IN RE ENERGY ANSWERS ARECIBO, LLC (ARECIBO PUERTO RICO RENEWABLE ENERGY PROJECT)

PSD Appeal Nos. 13-05 through 13-09

ORDER REMANDING IN PART AND DENYING REVIEW IN PART

Decided March 25, 2014

Syllabus

This matter involves five petitions seeking review of a Clean Air Act Prevention of Significant Deterioration ("PSD") permit ("Permit") that the U.S. Environmental Protection Agency ("EPA" or "Agency") Region 2 ("Region") issued to Energy Answers Arecibo, LLC ("Energy Answers" or "Permittee") on June 11, 2013. The Permit authorizes Energy Answers to construct and operate a new resource recovery facility in Arecibo, Puerto Rico.

Petitioners raise numerous issues challenging various aspects of the permit decision including the Permit's scope, the Region's environmental justice consideration, the Region's compliance with the public participation requirements of the PSD permitting program, the content of the Administrative Record, and the Region's substantive consideration of the Permit, including specific Permit conditions.

Held: The Board remands the Permit for the limited purpose of including regulation of biogenic greenhouse gas emissions and does not require the Region to reopen the Permit for public comment. The Board denies the Petitions for Review on all other grounds. The Board's most significant holdings are summarized below:

A. Issues concerning the Permit's scope and the Region's environmental justice consideration:

- Exclusion of Lead. The Region properly excluded lead emissions from the PSD permitting process because the municipality of Arecibo has been designated as a nonattainment area for lead, and thus, lead emissions are not subject to the PSD process. The Board also concludes that the questions Petitioners raised regarding the applicability of the nonattainment New Source Review permitting program to the proposed facility lie outside the Board's authority to decide.

- Biogenic Greenhouse Gas Emissions. The Board remands the Permit for the limited purpose of including regulation of biogenic greenhouse gas emissions consistent with the Region's proposed revisions in its Motion for Limited Voluntary Remand. Additionally, the Board concludes that the proposed Permit amendments will not result in any change to the control technology selected or the facility's total CO_2 emissions (both biogenic and non-biogenic), on which the public was given ample opportunity to review and comment. Accordingly, based on the facts of this case, the Board does not require the Region to reopen the Permit for public comments.

- Consideration of Environmental Justice Implications. The Region thoroughly evaluated the Environmental Justice implications of the proposed facility, including the impact of its lead emissions, the neighboring Battery Recycling facility, and alternatives to the proposed project.

B. Issues concerning compliance with the public participation requirements of the PSD permitting program:

- Notice of Draft Permit. The public notices complied with all applicable regulatory requirements and informed the public of the scope of the Permit. The fact that a criteria pollutant will not be regulated by a permit is information that is not required in the public notice of a Draft Permit. Rather, such information is typically found in the Fact Sheet, as was the case here.

- Opportunity to Consider the Draft Permit and to File Permit Appeal. The Region provided the public with ample opportunity to consider the Draft Permit and to file a permit appeal, and the Region exceeded the applicable requirements for public participation under the Clean Air Act, EPA's implementing regulations, and EPA policy. The public comment period for this permit exceeded the time granted in most permit proceedings: the Region held six public hearings and two availability sessions with simultaneous English and Spanish translations each, and translated relevant permit documents into Spanish.

- Availability of Administrative Record. Permit issuers are not required to post the administrative record of a permit proceeding online; a permit issuer's obligation is to provide physical access to the administrative record. The Region provided access to the Permit record at its offices in both Puerto Rico and New York. Additionally, no harm or prejudice occurred where the most significant documents forming the basis of the Draft Permit were available online and the Region notified commenters and the general public that the Final Permit decision and the Response to Comments document were available online at the Region's website.

C. Summary of most significant remaining issues:

- Content of Administrative Record. Information allegedly missing from the record, such as the Region's rationale for issuing the Draft Permit and information pertaining to fugitive emissions and health impacts from ash handling, the intake of water for the cooling tower, and ecological risks to species found in nearby forest and wetlands, was available in the administrative record of the Draft Permit. In addition, the Region explained in the administrative record why the Permit does not evaluate fugitive emissions at the ash disposal site, and Petitioner failed to address these explanations.

- Air Quality Analysis. The air quality analysis considered pollutant emissions from nearby sources and existing air quality. Petitioners failed to demonstrate clear error in the Region's determination that the meteorological data used in the air quality analysis was *spatially* or *temporally* representative.

- Challenged Permit Conditions. The Board defers to the Region's technical judgment on how often a permittee should conduct a combustion demonstration period or perform inspections of roadways and parking areas, and how best to demonstrate compliance with permit requirements.

Before Environmental Appeals Judges Leslye M. Fraser, Catherine R. McCabe, and Kathie A. Stein.

Opinion of the Board by Judge Stein:

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I. *STATEMENT OF THE CASE*

In this decision, the Environmental Appeals Board ("Board") considers five petitions for review of a Clean Air Act Prevention of Significant Deterioration ("PSD") permit ("Permit") that the U.S. Environmental Protection Agency ("EPA" or "Agency") Region 2 ("Region") issued to Energy Answers Arecibo, LLC ("Energy Answers" or "Permittee") on June 11, 2013. Petitioners include the Coalition of Organizations Against Incinerators (La Coalición de Organizaciones Anti-Incineración) ("Coalition"); Ms. Eliza Llenza; Ms. Martha Quiñones; Ms. Cristina Galán; and, filing jointly, Mr. Waldemar Flores and Ms. Aleida Centeno. The Permit authorizes Energy Answers to construct and operate a new resource recovery facility in Arecibo, Puerto Rico ("Energy Answers facility" or "proposed facility"), utilizing two 1,050 tons per day (each) refuse-derived fuel municipal waste combustors, a 77-megawatt steam turbine electrical generator, and ancillary equipment. Petitioners challenge many aspects of the final permit decision. Most notably, Petitioners argue that the Region excluded lead emissions and biogenic greenhouse gases from regulation in the Permit, improperly considered the environmental justice implications of the proposed facility, failed to comply with public participation requirements, and failed to make the administrative record appropriately available. Petitioners also challenge the content of the administrative record, the Region's permit analysis, and specific Permit conditions.

Both the Region and Energy Answers responded to the petitions. On November 14, 2013, the Region filed a Motion for Limited Voluntary Remand to allow it to amend the Permit to include regulation of biogenic greenhouse gases. For the reasons set forth fully below, the Board denies the petitions for review in nearly all respects. In doing so, the Board concludes the Region has in many places gone above and beyond what the statutes and regulations require with respect to its public outreach and consideration of environmental justice. The Board remands the Permit for the limited purpose of including regulation of biogenic greenhouse gas emissions. The Region is not required to reopen the Permit for public comment on remand.

II. *ISSUES ON APPEAL*

The five petitions filed in this matter present the following issues for Board resolution:

A. Issues concerning the Permit's scope and the Region's environmental justice consideration:

1. Did the Region clearly err when it determined that, because lead is a nonattainment pollutant for Arecibo, lead emissions would not be regulated in the Permit?

2. Did the Region clearly err in excluding biogenic greenhouse gas emissions from regulation in the Permit?

3. Did the Region appropriately evaluate the environmental justice implications of the proposed facility?

B. Issues concerning compliance with the public participation requirements of the PSD permitting program:

1. Did the Region appropriately provide notice of the Draft Permit and inform the public about the scope of the Permit?

2. Did the Region give the public sufficient opportunity to consider the Draft Permit and to file a permit appeal?

3. Did Ms. Llenza demonstrate that the Region failed to make the administrative record of the Draft Permit and final permit decision appropriately available?

C. Issues concerning the content of the administrative record:

1. Does the record reflect the Region's rationale for issuing the Permit?

2. Does the record provide adequate information about ash handling, ash disposal, and emissions from ash handling and associated health impacts?

3. Does the record provide adequate information about the intake of water for, and fugitive emissions at, the cooling tower, and has Ms. Quiñones demonstrated that the issue concerning fugitive emissions at the pump station was preserved for Board review?

4. Does the record provide sufficient information about the ecological risks to species found nearby?

D. Issues concerning the Region's substantive consideration of the Permit and specific Permit conditions:

1. Have petitioners demonstrated the Region clearly erred in the air quality analysis?

2. Have Co-Petitioners Flores and Centeno demonstrated the Region clearly erred by allowing the Permittee to demonstrate compliance with Permit conditions VII.E.1.a and VII.C.1 using supplier certification, and by requiring only one combustion demonstration period in condition VIII.A.4 and inspections of roadways and parking areas once a day in condition VII.G.1.c?

3. Has the Coalition demonstrated that the Region was required to conduct a materials balance analysis in the course of considering the Permit?

4. Did the Region take into account "Malfunctions, System Failures, and Breakdowns" in its decisionmaking?

III. *PRINCIPLES GUIDING BOARD REVIEW*

Section 124.19 of Title 40 of the Code of Federal Regulations governs Board review of a PSD permit. In any appeal from a permit decision issued under part 124, the petitioner bears the burden of demonstrating that review is warranted. *See* 40 C.F.R. § 124.19(a)(4).

