9th Cir. 2004) ("no notice and comment rulemaking is required to amend a previous *interpretive* rule."). An appellate court does not have to expressly reject a case from another Circuit to illustrate that it applies a different line of reasoning.

Furthermore, Petitioners do not demonstrate that OAR's action on this permit has national applicability and scope. While OAR has stated its intention to extend the same treatment to other permit applicants, it has taken no action to do so at this point. OAR expressly states in the record that this decision "should not be viewed as establishing a general rule or precedent applicable to any other permit application." RTC at 9, 69; *see also*, RTC at 72-73 (Numbers 13 and 14) Further, OAR has said that "EPA is separately

considering whether a rulemaking process or another mechanism may be a more appropriate means to develop a nationwide grandfathering policy for the 1-hour NO₂ NAAQS.” RTC at 9, 67. Sierra Club and CBD’s reference to media reports about EPA statements not in the record of this permitting action cannot establish that this permit action is based on “a determination of nationwide scope and effect.” *See*, 42 U.S.C. § 7607(b). Furthermore, OAR has not made or published a finding to that effect in the record supporting the issuance of the PSD permit to APC.

Petitioners do not demonstrate error in OAR’s reliance on Supreme Court precedent that clearly identifies the power of administrative agencies to formulate standards of conduct through ad hoc adjudication. RTC at 68; *SEC v. Chenery Corp.*, 332 U.S. 194, 202-203 (1947). Nothing on the pages that opinion (202-204) cited by El Pueblo suggests that an agency is only permitted to proceed through case-by-case determinations upon showing its lacks statutory and regulatory authority. The opinion states clearly that “the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.” *Id.* at 203. Even if an affirmative showing were required, OAR clearly explained how it has not anticipated the need to promulgate a rule earlier and that a statutory deadline necessitated proceeding without rulemaking in this instance. RTC at 67.

Finally, the Board’s opinions in *Vulcan Materials* and *Shell* recognize that “EPA has the authority to lawfully exercise, through an appropriate process, whatever discretion EPA has to interpret what ‘all applicable standards’ means with the respect to a particular source being permitted.” *In re: Vulcan Construction Materials, LP, PSD*

Appeal No. 10-11, Slip. Op. at 39 n. 41 (Mar. 2, 2011) (internal quotations omitted); *see also, In re Shell Gulf of Mexico, Inc. & Shell Offshore, Inc.*, OCS Appeal No. 10-01 through 10-04, at 19-25 (EAB Feb. 10, 2011) (Order on Motions for Reconsideration and/or Clarification). These orders do not specify that the only “appropriate process” is a notice and comment rulemaking process. For the reasons discussed above, OAR’s conclusion that it may, in this circumstance, determine the applicable standards through an adjudication is not clearly erroneous.

D. Petitioner El Pueblo Has Not Demonstrated That OAR Has Taken Any Action Precluded by the United States Constitution

El Pueblo’s allegations of unconstitutional action do not consider the constitutional jurisprudence cited by OAR in the Response to Comments or in any way demonstrate clear error in OAR’s application of those standards. RTC at 72 (Number 13). The Board has previously considered these same standards in evaluating due process and equal protection claims. *In re Desert Rock Energy Company, LLC*, PSD Appeal No. 08-03, Slip. Op. at 26-32 (EAB Sept. 24, 2009). The El Pueblo petition conflates due process and equal protection claims and does not clearly demonstrate that the actions of OAR on this permit are in violation of either constitutional provision.

E. Petitioners Do Not Demonstrate GHGs Were Subject to Regulation One-Year After the APC Application Was Complete

Sierra Club and CBD do not show clear error on the basis of their contention that greenhouse gas emissions were subject to regulation as of March 18, 2009, the one-year anniversary of EPA’s determinations that the APC permit application was complete. The Administrator has issued a final interpretation that GHGs did not become subject to regulation prior to January 2, 2011. 75 Fed. Reg. 17004 (April 2, 2010). OAR

referenced this action in response to comments and explained that the April 2, 2010 notice provided detailed reasoning for that conclusion. RTC at 66 (No. 10). OAR thus incorporated the reasoning of that action and responded to Petitioners' comments with more than just the observation that parties had the opportunity to challenge the April 2, 2010 action in court. The fact that the Petitioners challenging that action have elected to hold their claims in abeyance does not establish that it is now incumbent on the Board to address this issue. The proper forum for these claims is still the D.C. Circuit, regardless of whether the litigation is currently active or not.

The Board has previously recognized the significance of the April 2, 2010 final action by the Administrator in its review of PSD appeals. *In re: Russell City Energy Center, LLC*, PSD Appeal No. 10-1, Slip Op. at 133 n. 125 (Nov. 18, 2010) (“In that final decision, the Administrator concluded BACT limits for greenhouse gases are not required until January 2, 2011.”); *In re: Power Holdings of Illinois, LLC*, PSD Appeal No. 09-04, Slip. Op. at 3-4 n.1 (Aug. 13, 2010) (“in light of the Agency's recent determination stating that greenhouse gases are not subject to regulation until January 2, 2011, ... and the Sierra Club's acknowledgment that ‘this case is now controlled by’ the Agency's determination in this regard, ..., review is denied on this issue.”). The EAB should recognize the Administrator's action as controlling on this issue.

II. Petitioners Have Not Demonstrated that the Office of Air and Radiation Lacked Authority to Issue the Final Permit Decision

Petitioners do not demonstrate that EPA was required to complete a notice and comment rulemaking process to enable the Assistant Administrator for Air and Radiation to issue this permit. The record contains a memorandum to the file that provides a detailed legal analysis demonstrating how the Administrator's delegation qualifies as a

procedural rule that is exempt from notice and comment rulemaking procedures. Exhibit B (AR 117). The delegation and this memorandum were in the record as of the March 2011 date when OAR provided its supplemental public notice and opened another comment period on this permit. The Supplemental Statement of Basis provided notification of the delegation and that it was in the administrative record. SSB at 11. Petitioners fail to show clear error in OAR's response to comments explaining that commenters did not provide any information to undermine the reasoning of memorandum to the permit file. RTC at 71 (Number 12).

The Petitions do not demonstrate clear error in the conclusion that this March 1, 2011 delegation is a procedural rule that does not require notice and comment rulemaking. El Pueblo criticizes OAR's reliance on *James A. Hurson Assocs. v. Glickman*, 229 F.3d 227 (D.C. Cir. 2000) because the facts of that case did not involve a delegation. *Glickman* related to the process by which the agency would receive requests for approval of food labels and did not involve a delegation. El Pueblo at 24. However, the D.C. Circuit more broadly stated in *Glickman* that rules that do not alter the rights of parties are procedural. *Glickman*, 229 F.3d at 280. This language, which is quoted on page 3 of the March 3, 2011 memo to the permit file, is applicable to the delegation at issue here. Plus, additional cases support the same proposition. *See, e.g., Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980) ("A useful articulation of the exemption's critical feature is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency."). El Pueblo then cites *Home Health Agencies* for the proposition that a re-delegation of decision-making authority is a

substantive issue. *Nat'l Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932 (D.C. Cir. 1982). However, in that case, the court found that the delegation would

“substantially affect the rights and interests” of the petitioners

[F]or sixteen years freestanding HHAs had the option of choosing to deal with the Secretary or with an intermediary. Thus, freestanding HHAs had at least a qualified right to choose with whom they dealt. The [delegation] foreclosed that option, eliminating the qualified right.

Id. at 950. The court also expressed concern that the delegation would impose significant costs on the parties:

Furthermore, the elimination of this right will cause freestanding HHAs great expense and inconvenience. Appellees presented uncontradicted evidence that the transfer will cost an estimated \$10 million to \$30 million. Many HHAs will be required to change or scrap electronic billing systems which have been designed to interface with equipment used by the Secretary. Numerous HHAs will be required to train and re-educate employees to implement the new system and operate within the guidelines of the new intermediary.

Id. The delegation in Avenal would not impose any such burdens or affect parties' rights.

El Pueblo attempts to distinguish two other cases relied on in the legal memo on the grounds that neither of those had an existing regulation providing a delegation of authority which was then being changed by a new delegation. *See, Sacora v. Thomas*, 628 F.3d 1059 (9th Cir. 2010); *United States v. Gonzales*, 728 F.Supp.2d 1077 (N.D. Cal. 2010). However, whether a rule is procedural is determined by whether it affects rights or interests of parties, not whether another (procedural) rule on that topic exists. A procedural rule may be changed without notice and comment rulemaking in the same manner that it may be created in the first instance without such process. *See*, 5 U.S.C. § 553(b)(3)(A).

If an action by the Administrator to assign another Agency official responsibility for completing procedures in Part 124 does not qualify as a procedural rule, then this would cast doubt on Board's own authority to consider and decide the Petitions for Review. The Administrator originally established the Environmental Appeals Board in a procedural rule that did not undergo a notice and comment rulemaking process. 57 Fed. Reg. 5320 (Feb. 13, 1992). In that action, the EPA Administrator substituted the EAB for the Administrator in section 124.19 of EPA's regulations, which had previously assigned the Administrator responsibility to hear appeals of permit decisions issued under Part 124. In that notice, EPA reached the following conclusion: "All of the changes made in this notice affect only Agency practice and procedure. None of the changes are substantive in nature." *Id.* at 5322.

The only material difference between the Administrator's delegation for this permit and the 1992 delegation to the EAB is that EPA has not published the procedural rule applicable only to the APC permit in the Federal Register or Code of Federal Regulations. Petitioners do not address or demonstrate error in OAR's explanation as to why the one-time delegation authorizing the Assistant Administrator to issue the APC permit need not be published. Exhibit B at 4-5.

III. Consistent with Executive Order 12898, OAR Took Appropriate Action in the Context of Its PSD Permitting Decision for the Project to Identify and Address Potential Disproportionately High and Adverse Human Health or Environmental Effects

Petitioner El Pueblo argues that OAR failed to comply with Executive Order 12898 and EAB precedent in issuing its permit decision for the Project.¹ Petitioners

¹ Greenaction's petition for review states that it incorporates El Pueblo's petition for review, thus responses herein to arguments made by El Pueblo also address

Sierra Club and CBD raise similar arguments. None of the arguments made by these Petitioners, however, demonstrates that OAR's permitting decision was based on a "finding of fact or conclusion of law which is clearly erroneous" or involves "an exercise of discretion or an important policy consideration" which the Board in its discretion should review.

Executive Order 12898, entitled "Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations" states in relevant part that "to the greatest extent practicable and permitted by law. . . 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." Executive Order 12898, 59 Fed. Reg. 7629, 7629 (Feb. 11, 1994) ("EO 12898" or "EO"). In accordance with EO 12898, OAR thoroughly considered and appropriately addressed environmental justice concerns associated with its PSD permitting action for the Project, as documented in detail in the almost 20-page Environmental Justice Analysis ("EJ Analysis") that was circulated for public comment as part of OAR's Supplemental Statement of Basis, as well as in EPA's response to comments for this action. See RTC at 15-16, 48-49, 51, 82-98, 102-107. EPA also offered extensive public participation opportunities for its PSD permitting action for the

Greenaction's petition to the extent that it incorporates El Pueblo's petition by reference. Greenaction's petition also raises several general arguments about why it objects to EPA's permit decision based on environmental justice issues, but fails to identify where the issues were raised in comments, describe EPA's responses to those comments, or explain how EPA's responses were insufficient. Therefore, review of Greenaction's independent arguments should be denied. See, e.g., *In Re Peabody Western Coal Co.*, 12 E.A.D. at 33, and cases cited therein.

Project in order to ensure that community members and other interested parties would have ample opportunity to raise any concerns. *See, e.g.*, RTC at 9-10, 12-13.

A. OAR Conducted an Appropriate Analysis Using the Best Data Available to Identify Potential Disproportionately High and Adverse Human Health or Environmental Effects

Petitioner El Pueblo argues that OAR has an absolute and unqualified duty to identify disproportionate impacts noting comments made by El Pueblo concerning this issue. El Pueblo at 27. OAR does not dispute that EO applies to EPA PSD permitting decisions. *See, e.g.*, RTC at 12. El Pueblo acknowledges that OAR's Response to Comments document addresses this issue, and notes OAR's position that where, as here, "available data is limited, and where OAR 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, OAR 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 NO_x emissions." *Id.*; *see also* RTC at 87-8. El Pueblo is mistaken in characterizing the Agency's responsibilities with regard to implementing the EO. "The Board has held that environmental justice issues must be considered in connection with the issuance of PSD permits," and has "encouraged permit issuers to examine any 'superficially plausible' claim that a minority or low-income population may be disproportionately affected by a particular facility." *In re Shell Gulf of Mexico, Inc.*, OCS Appeal Nos. 10-01 through 10-04 (Dec. 30, 2010), Slip Op. at 63 n. 71. That is precisely what OAR has done in this case.