A. *Standard of Review*

Under 40 C.F.R. § 124.19, the Board has discretion to grant or deny review of a permit decision. *See In re Avenal Power Ctr., LLC*, 15 E.A.D. 384, 394-95 (EAB 2011) (citing Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)), *appeal docketed sub nom. Sierra Club v. EPA*, No. 11-73342 (9th Cir. Nov. 3, 2011). Ordinarily, the Board will deny review of a permit decision and thus not remand it unless the permit decision either is based on a clearly erroneous finding of fact or conclusion of law, or involves a matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a)(4)(i)(A)-(B); *accord, e.g., In re Prairie State Generating Co.*, 13 E.A.D. 1, 10 (EAB 2006), *aff'd sub. nom Sierra Club v. U.S. EPA*, 499 F.3d 653 (7th Cir. 2007); *see also* Revisions to Procedural Rules Applicable in Permit Appeals, 78 Fed. Reg. 5,280, 5,281 (Jan. 25, 2013). In considering whether to grant or deny review of a permit decision, the Board is guided by the preamble to the regulations authorizing appeal under part 124, in

which the Agency stated that the Board's power to grant review "should be only sparingly exercised" and that "most permit conditions should be finally determined at the [permit issuer's] level." 45 Fed. Reg. at 33,412; *see also* 78 Fed. Reg. at 5,281.

When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit to determine whether the permit issuer exercised his or her "considered judgment." *See, e.g., In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 191, 224-25 (EAB 2000); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997). The permit issuer must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied upon when reaching its conclusion. *E.g., In re Shell Offshore, Inc.* ("*Shell Offshore 2007*"), 13 E.A.D. 357, 386 (EAB 2007). As a whole, the record must demonstrate that the permit issuer "duly considered the issues raised in the comments" and ultimately adopted an approach that "is rational in light of all information in the record." *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002); *accord In re City of Moscow*, 10 E.A.D. 135, 142 (EAB 2001); *In re NE Hub Partners, LP*, 7 E.A.D. 561, 567-68 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3d Cir. 1999). On matters that are fundamentally technical or scientific in nature, the Board typically will defer to a permit issuer's technical expertise and experience, as long as the permit issuer adequately explains its rationale and supports its reasoning in the administrative record. *See In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 510, 560-62, 645-47, 668, 670-74 (EAB 2006); *see also, e.g., In re Russell City Energy Ctr. ("Russell City II")*, 15 E.A.D. 1, 29-32. 66 (EAB 2010), *petition denied sub nom. Chabot-Las Positas Cmty. Coll. Dist. v. EPA*, 482 F. App'x 219 (9th Cir. 2012); *NE Hub,* 7 E.A.D. at 570-71.

B. *Petitioners' Burden on Appeal, Including Threshold Requirements*

In considering a petition filed under 40 C.F.R. § 124.19(a), the Board first evaluates whether the petitioner has met threshold procedural requirements such as timeliness, standing, issue preservation, and specificity. *See* 40 C.F.R. § 124.19; *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006). To meet the issue preservation requirement, a petitioner must demonstrate that the issues and arguments it raises on appeal have been preserved for Board review (i.e., were raised during the public comment period or public hearing on the draft permit), unless the issues or arguments were not reasonably ascertainable at the time. 40 C.F.R. §§ 124.13, .19(a)(4)(ii); *see, e.g., In re City of Attleboro*, 14 E.A.D. 398, 405-06, 444 (EAB 2009); *In re City of Moscow*, 10 E.A.D. 135, 141, 149-50 (EAB 2001). If a petitioner satisfies all threshold procedural obligations, the Board then

evaluates the substance of the permit to determine whether remand is warranted. *Indeck-Elwood*, 13 E.A.D. at 143.

As noted above, in any appeal from a permit under part 124, the petitioner bears the burden of demonstrating that review is warranted. Thus, to the extent a petitioner challenges an issue the permit issuer addressed in its responses to comments, the petitioner must provide a record citation to the comment and response and also must *explain why* the permit issuer's previous response to those comments was clearly erroneous or otherwise warrants review.[1] 40 C.F.R. § 124.19(a)(4)(ii); *see, e.g., In re Teck Cominco Alaska, Inc.*, 11 E.A.D. 457, 494-95 (EAB 2004); *In re Westborough*, 10 E.A.D. 297, 305, 311-12 (EAB 2002); *In re City of Irving*, 10 E.A.D. 111, 129-30 (EAB 2001), *review denied sub nom. City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003). The Board consistently has denied review of petitions that merely cite, attach, incorporate, or reiterate comments previously submitted on the draft permit. *E.g.*, *In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review), *aff'd,* 614 F.3d 7, 11-13 (1st Cir. 2010); *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 Hadson Power 14*, 4 E.A.D. 258, 294-95 (EAB 1992) (denying review where petitioners merely reiterated comments on draft permit and attached a copy of their comments without addressing permit issuer's responses to comments).

When a person unrepresented by legal counsel files an petition, as is the case with many of the petitioners in this matter, the Board endeavors to liberally

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[1] Federal circuit courts of appeal have upheld this Board requirement that a petitioner must substantively confront the permit issuer's response to the petitioner's previous objections. *City of Pittsfield v. EPA*, 614 F.3d 7, 11-13 (1st Cir. 2010), *aff'g In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review); *Mich. Dep't of Envtl. Quality v. EPA*, 318 F.3d 705, 708 (6th Cir. 2003) ("[Petitioner] simply repackag[ing] its comments and the EPA's response as unmediated appendices to its Petition to the Board * * * does not satisfy the burden of showing entitlement to review."), *aff'g In re Wastewater Treatment Fac. of Union Twp.*, NPDES Appeal Nos. 00-26 & 00-28 (EAB Jan. 23, 2001) (Order Denying Petitions for Review); *LeBlanc v. EPA*, No. 08-3049, at 9 (6th Cir. Feb. 12, 2009) (concluding that the Board correctly found petitioners to have procedurally defaulted where petitioners merely restated "grievances" without offering reasons why the permit issuer's responses were clearly erroneous or otherwise warranted review), *aff'g In re Core Energy, LLC*, UIC Appeal No. 07-02 (EAB Dec. 19, 2007) (Order Denying Review).

construe the petitions to fairly identify the substance of the arguments being raised. *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999); *see also In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254, 292 n.26 (EAB 2005); *In re Envotech, LP*, 6 E.A.D. 260, 268 (EAB 1996). While the Board "does not expect such petitions to contain sophisticated legal arguments or to employ precise technical or legal terms," the Board nevertheless "does expect such petitions to provide sufficient specificity to apprise the Board of the issues being raised." *Sutter Power Plant*, 8 E.A.D. at 687-88; *accord In re P.R. Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995). "The Board also expects the petitions to articulate some supportable reason or reasons as to why the permitting authority erred or why review is otherwise warranted." *Sutter Power Plant*, 8 E.A.D. at 688; *accord In re Beckman Prod. Servs.*, 5 E.A.D. 10, 19 (EAB 1994). Thus, the burden of demonstrating that review is warranted still rests with the petitioner challenging the permit decision. *In re New Eng. Plating Co.*, 9 E.A.D. 726, 730 (EAB 2001); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 249-50 (EAB 1999).

IV. *PROCEDURAL AND FACTUAL HISTORY*

The Region issued the draft permit to Energy Answers and opened the public comment period on or about May 15, 2012. *See* U.S. EPA Region 2, Draft Permit Conditions (May 2012) (Administrative Record ("A.R.") IV.2) [hereinafter Draft Permit]. The public comment period was scheduled to last 45 days, but due to significant public interest, the Region extended the comment period another 59 days, for a total of 105 days.[2] The public comment period closed on August 27, 2012. The Region also held six public hearings between June and August 2012, which the Region conducted in Spanish with simultaneous English translation. U.S. EPA Region 2, Responses to Public Comments on the Clean Air Act Prevention of Significant Deterioration of Air Quality Draft Permit for Energy Answers Arecibo, LLC, Arecibo Puerto Rico Renewable Energy Project, at 5 (June 11, 2013) (A.R. V.3) [hereinafter RTC].

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[2] The Region issued multiple public notices. *See* First Public Notice English and Spanish (May 2012) (A.R. IV.6-.7); El Vocero Press-Spanish Ad Copy of First Public Notice (May 15, 2012) (A.R. IV.8); El Norte Press-Spanish-Ad Copy of First Public Notice (May 9, 2012) (A.R. IV.9) (collectively "First Public Notices"); *see also* Second Public Notice (English) (July 19, 2012) (A.R. IV.14); Second Public Notice (Spanish) (July 23, 2012) (A.R. IV.15); El Vocero Press-Spanish Ad Copy of Second Public Notice (July 23, 2012) (A.R. IV.17) (collectively "Second Public Notices").

In addition, the Region held a public availability session on May 25, 2012.[3] *Id.* The public availability session, which is not required by EPA regulations, provided the public with an informal opportunity to ask questions and learn about the Draft Permit. *Id*. In total, the Region received 1,100 written comments and heard more than 90 verbal testimonials from 3,280 commenters. *Id*.

On June 11, 2013, the Region issued the final permit decision and the Response to Comments document. The Region provided personal notice of the final permit decision to those who had commented on the Draft Permit and had provided the Region with adequate contact information. Interested Parties Final Permit Notification Letters (June 11, 2013) (A.R. V.7). Both documents were available online; the Response to Comments was translated into Spanish. *See* EPA News Release English and Spanish (June 11, 2013) (A.R. V.5-.6) (providing link to Response to Comments document). As noted above and throughout this decision, the Region translated many of the record documents into Spanish and provided Spanish interpretation at many of the public hearings. Although this is consistent with the Region's long-standing Policy on Translations and Interpretations (Dec. 10, 1997), which recognizes that Spanish is the official language of Puerto Rico and the "first" language of most of its citizens, these additional steps are not required by statute, regulation, or the Executive Order on Environmental Justice. *See* Region's Resp. to Motion for Extension of Time to File Pet., ex. A (Jul. 9, 2013). As such, these actions are illustrative of the extensive public outreach efforts that the Region took in this Permit proceeding.

Between July 12, 2013, and July 23, 2013, the Board received the five above-described petitions for review.[4] Substantive briefing for this appeal,

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[3] This was the second public availability session the Region held in connection with this Permit. The Region held an earlier public availability session shortly after Energy Answers submitted the initial PSD permit application to "allow [the permit issuer] to hear the concerns of the public at the outset so that they may be addressed to the extent possible in the application." RTC at 105.

[4] The original appeal deadline was July 15, 2013. On motion from the Coalition, the Board extended that deadline to July 22, 2013. *See* Order Granting in Part Extension of Time to File Petition for Review (July 11, 2013). For the reasons stated in the Board's July 31, 2013 Order on Timeliness of Petitions Filed and Denying Region's Motion to Dismiss, the Board considers all five petitions timely filed.

including briefing on the Region's Motion for Limited Voluntary Remand, was complete on December 6, 2013.[5]

V. *PENDING MOTIONS*

Three motions remain pending before the Board. On November 14, 2013, the Region filed a Motion for Limited Voluntary Remand, which the Board addresses below in Part VII.B.2. Petitioner Centeno filed a motion on December 3, 2013, in which she seeks a Board order requiring the Region to serve the Administrative Record Index on Petitioner Centeno. *See* Informative Motion and to Request Documents (Dec. 3, 2013) (Docket No. 29). That motion became moot when the Region served a copy of the Administrative Record Index on Petitioners Flores and Centeno. *See* Permit Issuer's Notice of Certificate of Service (Supplemental) for Administrative Record Index (Dec. 6, 2013) (Docket No. 30).

The third pending motion is the Coalition's motion for leave to file a short reply pursuant to 40 C.F.R. § 124.19(c)(1). *See* Coalition's Motion for Submission of a Reply (Aug. 26, 2013) (Docket No. 22). Energy Answers opposed the motion. *See* Energy Answers' Opposition to Coalition's Motion for Leave to Submit a Reply (Sept. 10, 2013) (Docket No. 23). The Board applies a presumption against the filing of a reply in a PSD appeal. *See* 40 C.F.R. § 124.19(c)(1). This presumption was established "to facilitate [the] expeditious resolution of NSR appeals, while simultaneously giving fair consideration to the issues raised in any given matter." 78 Fed. Reg. at 5,283. A party may overcome this presumption if the reply responds to arguments made in response briefs to which the party has not previously had the opportunity to respond. *See In re Pio Pico Energy Ctr.,* 16 E.A.D. 56, 70-71 (EAB 2013). In this matter, the Board concludes that the Coalition's short reply responds directly to arguments the Region and Energy Answers made in their responses to the petitions, and that allowing the Coalition's reply in this instance will not frustrate the purpose of the presumption. *See* Reply to Responses of EPA Region 2 and Energy Answers ("Coalition's Reply") (Attachment 1 to Coalition's Motion for Submission of Reply (Aug. 26, 2013)).

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[5] As discussed in Part V below, the Coalition filed a motion seeking leave to file a reply brief, which Energy Answers opposed. That motion was fully briefed on September 24, 2013. *See* Part V, below. Due to a lapse in appropriations, the U.S. government was partially shut down from October 1, 2013, through October 16, 2013, reopening October 17, 2013. The Board was closed during the shutdown, as was the majority of EPA. On November 14, 2013, the Region submitted its Motion for Limited Voluntary Remand, to which Energy Answers, the Coalition, and Petitioner Centeno responded. The Region filed a reply to those responses on December 6, 2013.

Therefore, the Board grants the Coalition's motion and considers the Coalition's Reply in the course of deciding this matter.[6]

VI. *RELEVANT STATUTORY AND REGULATORY REQUIREMENTS*

When Congress enacted the Clean Air Act, it sought "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." Clean Air Act ("CAA") § 101, 42 U.S.C. § 7401. To that end, Congress established a comprehensive regulatory scheme for addressing air pollution through a system of shared federal and state responsibility. *See generally* CAA §§ 101-618, 42 U.S.C. § 7401-7671q. Congress amended the Clean Air Act in 1977 to add detailed permitting programs to address air pollution from new sources prior to construction. CAA Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977).

Air quality standards known as "national ambient air quality standards" or "NAAQS" are central to the Clean Air Act's regulatory scheme. CAA §§ 107-109, 42 U.S.C. §§ 7407-7409. EPA uses the NAAQS to assess the quality of air in any given area to determine whether certain air permitting program(s) and regulations apply. CAA § 107(d), 42 U.S.C. § 7407(d). EPA has established NAAQS on a pollutant-by-pollutant basis, and NAAQS are currently in effect for six air contaminants (commonly referred to as "criteria pollutants"): sulfur oxides (measured as sulfur dioxide ("SO_2")), particulate matter ("PM"), carbon monoxide ("CO"), ozone, nitrogen dioxide ("NO_2"),[7] and – of primary concern in this appeal – lead ("Pb"). CAA § 108(a)(2), 42 U.S.C. § 7408(a)(2); 40 C.F.R. §§ 50.4-.12; *see also In re Amerada Hess Corp.,* 12 E.A.D. 1, 3 n.1 (EAB 2005).

Under the Clean Air Act, EPA classifies geographical areas by whether they meet, or fail to meet, the NAAQS for each of the criteria pollutants. *See* CAA § 107(d), 42 U.S.C. § 7407(d). When an area's air quality is as clean or cleaner than the NAAQS for a particular pollutant (because the concentration of the pollutant meets or falls below the NAAQS), EPA deems the area to be in "attainment" for

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[6] The Coalition also filed a Reply in Support of Motion for Submission of a Reply (Sept. 20, 2014) (Docket No. 24), which the Board has considered only to the extent that it supports the motion for leave to file a reply.

[7] Nitrogen dioxides are generally identified in terms of all oxides of nitrogen ("NO_x"). *See Amerada Hess,* 12 E.A.D. at 3 n.3) (quoting *Ala. Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 470 n.1 (2004)); *see also* Prevention of Significant Deterioration for Nitrogen Oxides, 53 Fed. Reg. 40,656 (Oct. 17, 1988)).

that pollutant. CAA § 107(d)(1)(A)(ii), 42 U.S.C. § 7407(d)(1)(A)(ii); *In re Maui Elec. Co.,* 8 E.A.D. 1, 4 (EAB 1998). In contrast, where the concentration of a pollutant in the ambient air does not meet the NAAQS for that pollutant (because the concentration of the pollutant in the air exceeds the NAAQs), EPA deems the area to be in "nonattainment." CAA § 107 (d)(1)(A)(i), 42 U.S.C. § 7407(d)(1)(A)(i). Where EPA cannot determine air quality based on available information whether air quality meets or does not meet the NAAQS for a particular pollutant, EPA considers the area to be "unclassifiable" with respect to that pollutant. CAA § 107(d)(1)(A)(iii), 42 U.S.C. § 7407(d)(1)(A)(iii). Because EPA classifies areas on a pollutant-by-pollutant basis as being in attainment, in nonattainment, or unclassifiable, EPA may designate a single geographic area as in attainment for one or more of the six criteria pollutants, but as in nonattainment for others. *In re Sutter Power Plant*, 8 E.A.D. 680, 682 n.2 (EAB 1999) (citing Office of Air Quality Planning & Standards, U.S. EPA, *New Source Review Workshop Manual* 4 (draft Oct. 1990) ("*NSR Manual*")).

The Clean Air Act's regulatory structure includes two separate permitting programs designed to address potential air pollution stemming from the construction of new major stationary sources of air pollution (or from major modification to existing sources of air pollution) by requiring appropriate permits to be obtained prior to construction. These preconstruction permitting programs are more commonly known as new source review or "NSR" programs. *See NSR Manual* at 4. Whether an NSR program applies to a proposed source is based, in part, on whether the area where the proposed source will be located is in a geographical area designated as "attainment," "nonattainment," or "unclassifiable."[8]

[8] Determining whether an NSR program applies is based not only on the designation of the geographical area (attainment, nonattainment, or unclassified), but also on whether the proposed project meets certain other applicability thresholds. For example, in determining the applicability of the PSD program, the permitting authority must determine whether the project is sufficiently large (in terms of emissions) to be "major." *NSR Manual* at A.1; *see also* CAA §§ 165(a), 169(1), 42 U.S.C. §§ 7475(a), 7479(1) (applying PSD preconstruction requirements to "major emitting facilities" based on their potential to emit). The threshold for municipal incinerators, such as the one Energy Answers proposes, is having the potential to emit 100 tons per year or more of any "regulated NSR pollutant," as such pollutants are defined in 40 C.F.R. § 52.21(b)(50). 40 C.F.R. § 52.21(b)(1)(i)(*a*); *see also NSR Manual* at A.1, A.11. Additionally, the permitting authority considers whether the pollutants to be emitted are subject to PSD permitting. *NSR Manual* at A.2. Nonattainment NSR ("NNSR") permitting has its own applicability

The prevention of significant deterioration of air quality (or PSD) program potentially applies to NSR permitting of sources that are proposed to be located in areas deemed to be in "attainment" with the NAAQS or in areas deemed as "unclassifiable." CAA § 161; 42 U.S.C. § 7471. The PSD program requirements are set forth in Part C of the Clean Air Act, CAA §§ 160-169B, 42 U.S.C. §§ 7470-7492. Typically, state or local permitting authorities implement the PSD program, either according to a PSD program that EPA has approved as part of a State Implementation Plan ("SIP") required under Clean Air Act § 110, or under an agreement whereby EPA delegates federal PSD program authority to the state. *See In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 131 (EAB 2006). Where, as in Puerto Rico, no SIP has been approved and EPA has not delegated its authority to implement the federal PSD program, EPA is the permitting authority for the federal PSD permitting program. *See* 40 C.F.R. §§ 52.21(a)(1), (a)(2)(iii), 52.2729; Part 52 – Approval and Promulgation of State Implementation Plans, 43 Fed. Reg. 26,388, 26,410 (Jun. 19, 1978).