El Pueblo disagrees with OAR's response, arguing that the language of the EO itself and EAB case law require that OAR make a definitive interpretation concerning

disproportionate adverse impacts in this case. El Pueblo at 26-29.² El Pueblo's argument depends on selectively ignoring language in the EO, effectively reading out of the EO the language stating that Federal agencies are to implement the EO "to the greatest extent practicable and permitted by law" and to identify and address disproportionately high and adverse effects "as appropriate." Based on this selective reading of the EO, it then argues that OAR has somehow violated the EO by conducting an analysis based on its best scientific evaluation of the available information, and then issuing a permit, using its best judgment to evaluate likely impacts when information gaps make it impracticable to achieve absolute certainty, or foreclose all uncertainty, about the source's conceivable impacts. El Pueblo fails to demonstrate that OAR's actions are based on a "finding of fact or conclusion of law which is clearly erroneous;" 40 CFR 124.19(a)(1). To the contrary, OAR's approach was entirely reasonable:

EPA does not read the Executive Order to call for EPA to draw a specific conclusion regarding compliance with the 1-hour NO₂ NAAQS or that we reach a definitive determination that the Project will not result in disproportionate adverse impacts with respect to short-term NO_x emissions. As noted above, in implementing this Executive Order, EPA believes it is appropriate for the Agency to consider the best available data that are germane in light of the scope and nature of the action before us in analyzing whether there may be disproportionate adverse impacts on minority communities and low-income communities. Moreover, the language in the Executive Order directing federal agencies to identify and address impacts "as appropriate," and "[t]o the greatest extent practicable and permitted by law," affords considerable discretion to the Agency in determining how to address any impacts that we may identify in light of uncertainties regarding those impacts. EPA believes that in conducting our Environmental Justice Analysis for the Project, and considering the comments on the analysis, we are appropriately exercising our discretion in implementing the Executive Order in the context of this permit application under the CAA, which does not preclude EPA from approving

² Sierra Club and CBD make arguments similar to El Pueblo's. Thus, this portion of OAR's response also addresses Sierra Club and CBD's arguments. *See*, Sierra Club and CBD at 38.

this PSD permit in the face of uncertainty concerning the impacts of short-term NOx emissions associated with the Project on the community.

RTC at 87. This approach is a reasonable and appropriate way to implement the directive in the EO providing that “[t]o the greatest extent practicable and permitted by law . . . 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 plain language of sections 1-101 and 6-608 of the EO makes clear that the directive to identify and address disproportionately high and adverse effects is circumscribed by what is practicable and lawful. Thus, El Pueblo show no clear error with its argument that OAR did not comply with the EO because gaps in the data prevented EPA from reaching definitive conclusions, and in its suggestion that what is practicable is not relevant to an agency’s effort to identify and address disproportionately high and adverse effects. El Pueblo at 28 n. 9. Indeed, El Pueblo correctly acknowledges OAR’s conclusion that “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.” RTC at 29. That is precisely what OAR did in this case. As noted in the following passage from OAR’s response to comments:

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. However, we recognize that the available data concerning impacts associated with the Project’s short-term NOx emissions are very limited, and concur with the commenter that our analysis is inconclusive in this regard. Nevertheless, we believe that our Environmental Justice Analysis and our consideration of public comments on the Analysis are appropriate and satisfy the requirements of the Executive Order.

RTC at 87-88; *see also* RTC at 83, 89-92.

B. OAR Provided Adequate Analysis and Support for Its Environmental Justice Findings

As discussed above, OAR's EJ Analysis and response to comments included extensive analysis and discussion of potential disproportionately high and adverse human health or environmental effects associated with the PSD permitting action for the Project. Yet El Pueblo argues that the Board should remand OAR's permit decision based on the premise that OAR failed to provide record support for a specific sentence that was included in OAR's Response to Comments document. El Pueblo at 29-30 ("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."); RTC at 5. El Pueblo argues that EPA's permit decision should be remanded because, in its view, this part of a longer sentence summarizing OAR's evaluation of the evidence in the record lacks sufficient evidentiary support and contradicts EPA's own analysis. El Pueblo is wrong on both counts, and certainly has not shown a "clearly erroneous" finding of fact or conclusion of law.

This is an attempt to flyspeck the record to find marginal variations in language in the 110-page Response to Comments document, and then inflate those variations into contradictions. But even engaging the comments on their own terms, the putative "contradiction" is illusory. EPA's statement that despite the uncertainties and limitations in the record, the source's emissions are "unlikely" to add "significant" environmental harm is appropriately qualified and fully consistent with the further statement cited by El Pueblo. *Id.* ("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.”); SSB at 27 (emphasis added). In the complete statement, EPA’s recognizes “some uncertainties and limitations in available data” and explains that this judgment was made after “[c]onsidering the environmental conditions of greatest significance in this region and the range of actions EPA and State and local government agencies are taking to reduce the risks these conditions pose to health and welfare in these communities.” RTC at 5. EPA also explained that it “has not identified disproportionate adverse impacts on minority communities and low-income communities that should affect issuance of this permit.” RTC at 5.