The "plan requirements for nonattainment areas" (also referred to as the nonattainment new source review, or NNSR, program) potentially apply to permitting of sources that are proposed to be located in nonattainment areas. The NNSR program requirements are set forth in Part D of the Clean Air Act, CAA § 171-193, 42 U.S.C. §§ 7501-7515. The Puerto Rico Environmental Quality Board ("PREQB") serves as the authorized permitting authority for the NNSR permitting program in Puerto Rico. *See* 40 C.F.R. § 52.2722 (indicating approval of Puerto Rico SIP as satisfying all requirements of Part D of the Clean Air Act); Air Quality Designations for the 2008 Lead (Pb) National Ambient Air Quality Standards, 76 Fed. Reg. 72,097, 72,119 (Nov. 22, 2011) (designating Arecibo, Puerto Rico as in nonattainment for lead).

New or modified facilities to be constructed in areas that are designated as being in attainment for one or more of the NAAQS pollutants, but as in nonattainment with other NAAQS pollutants, are potentially subject to the requirements of *both* permitting programs. *See Coal. for Responsible Regulation v. EPA*, 684 F.3d 102, 132 (D.C. Cir. 2012) ("It bears emphasis that attainment classifications are pollutant-specific: depending on the levels of each NAAQS pollutant in an area, a region can be designated as in attainment for NAAQS pollutant A, but in nonattainment for NAAQS pollutant B" and may be subject to both permitting programs)*; Sutter Power Plant,* 8 E.A.D. at 682 n.2; *see also NSR*

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thresholds. *See, e.g., NSR Manual* at F.7; *see also* 40 C.F.R. § 51.165(a)(2) (setting forth the applicability provisions for NNSR programs).

Manual at A.2 ("A source's location can be attainment or unclassified for some pollutants and simultaneously nonattainment for others"), 4 ("a source may have to obtain both PSD and [NNSR] permits if the source is [proposed to be located] in an area which is designated nonattainment for one or more of the pollutants.").

VII. *ANALYSIS*

The five petitions filed in this matter raise a number of issues, some of which overlap. For ease of discussion, the Board first considers the threshold matter of whether petitioners have demonstrated that the issues and arguments they raise were adequately preserved for review. The Board then considers overarching issues concerning the Permit's scope, specifically the Region's exclusion of lead emissions and biogenic greenhouse gases from regulation in the Permit, as well as the Region's consideration of environmental justice. Next, the Board considers whether the Region complied with public participation requirements of the PSD permitting program. The Board then evaluates issues concerning the availability and content of the administrative record. Finally, the Board addresses all other issues relating to the Region's substantive consideration of the Permit, as well as various challenges to specific permit conditions. Ultimately, for the reasons stated below, the Board remands the Permit to the Region for the limited purpose of including regulation of biogenic greenhouse gases. The Board denies the petitions for review on all other grounds.

A. *Threshold Question of Issue Preservation*

As a preliminary matter, the Board addresses the threshold question of whether petitioners have met their obligation to demonstrate that the arguments they raise on appeal were preserved for Board review. Section 124.19, which governs appeals of final permit decisions, requires as follows:

> Petitioners *must demonstrate, by providing specific citation to the administrative record, including the document name and page number*, that each issue being raised in the petition was raised during the public comment period (including any public hearing) to the extent required by § 124.13. *For each issue raised [on appeal] that was not raised previously, the petition must explain why such issues were not required to be raised* during the public comment period as provided in § 124.13.[9]

[9] 40 C.F.R. § 124.13 provides that "[a]ll persons, including applicants, who believe any condition of a draft permit is inappropriate * * * must raise *all reasonably*

40 C.F.R. § 124.19(a)(4)(ii) (emphasis added).

The requirement that petitioners first raise an issue during the public comment period, and not for the first time on appeal, ensures that the permitting authority has an opportunity to address potential problems with the draft permit before the permit becomes final. This allows the permit issuer to "make timely and appropriate adjustments to the permit determination, or, if no adjustments are made, to explain why none are necessary." *In re Union Cnty. Res. Recovery Facility,* 3 E.A.D. 455, 456 (Adm'r 1990); *see also In re New Eng. Plating Co.,* 9 E.A.D. 726, 732 (EAB 2001). Adhering to this requirement also serves to promote "the Agency's longstanding policy that most permit issues * * * be resolved at the [permitting authority] level, and to provide predictability and finality to the permitting process." *New Eng. Plating*, 9 E.A.D. at 732. Consequently, the Board consistently has declined to consider issues that were not preserved for Board review, unless the issues or arguments were not reasonably ascertainable. *See, e.g., In re Pio Pico Energy Ctr*., 16 E.A.D. 56, 146 n.83 (EAB 2013) (noting that the Board may decline to consider an issue which was not preserved); *In re Prairie State Generating Co.*, 13 E.A.D. 1, 45 n.41 (EAB 2006), *aff'd sub. nom Sierra Club v. U.S. EPA*, 499 F.3d 653 (7th Cir. 2007) (allowing issue not raised during the public comment period to be raised for the first time on appeal because permit issuer's analysis was not provided in the record prior to the public comment period and, therefore, the issue was not reasonably ascertainable at the time).

To ensure that the Board examines the merits of an issue, a petitioner must demonstrate, that the issue was raised (by providing specific citation to the administrative record) or explain why the issue was not reasonably ascertainable. 40 C.F.R. § 124.19 (a)(4)(ii). The Board is not obligated to scour the administrative record to determine whether an issue was properly preserved for Board review. *See, e.g., In re City of Palmdale*, 15 E.A.D. 700, 722 (EAB 2012); *In re ConocoPhillips Co.*, 13 E.A.D. 796, 801 (EAB 2008).

In this case, none of the petitioners have fully complied with the requirement in 40 C.F.R. § 124.19(a)(4)(ii) to "provide specific citation to the administrative record, including the document name and page number" for "each issue being raised in the petition." The Coalition attempts to comply with the rule by providing two pages of citations to the record under the heading of "Threshold Procedural Requirements," but the Coalition makes no effort to tie those citations to the specific issues or arguments made in their petition. *See* Coalition Pet. at 8-9

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ascertainable issues and submit *all reasonably available arguments* supporting their position by the close of the public comment period * * *." (Emphasis added.)

(providing citations for the very general issues of "lead emissions," "lead pollution," "material balance," and "air toxics," without tying these citations to the arguments made in its brief). The remaining petitioners, all of which filed their petitions pro se, establish their standing to petition by asserting they participated below, but none identify specifically where in the record the issues they present were raised. Thus, the Board would be well within its discretion to decline to review these petitions in their entirety.

The Board, however, in its discretion, has determined it will not summarily dispose of any petition in this appeal on issue preservation grounds alone. Rather, the Board recognizes, based on the Region's and Energy Answers' briefs, as well as the Response to Comments document, that many of the broader issues the petitions raise were in fact raised below. Some of the issues on appeal stem from the Region's responses to comments and, in some instances, the Region has responded extensively to these issues. Thus, the Board will address the issues that commenters raised below, as well as issues that are very closely related to the issues that were raised below, particularly where it is clear that the Region took the opportunity to address them in the Responses to Comments document.[10] The Board, however, will decline to consider arguments that could have been raised below but were not if the Region did not have the opportunity to address them in the Responses to Comments document.

B. *The Permit's Scope and the Region's Environmental Justice Consideration*

The petitions in this case present three overarching issues that concern the scope of the Permit or that underlie many of the other concerns raised. Thus, the Board begins its analysis by considering these three issues: the Region's determinations with respect to lead emissions, the Region's exclusion of biogenic greenhouse gases, and the Region's environmental justice consideration.

1. *Petitioners Have Not Demonstrated the Board Should Remand the Region's Determinations Regarding Lead Emissions*

Petitioners raise many questions about the Region's decision not to regulate lead emissions in this PSD Permit. For the reasons stated below, the Board

[10] In limited circumstances, the Board has considered the merits of an issue not specifically raised in comments below where the specific issue raised in the petition is "very closely related" to a challenge raised during the comment period, and the Region had the opportunity to address the concern in its response to comments. *New England Plating,* 9 E.A.D. at 732-33; *In re Ecoeléctrica, LP*, 7 E.A.D. 56, 64 n.9 (EAB 1997); *In re P.R. Elec. Power Auth*., 6 E.A.D. 253, 257 n.5 (EAB 1995).

determines that the Region properly excluded lead emissions from the PSD permitting process because the municipality of Arecibo has been designated as a nonattainment area for lead. Additionally, as explained below, the Board determines that the Coalition's arguments concerning NNSR applicability lie outside the Board's authority to decide.

a. *The Region Properly Excluded Lead Emissions from Regulation in the Energy Answers Arecibo PSD Permitting Process*

In this appeal, the Coalition argues that the Region should have regulated lead emissions in the PSD Permit because lead is subject to regulation under the PSD program and exempting lead emissions from PSD permitting contravenes the statute.[11] *See* Coalition Pet. at 10-11. As stated previously, the Energy Answers facility is proposed to be located in Arecibo, Puerto Rico. Petitioners do not dispute that the Arecibo area is designated as being in attainment for all of the NAAQS pollutants except for lead; Arecibo is designated as being in nonattainment for lead. *See* 40 C.F.R. § 81.355; *see also* 76 Fed. Reg. at 72,119; Region's Resp. Br. at 4; Llenza Br. at 1; Coalition Pet. at 4. Thus, the question the Board must resolve is whether the Region properly excluded lead emissions from PSD permitting where the new source is proposed to be located in an area that is deemed to be in nonattainment for lead.