Furthermore, El Pueblo ignores the detailed analysis and discussion of project impacts and environmental justice impacts that appear in the remainder of OAR’s response to comments document as well as in EPA’s Supplemental Statement of Basis, including its EJ Analysis, all of which provide background and context for the statement at issue.³ OAR’s analysis discusses the fact that the Project is a “state-of-the-art natural-gas fired electric generating facility that will achieve the lowest levels of air pollutant emissions achievable in this instance” and “will not cause or contribute to a violation of any NAAQS regulated under the permit that was in effect at the time EPA issued a

³ El Pueblo cites *In re Knauf Fiber Glass*, 8 E.A.D. 121 (EAB 1999), *In re Government of D.C. Municipal Separate Sewer System*, 10 E.A.D. 323 (EAB 2002), and *In re Hawaii Electric Light Company, Inc.*, 8 E.A.D. 66 (EAB 1998), to argue that the Agency has not provided adequate information to support its environmental justice determination. Those cases, however, are clearly distinguishable from this matter. Respondents in those cases provided little to no information to support their decisions. *In re Knauf*, 8 E.A.D. at 175 (Respondent provided “no details” in the administrative record.); *In re Government of D.C.*, 10 E.A.D. at 342 (Respondent produced “nothing in the record” that was reliable to support its decision.); *In re Hawaii*, 8 E.A.D. at 105 (Respondent did not provide “any adequate showing” to support its conclusion). In this matter, the Agency provided an extremely detailed analysis on a wide variety of information before reaching its conclusion.

proposed permit for this project.” SSB at 6. OAR’s position that it cannot reach any definitive conclusion about the specific human health or environmental impacts of short-term exposure to NO₂ emissions from the Project on minority and low-income populations is not inconsistent with the general statement in the introduction that emissions from the source are “unlikely” to add “significant” environmental harm to the community, when all the emissions from the facility are considered as a whole, and the entire context surrounding the statement is taken into account.⁴

C. OAR Appropriately Focused on the Best Available Data in its Environmental Justice Analysis

El Pueblo says its comments challenged OAR’s alleged failure to present any specific information or data in its EJ Analysis upon which to assess potential short-term NO₂ impacts from the project. El Pueblo at 30-31; RTC at 87. El Pueblo argues OAR provided no “no specific information” to support its contention that it relied on the best available data. What is missing from El Pueblo’s discussion, however, is the fact that EPA’s EJ Analysis made clear the specific data on which it was relying for its consideration of impacts associated with short-term NO₂ emissions, and which it determined to be the best available data. SSB at 26-27. OAR’s Response to Comments document explains this as well. RTC at 87-90.

El Pueblo also claims that “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.” El Pueblo at 30. El Pueblo appears to argue that OAR disclosed, for the first time, in its response to comments document the existence of two sets of data

⁴ El Pueblo’s argument that all evidence in the record suggests that the project will, in fact, disproportionately impact local communities is addressed in Section III.D of this Response.

arguably relevant to OAR's EJ Analysis with respect to short-term NO₂ emissions: (1) the SJVAPCD's hourly NO₂ analysis for the minor source project, and (2) various data, correspondence, and submittals concerning a separate hourly NO₂ analysis submitted by the applicant to EPA for the Project. El Pueblo argues that OAR should have but did not consider the data as part of its EJ Analysis as the information is relevant to determining potentially disproportionate impacts. *Id.* at 31. And by extension, it argues that OAR's decision to use or not use that information is "clearly erroneous." This is unsupported.

Contrary to El Pueblo's assertion, OAR did not withhold relevant data from its analysis. OAR discussed the existence of both sets of data in its Supplemental Statement of Basis and EJ Analysis for the project, and certain information concerning the NO₂ analysis submitted by the applicant to EPA for the Project was available on EPA's docket for this matter in 2010. First, OAR made clear in its EJ Analysis that the short-term NO₂ component of the analysis specifically relied on certain data from the SJVAPCD's hourly NO₂ analysis for the minor source project. SSB at 27 n.23, 24. In fact, OAR received comments from the applicant arguing that this SJVAPCD analysis demonstrated the Project's *compliance* with the hourly NO₂ standard, and therefore a lack of adverse impacts for purposes of the EJ analysis. But OAR, relying on its expertise, concluded that this information was not reliable, responding to these comments as follows:

We also disagree that the District's 1-hour NO₂ analysis prepared in the context of the Avenal minor source permit demonstrates that the Project complies with the 1-hour NO₂ NAAQS for purposes of EPA's analysis conducted in conjunction with our PSD permit decision for the Project. The District followed its own modeling approach and guidance that it issued specific to minor source projects, which in some respects differ from EPA's guidance and recommendations for modeling for PSD permits governing major sources. The District's analysis was not intended to serve as a PSD modeling analysis for a major source.

RTC at 89-90. Neither El Pueblo nor any other party argued in comments that the SJVAPCD analysis supported a finding that the Project would result in disproportionate impacts. Further, El Pueblo's petition fails to mention the applicant's comments regarding this analysis or OAR's response to the applicant's comments, and also fails to explain why OAR's response indicating that the analysis was not sufficient "for purposes of EPA's analysis conducted in conjunction with our PSD permit decision for the Project" was incorrect.

Second, OAR's Supplemental Statement of Basis was clear that the applicant had made an effort to prepare an hourly NO₂ analysis for the Project. SSB at 6 ("The challenges encountered in supplementing the APC permit application to address the hourly NO₂ NAAQS caused additional delay beyond the dates when the hourly SO₂ NAAQS and greenhouse gas requirements became applicable to PSD permit applications"); SSB at 8 ("... APC's efforts to complete a sufficient modeling demonstration to show this source will not cause or contribute to violations of the hourly NO₂ standard has produced unanticipated delays in the review of the PSD permit application submitted by APC. This has exacerbated EPA's failure to comply with the statutory deadline for action on this permit application.") In addition, EPA posted certain correspondence between EPA and the applicant concerning this analysis on EPA's electronic docket for its PSD permitting action as early as 2010. *See, e.g.*, AR 64 – AR 74 (<http://www.epa.gov/region9/air/permit/r9-permits-issued.html>). So the argument that OAR withheld data is baseless. Moreover, neither El Pueblo nor any other commenter suggested during the public comment period that OAR should have relied on information relating to that analysis in examining disproportionate impacts with respect

to short-term NO₂ emissions; therefore, El Pueblo is precluded from raising this issue for the first time on appeal. Furthermore, even if El Pueblo were not precluded from raising the issue at this time, OAR's response to comments states that EPA does not consider the applicant's analysis "sufficient to demonstrate compliance or noncompliance with the 1-hour NO₂ NAAQS because it was not supported by data and justifications that are called for in EPA's modeling guidelines in 40 CFR Part 51 Appendix W and related EPA guidance." RTC at 89. Thus, OAR explained that: "[b]ecause of the limitations in this analysis, EPA does not believe it is sufficient to enable us to draw any conclusions regarding whether this source would cause or contribute to a violation of the 1-hour NO₂ NAAQS." *Id.* El Pueblo does not explain why EPA's position here constitutes clear error.

D. OAR Properly Determined That the Best Available Data Was Inconclusive Regarding the Impacts of Short-Term NO₂ Emissions on the Community

El Pueblo finally gets to the heart of its challenge to the EJ Analysis when it contends that the data indicate that "the project will cause a disproportionate impact." Rejecting all of OAR's analysis, and flatly disagreeing with OAR's conclusion, El Pueblo makes the sweeping claim that "[a]ll available data indicates that the project will result in a violation of the 1-hour NO₂ NAAQS and therefore presents an unacceptable risk to local populations." El Pueblo at 32 (emphasis added). Sierra Club and CBD make a similar claim, relying on the same general argument and data that El Pueblo does. Sierra Club and CBD at 37-39.⁵ These arguments are not supported by the record, however.

⁵ Sierra Club and CBD also say that EPA "ultimately determined that because the modeled results for the projected air emissions are below the new 1-hour standard, there will be no adverse impacts and the Agency has satisfied its environmental justice

OAR cited and relied on the best available data, which was inconclusive, and specifically rejected as unreliable the information Petitioners rely on to support the argument that the Project will cause a disproportionate impact. RTC at 88-92.⁶ Petitioners fail to demonstrate that OAR's response to comments on this issue is incorrect or insufficient. Unless the Board second-guesses OAR's technical evaluation of the information and adopts the commenters' evaluations instead, there is no basis to determine that OAR's action is based on a finding of fact or conclusion of law that is "clearly erroneous."

El Pueblo extends its disagreements with OAR's expert judgments by also calling into question OAR's determination that the best available data did not provide an adequate basis on which to draw a conclusion about impacts to the community associated with short-term NO_x emissions, based on the argument that OAR incorrectly presumes that it is required to determine that the facility would cause an exceedance of the NAAQS

obligations." Petitioners provide no reference in the record for this contention, nor can it, because EPA made no such determination. Rather, EPA determined that the best data with respect to impacts associated with short-term NO₂ emissions was inconclusive. *See, e.g.*, RTC at 83.

⁶ El Pueblo also attempts to rely for the first time on quoted language that it "cherry picks" from correspondence from EPA to the permit applicant dated August 12, 2010 concerning the applicant's hourly NO₂ analysis, in order to further support El Pueblo's conclusion that the Project would have a disproportionate impact. El Pueblo at 33. However, El Pueblo omits language in the same correspondence immediately following the language quoted that qualifies the statement El Pueblo relies on: "This cumulative 1-hour NO₂ impact is well above the EPA 1-hour NO₂ standard, although we recognize that the 1-hour modeled NO₂ concentration documented in the APC is likely to be higher than the 98th-percentile of the annual distribution of maximum daily 1-hour values used as the form of the 1-hour EPA standard. However, the AFC results are also about 2.7 times higher than the cumulative 1-hour NO₂ impact reported in the May 13, 2010 submittal, which serves to highlight the significance of the issue raised by EPA in this comment, and to emphasize the importance of having clear justification and documentation of the approach taken for combining modeled and monitored concentrations for comparison to the NAAQS." See Exhibit C (AR 71). In any event, as discussed in Section III.C above, it is improper for El Pueblo to raise arguments based on documentation relating to the applicant's hourly NO₂ submittal to EPA for the first time on appeal.

based on “EPA’s highly technical regulatory process.” El Pueblo at 33. El Pueblo agrees that EPA has the discretion to choose the methodology it will use to determine disproportionate impacts, citing EAB caselaw for the proposition that “the selection of method for determining disproportionate impacts is best left to the technical expertise of the Region.” *Id.* at 33-34. In the case of this permit, EPA’s technical expertise led to the judgment that the best available data provided an insufficient basis on which to draw a definitive conclusion about short-term NO₂ impacts, and that available analyses were not sufficiently reliable to be consistent with “EPA’s highly technical regulatory process” for NAAQS compliance determinations in the context of PSD permitting. Thus, OAR concluded that the available, reliable information was not sufficient to allow OAR to draw definitive conclusions about whether the source would cause or contribute to a violation of the NAAQS. *See, e.g.,* RTC at 89-90. El Pueblo has not demonstrated that OAR’s judgment on these issues is not technically defensible, much less that it is “clearly erroneous.” Nor has it shown that it was “clearly erroneous” not to employ some other analytical method for reaching such a definitive conclusion in this case, or even that there is an alternative method that would be preferable or even reliable. OAR’s determinations in this regard merit deference, and certainly did not constitute clear error.

E. OAR Appropriately Considered Potential Cumulative Impacts

El Pueblo next presents a rather confusing discussion of cumulative impacts. First, it concedes that, in assessing cumulative impacts in the area, OAR properly considered a broad range of environmental and health burdens facing the community. El Pueblo at 35. El Pueblo states that OAR “recognized that the existing conditions identified by commenters would increase residents’ vulnerability to the health effects of

air pollution.” *Id.*⁷ But then El Pueblo suggests that it is inappropriate for OAR’s analysis to consider the likely effects of ongoing measures to reduce those burdens. The record shows that substantial actions are being taken to address the actual or potential environmental problems facing these communities by numerous agencies. RTC at 84-85. El Pueblo cites *In re Chemical Waste Management of Indiana*, 6 E.A.D 66 (EAB 1995) to support the proposition that “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.” El Pueblo at 33. Yet this case does not support El Pueblo’s reading. It merely explains in response to petitioners’ suggestion that operation of the facility at issue should be halted to address their environmental justice concerns that the EO “does not purport to, and does not have the effect of, changing the substantive requirements for issuance of a permit under RCRA and its implementing regulations,” noting limitations in implementing the EO in the RCRA permitting context. 6 E.A.D. at 72. Furthermore, there is nothing in the language of the EO itself that supports El Pueblo’s reading of the EO’s directives.