It is well-established that nonattainment pollutants are excluded from PSD permitting. *See Chabot-Las Positas Cmty. Coll. Dist. v. EPA*, 482 F. App'x 219, 221 (9th Cir. 2012) (citing *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 472 (2004)), *aff'g Russell City II,* 15 E.A.D. at 89-90. Clean Air Act section 161 makes it clear that PSD requirements under Part C are aimed to prevent the significant deterioration of air quality in areas that are designated as being in attainment or unclassifiable. 42 U.S.C. § 7471. Clean Air Act section 165(a), in turn, restricts PSD permitting to facilities located in areas to which Part C applies. 42 U.S.C. § 7475(a). The U.S. Circuit Court of Appeals for the District of Columbia ("D.C. Circuit") interpreted this language in *Alabama Power Co. v. Costle*, 636 F.2d 323, 365-66 (D.C. Cir. 1979), emphasizing the intended location of the facility as the key limit on PSD applicability. Responding to *Alabama Power*, EPA promulgated regulations implementing Part C of the PSD permitting program in which it specifically exempted "particular pollutant[s]" from the

[11] Petitioner Eliza Llenza and Co-petitioners Flores and Centeno also argue or imply, that the PSD Permit should have regulated lead emissions. *See* Llenza Pet. at 2-4, 8; Flores/Centeno Pet. at 5.

substantive PSD requirements[12] "if the owner or operator demonstrates that, as to that pollutant, the source or modification is located in an area designated as nonattainment." 40 C.F.R. § 52.21(i)(2); *see also* Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 45 Fed. Reg. 52,676, 52,677 (Aug. 7, 1980) ("If a new major stationary source emits pollutants for which the area it locates in is designated nonattainment, then the source is exempt from PSD review for those pollutants."), 52,711-12 (providing an example of the cited proposition). The D.C. Circuit recently acknowledged this exclusion in *Coalition for Responsible Regulation. See* 684 F.3d at 132-33 (explaining that if a major emitting facility will be located in an area that has been deemed in attainment for one criteria pollutant, but in nonattainment for a different criteria pollutant, then "the source must obtain a general PSD permit and must also abide by Part D's more stringent, pollutant-specific requirements for any NAAQS pollutants for which the area is in nonattainment"). Agency guidance incorporates this exclusion as well. *See NSR Manual* at A.25 to .26. The Board also has stated as much. *See In re Hess Newark Energy Ctr.*, PSD Appeal No. 12-02, at 2 n.2 (EAB Nov. 20, 2012) (Order Dismissing Petition) ("Although a single geographic area may be designated as attainment or unclassifiable for one or more of the six criteria pollutants * * *, and as nonattainment for others, the PSD permitting requirements will only apply to the attainment/unclassifiable pollutants in that geographic area.") (citing *Sutter Power Plant*, 8 E.A.D. at 682 n.2); *see also Russell City II,* 15 E.A.D. at 89-90, 94-95.

The Coalition argues that the Agency's exclusion of nonattainment pollutants from PSD permitting contravenes the Clean Air Act. Coalition Pet. at 11. In so arguing, the Coalition, in essence, is challenging the Agency's

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[12] Specifically, 40 C.F.R. § 52.21(i)(2) provides that the "requirements of subsection (j) through (r) [do] not apply to a major stationary source or major modification with respect to a particular pollutant if the owner or operator demonstrates that, as to that pollutant, the source or modification is located in an area designated as nonattainment under section 107 of the Act." Subsections (j) through (r) contain the substantive PSD permitting requirements, including requirements relating to air quality analyses, the selection of BACT, emissions limits and enforcement action for the failure to obtain PSD approval prior to construction. *See* Region's Resp. Br. at 6*; see generally,* 40 C.F.R. § 51.21(j)-(r). Thus, although the Coalition argues that this exemption was not intended to completely exclude the regulation of nonattainment pollutants from PSD permitting review, *see* Coalition Pet. at 11, the Coalition offers no compelling explanation for how a permitting authority could regulate any nonattainment pollutants without the substantive subsections (j) through (r). Moreover, as explained further above, excluding nonattainments from PSD review was precisely what the Agency intended. *See* 45 Fed. Reg. at 52, 677.

implementing regulation – 40 C.F.R. § 52.21(i)(2). The time for challenging that regulation, however, has long since passed. *See* CAA § 307(b), 42 U.S.C. § 7607(b) (limiting challenges to Clean Air Act regulations to petitions for review brought to the designated U.S. Circuit Court of Appeal within 60 days of promulgation); *see also In re Tondu Energy Co.*, 9 E.A.D. 710, 715-16 (EAB 2001) ("As the Board has repeatedly stated, permit appeals are not appropriate fora for challenging Agency regulations."). Absent "'exceptional' circumstances where an 'extremely compelling argument' is made" the Board will not entertain such a challenge. *In re Sierra Pacific Indus.,* 15 E.A.D. 1, 25 (EAB 2013) (noting that "the only [such] circumstance identified by the Board to date" was an invalidated, but not yet repealed, regulation). The Coalition has set forth no such circumstance here.[13]

The Board observes that, even if Arecibo were in attainment for lead, which it is not, the facility would not be subject to lead emissions limits under the PSD permitting program because the facility's potential to emit lead does not exceed the PSD applicability threshold. New major sources are subject to PSD regulation for a particular pollutant only if they have the potential to emit significant amounts of the regulated NSR pollutant. *See* 40 C.F.R. § 52.21(j)(2); *see also NSR Manual* at A.2 (noting that the third criterion of the applicability determination for PSD permitting is determining which pollutants are subject to regulation based on their potential to emit in "significant" amounts). For lead, EPA has determined that a "significant amount" is any amount greater than 0.6 tons per year or "tpy." *See* 40 C.F.R. § 52.21(b)(23)(i). According to the Coalition, the Energy Answers facility has the potential to emit 665.76 pounds per year of lead. *See* Coalition Pet. at 16. Given that 1 ton is equal to 2000 pounds, 665.76 pounds per year of lead is the equivalent of 0.33 tpy (665.76 divided by 2000 equals 0.33), which is less than 0.6

[13] The Coalition argues that this matter presents "an extremely compelling argument" in favor of the Board considering the Coalition's challenge to decades-old regulations. *See* Coalition's Reply at 6-7 (Aug. 26, 2013) (arguing that the Region's interpretations are "illogical and unreasonable" because, under those interpretations, the proposed facility's lead emissions will not be regulated). The Board disagrees. The Coalition's argument rests on the faulty premise that the proposed facility's lead emissions pose a greater lead risk than the nearby Battery Recycling facility (that is widely attributed as having caused the nonattainment problem) and, yet, the proposed facility's lead emissions will not be regulated under either the NNSR or PSD permitting programs. *See id.* at 6-7. Thus, in essence, the Coalition's dispute is not with the underlying regulatory scheme, but with the Region's conclusions regarding the impacts of the proposed facility. The Board will not entertain the Coalition's challenge to the regulations under the circumstances presented.

tpy. Thus, if for the purpose of this discussion only, the Board assumes the Coalition's assertion of the facility's potential to emit lead is correct,[14] the potential to emit lead would not exceed the applicability threshold for PSD permitting. As such, even if the facility were subject to PSD permitting for lead based on a designation of "attainment" or "unclassifiable" for lead, which it is not, the facility's potential to emit lead is not high enough to require PSD regulation of lead emissions.

Additionally, the Board observes that, notwithstanding the nonapplicability of PSD to lead emissions in Arecibo, Energy Answers has taken measures in the PSD permitting process to both model and monitor its lead impacts. *See, e.g.,* RTC 107-08. Moreover, although Energy Answers' lead emissions are not subject to PSD regulation, lead emissions will nonetheless be controlled by the pollution control equipment the Permit requires for the "municipal waste combustor metals," which include lead. *See* Fact Sheet (English) at 13-14 (discussing the pollution control equipment required for municipal waste combustor metals (which includes lead) and identifying the emissions limitation for municipal waste combustor metals); *see also* Permit at 28, 34); RTC at 41.

In sum, as explained above, nonattainment pollutants are exempted from PSD regulation. Because Arecibo is designated as being in nonattainment for lead, the Board concludes that the Region did not err in omitting lead emissions limits from the PSD permit issued for the Energy Answers facility.

b. *NNSR Applicability Lies Outside the Board's Authority*

When explaining that lead emissions would be excluded from the PSD Permit, the Region also observed that because the Arecibo area was in nonattainment for lead, any proposed lead emissions from the proposed facility would be subject to the NNSR permitting program under the authority of the PREQB. *See* RTC at 41 (noting that lead and other specified metals "will be addressed in the State permit issued by [PR]EQB"), 63 ("the State permit issued by PREQB is expected to specifically address [lead and other emissions which are not subject to PSD regulations]"), 75 (stating that lead "will be included in the

[14] The Region, as well as the permit application, indicated that Energy Answers' emissions of lead are projected to be 0.31 tpy, rather than the 0.33 the Coalition asserts. Region's Resp. Br. at 9, 14 n.7 (explaining that the upper limit of Energy Answers' lead emissions is 613.2 lbs/year (or 0.31 tpy) due to the heat input rate limit in the Permit). Regardless which projection is used, the potential to emit does not exceed the PSD applicability threshold for lead.

Commonwealth permit issued by PREQB"). Going one step further, the Region also opined that, under the NNSR program, the proposed emissions of lead from the facility may "fall below the de minimis thresholds for nonattainment regulation." RTC at 58; *see also id.* at 99 ("Energy Answers is not subject to the nonattainment permit regulations since it would have to emit 100 tons per year of lead. Since the facility will emit less than this major source threshold, it is not subject to nonattainment permit requirements."), 108 ("Energy Answers is not subject to the lead nonattainment permit requirements.").[15]

The Coalition questions the Region's assertions regarding the level of lead emissions from the proposed facility, as well as the applicability of NNSR to the proposed facility, and asks the Board to consider and reject the Region's assertions. Coalition Pet. at 21-33. For reasons explained further below, however, the Board does not have authority to consider whether the Region erred with respect to its statements regarding Arecibo's NNSR applicability thresholds.

The authority to administer the NNSR program in Puerto Rico resides with the PREQB, as a duly authorized state program with an approved SIP. *See* 40 C.F.R. § 52.2722 (indicating approval of Puerto Rico SIP as satisfying all requirements of Part D of the Clean Air Act). As such, the PREQB determines whether applicability thresholds for NNSR permitting are or will be met. Moreover, such determinations are not subject to Board review. Rather, as explained in prior decisions, the Board is "a tribunal of limited, not general, jurisdiction." *Hess* at 4; *accord In re State of Hawaii*, NPDES Appeal No. 13-11, at 2 (EAB Nov. 6, 2013) (Order Dismissing Petition for Review); *In re Stevenson*, CWA Appeal No. 11-02, at 4 (EAB Apr. 19, 2011) (Order Dismissing Appeal for Lack of Jurisdiction). Its authority to review permit decisions is "limited by the statutes, regulations, and delegations that authorize and provide standards for such review." *In re DPL Energy Montpelier Elec. Generating Station*, 9 E.A.D. 695, 698 (EAB 2001) (quoting *In re Carlton, Inc. N. Shore Power Plant*, 9 E.A.D. 690, 692 (EAB 2001)). The Board's authority to review permits under Part 124 does not extend to the review of NNSR permits issued under Part D of the Clean Air Act. *See Hess*, at 4-5. Although the Coalition urges the Board to consider and reject the Region's conclusions regarding whether the applicability thresholds of NNSR are

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[15] While these statements seem somewhat conflicting (on the one hand stating that PREQB will regulate lead under NNSR, and on the other hand stating that lead will not be regulated under NNSR), what the Region could have more clearly articulated was that nonattainment pollutants are excluded from the PSD permitting process and are instead regulated under the NNSR program, but only to the extent that the relevant applicability thresholds for the NNSR program are met. *See* note 8, above (citing *NSR Manual* at F.7).

met, Coalition Pet. at 22, 24, the Board may not assert jurisdiction over a matter simply because it has jurisdiction over other types of appeals under the same statute. *See Hess*, at 4-5; *cf. Sutter Power Plant*, 8 E.A.D. at 688; *In re W. Suburban Recycling & Energy Ctr., LP*, 6 E.A.D. 692, 704 (EAB 1996). As such, the Board will not consider whether the Region's statements regarding the level of lead emissions from the proposed facility would be sufficient to trigger NNSR permitting.

The Board observes, however, that the Region's statement with respect to whether minimum thresholds for nonattainment regulation were met did not in any way affect the conditions or validity of the Permit. Nor does the Region's statement alter the authority or responsibility of the PREQB to make its own determination as to whether proposed emissions of lead are subject to nonattainment regulations. The Region's assertions here do not bind PREQB, which must still make its own independent determination. In sum, the Board concludes that the Region's statements regarding whether proposed emissions of lead would meet the applicability threshold for an NNSR permit do not give rise to any error that is reviewable by the Board.

2. *The Board Remands the Permit to the Region for the Limited Purpose of Regulating Biogenic Greenhouse Gas Emissions*

The Region issued the Energy Answers Permit on June 11, 2013. At the time, EPA had in place a "Deferral Rule" that, in essence, deferred regulation of biogenic greenhouse gases ("GHGs") under the PSD program for a period of three years. *See* Deferral for CO_2 Emissions From Bioenergy and Other Biogenic Sources Under the PSD and Title V Programs, 76 Fed. Reg. 43,490 (July 20, 2011); RTC at 36. Consequently, the Region did not include provisions regulating biogenic greenhouse gases. RTC at 36. After the Region issued the Permit, the D.C. Circuit invalidated the Deferral Rule. *See Ctr. for Biological Diversity v. EPA*, 722 F.3d 401 (D.C. Cir. 2013).

The Coalition argues in its petition that, because the D.C. Circuit has invalidated the Deferral Rule, the Board must remand the Permit for a proper consideration of biogenic greenhouse gas emissions. Coalition Pet. at 33-34. The Region now seeks a limited remand on this issue to amend the Permit to include provisions regulating biogenic greenhouse gases. *See* Region 2's Motion for Limited Voluntary Remand (Nov. 14, 2013) ("Region's Motion for Limited Remand").[16] Although the Region seeks to modify the Permit, the Region argues

[16] In response to the petitions, the Region acknowledged the D.C. Circuit Court decisions but noted that the decision was not final because the Court had not yet issued its

that the changes it proposes should not require a reopening of the Permit for public comment. *Id.* at 2. Energy Answers filed a response in support of the Region's Motion for Limited Remand, agreeing that the Region's revision of greenhouse gas emissions limits is appropriate and reasonable under the circumstances, "so long as the limited remand does not pose further delay with respect to the issuance of a truly final permit." Energy Answers Arecibo, LLC's Brief in Support of EPA Region 2's Motion for a Limited Voluntary Remand (Dec. 2, 2013). The Coalition also responded and argues that the Region's proposed revisions "do not impose any meaningful restrictions on the facility's emissions of greenhouse gases" and argues that the Permit should be remanded in its entirety and for all the reasons stated in its petition. *See* Coalition's Response to EPA Region 2's Motion for Limited Voluntary Remand ("Coalition's Resp. to Region's Motion for Limited Remand") at 4 (Nov. 29, 2013). Petitioner Centeno also filed a "response," which is not directly responsive to the changes proposed, but instead argues generally in opposition to the Permit and requests that "the permit be denied for lack of accurate information, lack of scientific bas[is] to impose such limits and the lack [of] application of Rules and Regulations."[17] *See* Centeno Response to EPA Region 2's Motion for Limited Voluntary Remand (Dec. 2, 2013).

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mandate. Region's Resp. Br. at 37. As such, the Region stated it was premature to address the significance of the decision. The Region subsequently filed a Motion for Limited Voluntary Remand and noted that the D.C. Circuit had granted a motion extending the deadline to petition for rehearing in *Center for Biological Diversity*, pending the Supreme Court's decision on pending petitions for a writ of certiorari filed in *Utility Air Regulatory Group* ("*UARG*") *v. EPA*, Sup. Ct. Nos. 12-1146, *et.al*. *See* Region's Motion for Limited Remand at 4-5. As such, the Region asserts, the proceedings in *Center for Biological Diversity* may not be certain for some time. *Id.* In fact, since the Region's motion was filed, the Supreme Court granted certiorari in the *UARG* matter and heard oral argument on February 24, 2014. The D.C. Circuit extended the deadline for petitions for rehearing until after the Supreme Court issues its decision. *See Center for Biological Diversity*, No. 11-1101 (D.C. Cir. Nov. 14, 2013) (order extending deadline to petition for rehearing). The Region asserts that in the interest of administrative efficiency and closure on this two-year-old PSD application, the appropriate course of action is to remand the Permit for the sole purpose of amending the CO_2 emissions limit to regulate both biogenic and non-biogenic CO_2 emissions, thereby "providing the relief requested in public comments and eliminating the issue" the Coalition raises on appeal with respect to biogenic greenhouse gases. *Id.*

[17] Ms. Centeno states incorrectly that the intent of the Region's Motion for Limited Remand is to "address" the concerns of Dr. Osvaldo Rosario Lopez ("Dr. Rosario") regarding CO_2. *See* Centeno's Response to EPA Region 2's Motion for Limited Voluntary Remand at 1. The intent of the Region's motion, however, is to revise the Permit to include

Given that the Region has stated that it intends to regulate biogenic CO_2 emissions in this Permit, essentially resolving the issue raised in the Coalition's petition, the Board agrees that the Permit should be remanded for this limited purpose. The only question remaining is whether the Permit must be reopened for public comment on the Region's proposed revisions.

The determination of whether and when to reopen a permit for public comment is generally left to the sound discretion of the permitting authority. *See* 40 C.F.R. § 124.14; *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 146 (EAB 2006) (stating the same and citing 40 C.F.R. § 124.14(b)); *see also In re City of Palmdale,* 15 E.A.D. 700, 713-15 (EAB 2012) (explaining, in the context of a review of a permitting authority's determination *not* to reopen a permit for public comment, that the permitting authority is given broad discretion in determining whether reopening is warranted); *cf. In re ConocoPhillips Co.*, 13 E.A.D. 768, 786 (EAB 2008) (leaving the question of whether to reopen the permit for public comment on remand up to the discretion of the permitting authority).