Moreover, as already noted, based on the best available data, OAR has not identified any likely adverse impacts associated with the Project, contrary to El Pueblo’s assertion that “the agency has determined that approval of the Energy Project may exacerbate existing vulnerabilities when combined with pollution sources,” El Pueblo at 36. *See, e.g.*, RTC at 83 (“After preparing our analysis based on the best available data, and considering comments received, EPA has not identified disproportionate adverse

⁷ El Pueblo overstates EPA’s response. EPA’s response stated that it agreed that communities near the Project face a number of environmental concerns, including those identified by the commenters, and that those factors *in some cases may increase vulnerability to the health effects of air pollution.*” RTC at 82 (emphasis added).

impacts on minority communities and low-income communities that would result from our proposed PSD permitting action that should affect issuance of this PSD permit, though EPA acknowledges that in light of the limited data available, EPA is not able to reach any definitive conclusion about the specific human health or environmental impacts of short-term NOx emissions associated with the Project.”) In these circumstances, EPA has taken and is taking appropriate steps to identify, and to address, the environmental problems facing this community, and that its actions are consistent with the EO.

F. OAR Appropriately Considered Nonattainment Pollutants

El Pueblo next argues that OAR’s permit decision should be remanded because the responses to comments declined to specifically address commenter’s criticisms of the California Energy Commission's environmental justice analysis, which OAR described in its EJ Analysis for the Project. El Pueblo at 37-38. El Pueblo notes that OAR’s Response to Comments document (page 94) states that “[g]iven 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.” *Id.* El Pueblo neglects to mention, however, the extensive additional discussion in the Response to Comment document on this issue, or to argue how the full response was inadequate. *See*, RTC at 93-94. OAR’s analysis and response to comments adequately addressed this issue.

G. Petitioner’s Argument that EPA’s Action Is Discriminatory Does Not Warrant EAB Review

El Pueblo argues that in implementing EO 12898, EPA must not only identify and address disproportionate impacts stemming from its programs and activities, but also

ensure that it conducts its activities so as to avoid discriminatory effects based on race or national origin, citing Section 2-2 of EO 12898. El Pueblo at 38-9. El Pueblo argues that OAR's action will have a discriminatory effect on Latino residents due to OAR's decision to grandfather the Project from demonstrating compliance with new NAAQS and GHG requirements, OAR's alleged failure to identify potential disproportionate impacts, and OAR's alleged refusal to address emissions that will exceed health protective standards. El Pueblo does not state that this issue was raised in comments submitted on the permit, nor does it provide a citation to any such comments. Similarly, El Pueblo does not explain where OAR provided any response to comment on this issue and if so why OAR's response was not sufficient. As Petitioner fails to meet these threshold requirements for review, the Board should deny review of this issue. Furthermore, Petitioner's argument is unsupported by the record in this case.

H. OAR Properly Issued a PSD Permit Decision for the Project During the Pendency of the Title VI Complaint

Petitioner El Pueblo argues that OAR should not have issued the PSD permit for the Project at this time because a Title VI complaint is pending before EPA with respect to another agency's approval action for the Project. El Pueblo argues that the Board should review this issue as a matter of policy.

El Pueblo says it raised a similar argument in its comments dated April 12, 2011,⁸ and notes that OAR responded, stating 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

⁸ This argument appears to have been raised on pages 9-10 of El Pueblo's April 12, 2011 comments. However, El Pueblo's petition for review does not include this citation.

process that is also outside the scope of EPA's PSD permit decision action." El Pueblo at 40; RTC at 90. While El Pueblo disagrees with OAR's response, Petitioner offers no convincing arguments as to why the response was inadequate. El Pueblo cites no authority, nor is OAR aware of any, for the proposition that a Federal agency considering a Title VI complaint with respect to a particular facility is, or should be, precluded from taking action under other legal authorities that permit or require that agency to take action with respect to that facility.

Further, EPA's Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits explains EPA's position that "[n]either the filing of a Title VI complaint nor the acceptance of one for investigation by [EPA's Office of Civil Rights] stays the permit at issue."⁹ The "permit at issue" in the pending Title VI investigation here is the nonattainment NSR permit issued by the SJVAPCD. While the language cited in EPA's Draft Guidance does not address the OAR's CAA PSD permit, it demonstrates the weakness of El Pueblo's argument. If even the "permit at issue" is not stayed by a Title VI investigation, then there is no reason to conclude that a separate permit that is *not* at issue in the Title VI investigation would or should be stayed by such investigation. In addition, Petitioner fails to reconcile its argument that OAR should not have acted on the PSD permit during the pendency of the Title VI investigation with the requirement in Clean Air Act section 165(c) that EPA grant or deny a PSD permit application within one year of application completeness, which was noted by OAR in its response to comments on this issue. RTC at 90 n.14.

⁹ See Draft Revised Guidance for Investigation Title VI Administrative Complaints Challenging Permits, 65 Fed. Reg. 39650, 39676 (June 27, 2000).

El Pueblo argues that EO 12898 requires all agencies to conduct their programs, policies, and activities with respect to environmental justice, but neglects to explain how that responsibility was not fulfilled with respect to OAR's action in this case due to the pending Title VI complaint, or to explain how OAR's response to comments on the issue is inadequate in light of this responsibility. El Pueblo next argues that because certain data from the State process was considered by OAR in its PSD permitting action, the State/local permitting processes are interrelated with OAR's action. It is not clear whether this specific argument was raised in comments, but to the extent it was, El Pueblo fails to explain how OAR's response was insufficient. In any event, EPA's PSD permitting action is separate and distinct from the SJVAPCD's nonattainment NSR permitting action.

El Pueblo then argues that "EPA relies on other agencies' activities to cure cumulative impacts stemming from this permit." However, Petitioner fails to explain the relevance of the fact that a number of agencies are actively addressing environmental issues in the Project area related to the Title VI issue being considered.¹⁰

IV. There Was No Clear Error in EPA's Public Participation Process

A. EPA's Public Notices Satisfied Applicable Regulatory Requirements

Petitioner Rob Simpson argues that OAR's permit decision should be remanded because EPA's public notices issued in 2009 contained the following statement, which he contends is factually and legally misleading: "Air pollution emissions will not cause or

¹⁰ Petitioner cannot sustain its claim that actions taken by other agencies to address potential environmental impacts in the area near the Project site, as discussed in EPA's response to comments, were taken to address impacts "stemming from this permit." OAR has not identified any adverse impacts associated with its permit for the Project. *See, e.g.*, Section III.E of this Response.

contribute to violations of any of the National Ambient Air Quality Standards.” Simpson at 11. Mr. Simpson asserts that he raised this issue in his October 15, 2009 comments.