Notwithstanding this discretion, the Board has directed the permitting authority to reopen a permit for public comment where the circumstances clearly warranted reopening. *See Indeck-Elwood*, 13 E.A.D. at 147 (explaining that the Board will consider the significance of a change in the permit to determine whether reopening the public comment is warranted). Such circumstances, of course, have included matters where the Board determines that there was a fundamental procedural flaw in the public process. *In re Sierra Pacific Indus.*, 16 E.A.D. 1, 38-39 (EAB 2013) (holding that the permitting authority abused its discretion by not holding a public hearing on the draft permit after erroneously concluding there was no "significant degree of public interest" in the draft permit); *In re Russell City Energy Ctr.*, 14 E.A.D. 159, 177-78 (EAB 2008) (remanding a permit based on the permitting authority's failure to provide adequate notice of the issuance of the draft permit and opportunity to comment). The Board has also required the permitting authority to reopen a PSD permit for public comment where the remand would require a new BACT analysis or a significant change to a permit condition, particularly where the new analysis or change was not previously made available for public review and comment. *See, e.g., In re Pio Pico Energy Center,* 16 E.A.D. at 138 (remanding to correct record inconsistencies in BACT analysis and to provide adequate support and explanation for new emission limits and directing that the permit be reopened for public comment); *In re Mississippi Lime Co.*, 15

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biogenic greenhouse gas regulation which, the Region points out, was *one* of the concerns Dr. Rosario raised.

E.A.D. 349, 361, 373, 379, 382 (EAB 2011) (remanding to reconsider and revise multiple BACT analyses, to provide sufficient justification for various permit conditions, and to provide the public with the opportunity to review and comment on the new analyses and justifications); *Indeck-Elwood,* 13 E.A.D. at 148 (directing the permitting authority to either remove a new problematic provision in the permit or to revise the condition appropriately and reopen the permit for public comment). It is in the context of these decisions that the Board considers whether to require the Region to reopen the Permit for public review and comment on the proposed revisions to the Permit.

In support of its position that no further public review is warranted, the Region explained that the changes it proposes to make to the Permit would not alter the actual CO_2 emissions (both biogenic and non-biogenic) that were already allowed under the Permit, as issued. Region's Motion for Limited Remand at 8. In the course of evaluating Energy Answers' *non*-biogenic CO_2 emissions, which were subject to regulation under the PSD program at the time the Permit was issued, the Region considered Energy Answers' BACT analysis that included total CO_2 emissions (*i.e.*, both biogenic and non-biogenic emissions). *See* Region's Motion for Limited Remand at 3, 9-11; *see also* Energy Answers Arecibo, LLC's Revised GHG BACT Analysis (Sept. 2011) ("BACT Analysis"), Region's Motion for Limited Remand, Attach. 3. More specifically, the control options Energy Answers identified in step one of the BACT analysis[18] included (1) carbon capture and sequestration ("CCS"), (2) utilizing biomass fuel, and (3) maximizing energy efficiency to minimize GHG emissions. *See* BACT Analysis at 5. Energy Answers eliminated CCS in step four of the BACT analysis as cost prohibitive. *Id.* at 20. In eliminating CCS, Energy Answers considered the total costs of combined (or total) biogenic and non-biogenic CO_2 emissions because it was not possible to remove just the non-biogenic emissions in the CCS process. *Id*. Ultimately, Energy Answers selected the two remaining control options as both were technically and

[18] The NSR Manual sets forth a five-step process for determining BACT for each particular pollutant that will be regulated in a PSD permit: (1) Identify all available control options with potential application to the source and the targeted pollutant; (2) Analyze the control options' technical feasibility; (3) Rank feasible options in order of effectiveness; (4) Evaluate the energy, environmental, and economic impacts of the options; and (5) Select a pollutant emission limit achievable by the most effective control option not eliminated in a preceding step. *NSR Manual* at B.5-.9. Although the NSR Manual is not binding on the Agency, and consequently strict application of the methodology described in it is not mandatory, the five-step process has guided the PSD permitting process for years because it provides a framework that assures adequate consideration of the statutory and regulatory criteria. *See, e.g., Palmdale*, 15 E.A.D. at 708-09.

economically feasible. *Id.* at 27. While conducting the BACT analysis, Energy Answers provided and the Region considered detailed information about Energy Answers' biogenic emissions. *See* BACT Analysis, Region's Motion for Limited Remand, Attach. 3; E-mail from Kevin Scott, Energy Answers, to Viorica Petriman, EPA, Information related to GHG emissions (Sept. 21, 2011) (A.R. I.B.6.7), Region's Motion for Limited Remand, Attach. 4. As the Region points out, none of the public comments received challenged the Region's selection of utilizing biomass fuels and maximizing energy efficiency as BACT for CO_2.[19] Region's Motion for Limited Remand at 7, 9-10.

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[19] The Coalition disagrees with the Region that no commenters expressed concern regarding the control technique selected for CO_2. *See* Coalition's Resp. to Region's Motion for Limited Remand at 5-6. In support of its assertion, the Coalition points to comments by Dr. Rosario and Dr. Obed García. *See id*. at 6-7. Dr. Rosario's comments, however, do not reference the top-down BACT analysis conducted (which included identifying the potential control techniques and evaluating the technical feasibility, control effectiveness, economic feasibility and energy impacts of those techniques) or the ultimate BACT determination. Rather, it is clear from the comments cited that Dr. Rosario (in the context of discussing his concerns regarding the materials balance) disagreed with the Region's decision to exclude biogenic CO_2 emissions limits from the Permit. *See, e.g.,* Testimony of Dr. Rosario (Excerpt from August Public Hearings Sessions - Translations Including the List of the Speakers (Aug. 25, 2012) (A.R. IX.2)), Region's Motion for Limited Remand, Attach. 1 at 13-15. Dr. Rosario further opined that the unaccounted for waste was "quite clearly not CO_2," notwithstanding what he had been told. *Id.* at 15-16; *see also id.* at 90-92. Finally, Dr. Rosario made generalized comments regarding incinerator technology and its potential to fail. *Id.* at 16-18; *see also* 91-93. Dr. Rosario did not reference the BACT analysis for CO_2 at any point during his comments, let alone raise any challenges to the BACT determination.

Similarly, Dr. García's comments regarding the sufficiency of the environmental impact statement completed for the permit included disagreement with incineration, generally, and the CO_2 emissions that result, but those comments were not specific enough to challenge either the Region's BACT analysis or the Region's ultimate selection of BACT. *See* Testimony of Dr. Obed García (Excerpt from August Public Hearing Sessions - Translations Including the List of Speakers (Aug. 25, 2012) (A.R. IX.2)), Coalition's Resp. to Motion for Limited Remand, Attach. 1 at 58-62.

As the Board frequently has explained, issues must be raised with a "reasonable degree of specificity and clarity" in order to be preserved on appeal. *See Palmdale*, 15 E.A.D. at 737. General expressions regarding CO_2 emissions, such as "incineration does not reduce greenhouse gas emissions," do not amount to the level of specificity required to preserve a challenge to the Region's BACT determination in this case. *See ConocoPhillips,* 13 E.A.D. at 801 ("The fact that Petitioners' comments expressed

After selecting BACT for CO_2 emissions, the Region set the emissions limit solely for non-biogenic CO_2 by accounting for and removing the biogenic portion of the total CO_2 emissions. Ultimately, the Permit included provisions that required Energy Answers to "(1) continuously monitor the total combustor CO_2 emissions (both biogenic and non-biogenic CO_2) * * *; (2) measure on a calendar quarterly basis the combustors' biogenic CO_2 emissions * * *; and (3) determine the non-biogenic CO_2 emissions as the difference between (1) and (2)." RTC at 36-37. The emissions limit included in the Permit was for the non-biogenic portion of the CO_2 emissions only. *See* Permit at 7, 47 (Jun. 11, 2013) (A.R. V.2); Region's Motion for Limited Remand at 8. The existing Permit also identifies the procedures for monitoring and measuring both biogenic and non-biogenic emissions. Region's Motion for Limited Remand at 8; *see also* Permit at 42, 45, 47 (Conditions XI.A.11.c, XII.1.c., XIII.A.3).

The revisions the Region proposes, in essence, eliminate the subtraction of biogenic CO_2 from total combustor CO_2 measurements and set a total CO_2 emissions limit that includes the biogenic portion of CO_2 emissions. *See* Draft Revised Permit (Oct. 28, 2013), Region's Motion for Limited Remand, Attach. 2 at 7, 35-36, 41-42, 44, 47. The control technologies chosen through the BACT analysis remain unchanged.

Importantly, none of the petitioners in this appeal challenged the Region's BACT analysis for CO_2, or the control technology selected. The only argument on appeal with respect to CO_2 was that the Region should not have excluded regulation of biogenic GHG, particularly given the D.C. Circuit's vacatur of the Deferral Rule. *See* Coalition Pet. at 34. Because the control technologies and the total CO_2 emissions will not change with the proposed amendments, it is unclear on what basis reopening for public comment would be warranted.

In its response to the Region's Motion for Limited Remand, the Coalition does not specifically argue (or provide support for the argument) that reopening of the public comment period on the proposed changes is necessary or required. Rather, the Coalition raises several other arguments, none of which establish that the proposed changes require additional public input.

'extensive concern' regarding greenhouse gas emissions * * * does not by itself reflect the requisite level of specificity required to properly preserve the issue or whether BACT for CO_2 and methane was required."). None of the comments the Coalition identifies constitute a challenge to the BACT analysis or control techniques selected.