Id. at 11-12. OAR responded to Mr. Simpson’s comment as follows:

The statement quoted by the commenter refers to applicable NAAQS for pollutants regulated under the PSD permit. As discussed above, the project demonstrates compliance with the NAAQS that are regulated under this PSD permit. For further information about why PSD permits do not have to demonstrate compliance with the NAAQS for nonattainment pollutants, please see our response to comment number 8, 11, 12 and 17 in Section II.A.1.

RTC at 34. Petitioner challenges this response as inadequate, asserting that the general public would have “no way of decoding this statement to mean what the EPA suggests it does.” Simpson at 12. The focus of the EPA’s action in proposing its PSD permit, and hence the focus of its public notice, is the set of pollutants covered by the PSD permit, rather than the nonattainment pollutants about which Petitioner appears to be raising concerns. 40 C.F.R. § 52.21(i)(2); RTC at 28-30. Petitioner does not show error in OAR’s reading of the regulations or its response to comments on this issue.

Mr. Simpson’s Petition also argues for the first time that, as a result of the statement at issue, EPA’s notice provided an inadequate description of the activity described in the permit application or the draft permit as per 40 C.F.R. 124.10(d)(iii). Simpson at 12. Mr. Simpson does not state that this issue was raised during the public comment period. *See id.* Because this argument was not made in public comments, it cannot be raised now. Even if that were not the case, Mr. Simpson’s argument is conclusory and provides no explanation as to why the statement at issue provides an inaccurate description of the “activity described in the permit application or the draft permit” such that the permit was inconsistent with the 40 C.F.R. 124.10(d)(iii),

particularly in light of the fact that the alleged inaccuracy about which he complains is not the focus of the PSD permit at issue. Mr. Simpson's argument here demonstrates no clear error or important policy considerations warranting EAB review.

B. EPA's Public Information Meeting Was Appropriately Limited in Scope

Petitioner Simpson next argues that EPA failed to record public comment at the public information meeting it held on September 30, 2009, quoting the following statement from OAR's Response to Comments document at page 10:

EPA held a public information meeting on September 30, 2009 in Avenal, California. The purpose of the public information meeting was to provide information about the proposed permit and how to participate in the public comment process. A Spanish language interpreter was present for oral translation. EPA responded to questions at these meetings but did not formally record remarks from the audience.

Simpson Pet. at 13. Petitioner argues that EPA acted "recklessly" in that it held a public meeting during the comment period and then failed to record public comment, quoting the EAB's opinion in *In re: Russell City Energy Center*, PSD Appeal No. 10-1, Slip Op. at 37 (EAB 2008), where the EAB expressed concern about allegations that the public attended a permitting agency workshop believing that it was a hearing and made comments believing they would be considered. *Id.* at 13-14. In contrast, in this case, Petitioner does not allege that any person attending EPA's public information meeting on September 30, 2009 believed that the meeting was a public hearing, that any person made comments believing they would be considered or recorded, or that EPA failed to record any such comments. As is made clear by the language quoted by the Petitioner, the meetings were intended for EPA to share information with the public, rather than to take public comment. RTC at 10. Petitioner Simpson fails to mention other information

provided by EPA that made clear that EPA had scheduled public hearings precisely for the purpose of taking public comment on EPA's PSD permit action. OAR's response to comments explains that EPA offered two public hearings shortly after the public information meeting, as well as an additional public hearing in 2011, to take public comment RTC at 9-10.

In addition, EPA's public notices announcing the September 30, 2009 public information meeting and the October 1, 2009 public hearing made very clear that the public hearing was the appropriate venue in which the public could provide formal comment. Exhibit D (AR 102) ("EPA intends to hold a Public Information Meeting for the purpose of providing additional information and discussion of the proposed project as follows . . . []. Pursuant to 40 CFR 124.12, EPA also intends to hold a Public Hearing to provide the public an opportunity to comment on the proposed permit. Any person may provide written or oral comments, in English or Spanish, and data pertaining to the proposed permit at the Public Hearing. The date, time and location of the Public Hearing are as follows . . ."). Finally, to the extent that anyone might have been confused about whether the purpose of the public information meeting was to provide comments, EPA provided a Public Involvement Process handout at the September 30, 2009 public information meeting which made clear that comments would be taken at the October 1, 2009 and October 15, 2009 public hearings. Exhibit E (AR 130). Petitioner's request for review and remand based on this issue fails to demonstrate clear error or important policy considerations warranting EAB review, and therefore should be denied.

C. Petitioner Simpson Fails to Demonstrate that EPA’s Compilation of Its Mailing List and Public Notice Distribution in 2009 Constituted Clear Error

Petitioner’s argument that EPA failed to compile a sufficient mailing list thereby providing inadequate notice to persons who should have been included does not meet the prerequisites for Board review, as Petitioner fails to mention that he raised this issue in comments, to describe OAR’s response to those comments, or to explain why OAR’s response to comments, wherein OAR explained in detail how EPA compiled its mailing list for this proposed permitting action, and noted that it would add CARE to the list, see RTC at 34-35, was not sufficient. Because Petitioner fails to meet these threshold requirements, EAB review of this issue should be denied.

Even if that were not the case, however, Petitioner’s argument that EPA did not compile a sufficient mailing list is based solely on the fact that EPA did not provide an individual public notice to CARE in 2009, and fails to demonstrate clear error. First, Mr. Simpson’s argument that CARE was entitled to notice was only suggested in his public comment, where he stated that he has had difficulty getting on EPA public notice lists, asks how EPA has satisfied 40 C.F.R. § 124.10(c)(1)(ix), then states that “[i]t does not appear that organizations like Californians for Renewable Energy (CARE) have been provided notice of these proceedings, although it appears that they have been ‘participants in past permit proceedings in that area.’” Exhibit F (AR 159)¹¹ Petitioner’s

¹¹ Petitioner’s comment raising this issue was submitted on October 15, 2009, the final day of the four-month-long public comment period provided by EPA in 2009. Another commenter notified Region 9 immediately after Region 9 issued its June 2009 public notice to notify the Region that certain interested parties were not included in EPA’s distribution list for the notice. The Region added those parties to its distribution list for its PSD permitting action for the Project, and they received subsequent public notices issued by EPA with respect to its PSD permitting action for the Project starting in August 2009. See RTC at 11, 13.

general question and assertions did not provide information sufficient to indicate that CARE was entitled to receive individual public notice in this case, and as such, did not provide the level of specificity required to preserve this issue for EAB review. *See, e.g., In re: Carlota Copper Co.*, 11 E.A.D. at 723-24 n.38.¹²

Furthermore, even if CARE were entitled to such notice, the EAB has held that petitioners lack standing to argue that EPA's public notice was insufficient based on allegations that EPA failed to mail the notice to a third party, unless the petitioner can demonstrate how the alleged errors affected the proceedings or that the person was harmed or prejudiced by the alleged violations. *See J & L Specialty Products Corp.*, 5 E.A.D. 31, 79 (EAB 1994); *In re: MCN Oil and Gas Company*, UIC Appeal No. 02-03, at 11 (EAB Sept. 4, 2002) (Order Denying Review).¹³ In this case, while Mr. Simpson's petition argues that "EPA missed out on the benefit of CARE's experience participating in such proceedings," Simpson at 14, and Mr. Boyd's declaration makes the conclusory statement that "CARE was denied an opportunity to comment on the [SJVAPCD] PDOC,

¹² Petitioner's reference to CARE's participation in the GWF Tracy Peakers project was mentioned for the first time in his petition for review, and was not raised in public comment, and therefore should not be considered here. Even if that were not the case, however, this information, without more, is still insufficient to demonstrate that CARE was entitled to individual public notice in 2009.

¹³ There are exceptions to this general rule, as noted in the following passage from *Russell City*: "While these cases indicate that the Board generally will not consider notice allegations where the sole deficiency is failure to give notice to a particular person other than the petitioner, we nevertheless regard it as appropriate to consider claims of failure of notice to other persons within the scope of allegations of fundamental defects in the integrity of the notice process as a whole that may be prejudicial to the notice rights of the petitioner and others and thus may require Board remedy." *Russell City*, PSD Appeal No. 10-1, Slip Op. at 32-33. Petitioner's assertion that EPA did not provide direct mail notification in 2009 to one organization clearly does not rise to the level of "fundamental defects in the integrity of the notice process as a whole."

and US EPA's PSD permit, because both agencies failed to notify CARE of the opportunity for public comment in a timely manner," Boyd Decl., Petitioner has not established that he was harmed or that the permit proceeding or the permit itself would have changed in any substantive way as a result of the lack of individual notice to CARE in 2009. In fact, neither Mr. Simpson nor Mr. Boyd explicitly states that CARE would, in fact, have participated in the PSD permit process for the Project had CARE received direct notice on an earlier date, or identifies any issues that CARE would have raised had it received such notice. Therefore, Petitioner lacks standing to object to EPA's failure to provide direct mail notice to CARE in 2009.¹⁴

For all of these reasons, Petitioner has failed to demonstrate clear error or important policy considerations meriting EAB review, 40 CFR 124.19(a), and the EAB should therefore deny Petitioner's request for review and remand based on this issue.

V. Petitioners Show No Error in OAR's Alternatives Analysis

Petitioners do not demonstrate any clear error in OAR's response to comments on alternatives to the proposed source or the need for the source. RTC at 16-19, 99-101. OAR's responses to comments are sufficient under the standard described by the Board in *In re Prairie State Generating Company*, 13 E.A.D. 1, 31-34 (EAB 2006). The response to comments document "must demonstrate that all significant comments were

¹⁴ It is particularly appropriate to find that Petitioner Simpson lacks standing to raise this notice argument in this case because the third party at issue, CARE, had actual notice from EPA of EPA's permitting action no later than March 2011, and apparently was aware of the Avenal Energy Project no later than November 2010. Boyd Decl. CARE did not submit comments to EPA or contact EPA to express concern about the lack of earlier notice. EPA published two public notices in newspapers prior to this time. AR 99 - AR 113; *see e.g.* Exhibit D.

considered.” *Id.* at 30. The “consideration and analysis of alternatives need be no broader than the analysis supplied in public comments.” *Id.*

OAR’s response to Sierra Club’s comment on the minor source permit meets these criteria. RTC at 99-100. The response shows that OAR considered this comment and reached the conclusion that the pending minor source permit does not justify denial of the PSD permit application because “the limited information provided by the commenter does not demonstrate that the minor source project is a preferable demonstrated alternative to the major source project.” *Id.* at 101. In support, OAR explains that “the Project for which the applicant is seeking a minor source permit from the District is essentially the same as the Project for which the applicant is seeking a major source permit from EPA” and that “the equipment emitting NO_x from the minor source project would have the same permitted hourly emission rates.” *Id.* at 100.

The Petition for Rob Simpson does not meet the threshold requirements for review and should be denied on that basis alone. The Petition provides no references to documents or page numbers to demonstrate that this issue was raised during the comment period. Further, the Petition does not identify, with page citations, where in the response to comments that OAR responded to the comments. Even if Petitioner could show that he raised this issue or that he can now allege error on the basis of comments prepared by others, he does not demonstrate any clear error in OAR’s response to the comments on this issue submitted by another party. OAR provided a reasoned explanation as to why it was preferable for EPA to defer to California state agencies that are authorized to consider “need” in various contexts. RTC at 16-19. Petitioner does not demonstrate any error in OAR’s observation that “[v]arious mechanisms are in place within the State of

California to provide a structure for considering the need for new natural-gas fired power plants.” RTC at 17.

CONCLUSION

WHEREFORE, for the reasons set forth above, OAR requests that the Board deny the Petitions for Review. In light of the District Court Order establishing an August 27, 2011 deadline for final agency action on this permit (Exhibit A), OAR requests the Board issue an order denying review by Thursday, August 25, 2011 to afford OAR sufficient time before close of business on Friday, August 26 to issue a final permit decision in accordance with 40 C.F.R. 124.19(f). To the extent the Board does not deny review on all issues, OAR requests that the Board’s order specify a remedy that enables OAR to grant or deny the APC permit application by August 27 and to complete any remedial actions the Board determines are necessary to take final agency action by that date.

Date: July 11, 2011

Respectfully submitted,



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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that this Response to Petitions for Review by EPA Office of Air and Radiation contains 14,385 words, as calculated using Microsoft Word word processing software.



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CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Response to Petitions for Review by EPA Office of Air and Radiation was served on the following persons by U.S. Mail and electronic mail (to the extent an email is provided below).

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