First, the Coalition argues that the proposed CO_2 emissions limit of 924,825.3 tpy is *higher* than the facility's potential to emit of 924,750 tpy and is thus no limit at all. Coalition's Resp. to Region's Motion for Limited Remand at 4, 8. In reply, the Region recognized that it had made an inadvertent mathematical error in calculating the emissions limitation and submitted a revised draft permit that corrected the error and lowered the emissions limit to 924,750 tpy. *See* Region's Reply to Petitioners' Responses to Region's Motion for Limited Remand ("Region's Reply in Supp. of Mot. for Remand") at 7 & Attach 2A at 7 (Draft Revised Permit (Dec. 6, 2013). Thus, the revisions included in Attachment 2A to the Region's reply contain the revisions the Region proposes to make on remand.

The Coalition also argues that the limits the Region proposes are not meaningful because they do not limit CO_2 emissions from what previously was allowed. Coalition's Resp. to Region's Motion for Limited Remand at 4, 8. The Coalition's argument ignores the fact that the air pollution control techniques chosen as BACT are considered part of the physical or operational design used in calculating the facility's potential to emit. *See* Region's Reply in Supp. of Mot. for Remand at 6 (citing 40 C.F.R. § 52.21(b)(4)). Thus, in this case, the annual emission limit for Energy Answers is equal to the potential to emit because it was derived *after* the application of the control techniques that will reduce CO_2 emissions.

Although the Coalition argues that biogenic CO_2 should have been considered in the analysis of whether to grant the permit in the first place, as discussed above, biogenic CO_2 emissions were taken into account during the BACT analysis. Moreover, the Coalition does not advance any argument that the BACT analysis would have been any different if the intent had been to include biogenic CO_2 emissions limits at the time BACT was being considered.

The Board recognizes the importance and value of a robust public process in administering the PSD permitting program. EPA's PSD permitting regulations provide for significant public participation, including the opportunity for public comments and public hearings on permit conditions, prior to the issuance of a permit. The Board has no doubt that the Region's public outreach and participation efforts for this Permit exceeded what was required, and that such comments have led to improved Permit conditions. *See* Part VII.C, below.

The Board concludes that, although the Region's proposed change to the Permit includes adding a substantive emissions limit, the circumstances of the change proposed will not result in any effective change in CO_2 emissions (whether biogenic or non-biogenic) and will not alter the Region's BACT determination.

The public was given ample opportunity to review and comment on the BACT analysis, the control technique chosen, and the CO_2 emissions, and the Board has no reason to believe additional public process on the proposed revisions would add any substantial value or result in any different outcome. The only argument raised in the petitions with respect to CO_2 emissions was that biogenic gases should not be excluded from regulation. *See* Coalition Pet. at 33-34. The proposed change directly responds to that argument.

In sum, the Coalition has presented no basis for the Board to require the Region to reopen the Permit for public comment on the proposed revisions, particularly given that PSD permits are statutorily time-sensitive[20] and this permit application has been pending for more than two years. Accordingly, the Board remands the Permit for the limited purpose of incorporating the regulation of biogenic CO_2 emissions as proposed in the December 6, 2013 Draft Revised Permit-red lined version. *See* Region's Reply to Petitioners' Responses to Region's Motion for Limited Remand, Attach. 2A. The Region need not reopen the permit proceedings for public comment on the proposed revisions.

3. *The Region Appropriately Evaluated the Environmental Justice Implications of the Proposed Facility*

The Coalition asserts broadly that the Region "failed to consider the environmental justice implications associated with siting a lead-emitting facility in a lead nonattainment area." Coalition Pet. at 18. More specifically, the Coalition challenges the Region's reliance on a map showing the physical location of five Toxics Release Inventory ("TRI") reporting facilities in the area to conclude that "there was no disproportionate distribution of TRI facilities the area" and asserts that this was "insufficient to address environmental justice concerns." Coalition Pet. at 19. The Coalition also asserts that the Region has not addressed the cumulative impacts from the proposed facility and surrounding facilities, including an assessment of the underlying health status of the population with respect to lead. *Id.* Although not entirely clear, Petitioner Llenza also suggests the Region has erred with respect to environmental justice in the context of the Region's consideration of alternatives. Llenza Pet. at 8.[21]

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[20] As the Board has previously explained, PSD permit appeals are time-sensitive in light of the one year deadline in section 165(c) of the Clean Air Act, 42 U.S.C. § 7475(c).

[21] Llenza also cites the Executive Order on Environmental Justice in the context of her challenge regarding the public's inability to access information or participate in a meaningful way. Llenza Pet. at 4, 7, 8. As further described in Part VII.C below, however,

In response, the Region points to the 260-page environmental justice evaluation that Energy Answers submitted and its own Responses to Comments document relating to environmental justice concerns and asserts it has complied with all environmental justice requirements, including taking into account lead impacts, notwithstanding the fact that lead is a nonattainment pollutant in the Arecibo area. Region's Resp. Br. at 16-20. Energy Answers similarly asserts that it went above and beyond environmental justice requirements in this Permit proceeding. Energy Answers' Resp. Br. at 12-15. Thus, the Board next considers whether these petitioners have met their burden to show that the Region's environmental justice analysis was insufficient, thus warranting further consideration on remand.[22]

a. *Principles of Law Relating to Environmental Justice*

EPA's authority to consider issues relating to environmental justice is derived from an Executive Order on Environmental Justice (Exec. Order 12898) that directs federal agencies to make environmental justice part of their mission by identifying and addressing, "as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority and low-income populations." Exec. Order No. 12,898, 59 Fed. Reg.

Energy Answers' extensive public outreach and community education efforts to inform and include every community within Arecibo more than satisfied the Region's environmental justice obligations.

[22] Both the Region and Energy Answers also argue that the specific challenges the Coalition raises were not raised in comments and therefore were not properly preserved pursuant to 40 C.F.R. § 124.19(a)(4)(ii). *See* Region's Resp. Br. at 16; Energy Answers' Resp. Br. at 11. While the Board agrees that the record is not entirely clear that the Coalition's specific sub-arguments were properly preserved, given the volume of comments received regarding lead, the cumulative health effects of air toxics, and environmental justice, as identified in the Coalition's Petition at pages 8-9, and the Region's responses to comments concerning these issues, the Board considers broadly whether the Region's environmental justice evaluation was sufficient without deciding whether the more specific sub-arguments were properly preserved during the public comment period.

Similarly, as discussed previously, although Petitioner Llenza does not properly identify in her petition where issues were raised, it is clear from the record and the Region's response brief that the Region had the opportunity to respond to the environmental justice issues to which Petitioner Llenza alludes. As such, the Board will exercise its discretion to consider the issues briefly below.

7629, 7629 (Feb. 11, 1994). President Barack Obama recently honored the 20th anniversary of the Executive Order on Environmental Justice and renewed the federal government's commitment to environmental justice for all. *See 20th Anniversary of Executive Order 12898 on Environmental Justice*, Proclamation No. 9082 of Feb. 10, 2014, 79 Fed. Reg. 8819 (Feb. 13, 2014).

The Agency is committed to achieving environmental justice in its permitting actions. *See, e.g.,* EPA Activities to Promote Environmental Justice in the Permit Application Process, 78 Fed. Reg. 27,220, 27,222 (May 9, 2013). Nevertheless, federal agencies are required to implement the Executive Order "consistent with, and to the extent permitted by, existing law." *Id.* at 7632. Thus, the Board has recognized that the Executive Order on Environmental Justice does not dictate any particular outcome in a permit decision; rather, the order gives permitting authorities broad discretion to determine how best to implement its mandate within the confines of existing law. *See In re Pio Pico*, 16 E.A.D. 56, 91 n.30 (EAB 2013); *see also* U.S. EPA, Plan EJ 2014 Progress Report (Feb. 2013), *available at* http://www.epa.gov/environmentaljustice/; 78 Fed. Reg. at 27,222 (noting that each permit and community is different and that each EPA regional office has the insight and experience to develop strategies tailored to the particular communities and needs within the region). As the Board has explained, the Executive Order "plainly states that it is 'intended only to improve the internal management of the executive branch * * *' and 'shall not be construed to create any right to judicial review' of the Agency's efforts to comply with the Order." *In re Avenal Power Ctr., LLC*, 15 E.A.D. 384, 398 (EAB 2011) (quoting Exec. Order No. 12898, 59 Fed. Reg. at 7632-33), *appeal docketed sub nom. Sierra Club v. EPA*, No. 11-73342 (9th Cir. Nov. 3, 2011).

In considering environmental justice issues, the Board has held that a permit issuer should exercise its discretion to examine any "superficially plausible" claim that a minority or low income population may be disproportionately affected by a particular facility seeking a PSD permit. *In re EcoEléctrica, LP*, 7 E.A.D. 56, 69 n.17 (EAB 1997); *see also In re Shell Gulf of Mex., Inc. & Shell Offshore, Inc.* ("*Shell 2010*")*,* 15 E.A.D. 103, 148 (EAB 2010). The Board has also previously recognized that an environmental justice analysis need not consider emissions that are beyond the scope of the permit action. *See In re Shell Gulf of Mex., Inc. & Shell Offshore, Inc. ("Shell 2012"),* 15 E.A.D. 470, 500 n.39 (EAB 2012) (stating that the permitting authority went "further than it was legally required" when it considered information available regarding mobile source emissions which were beyond the scope of the PSD permit). The Board generally "relies on and defers to the Agency's cumulative expertise" where the permit issuer's environmental justice determinations are based on a proposed facility's compliance with the relevant

NAAQS. *See Shell 2010* 15 E.A.D. at 156 (explaining that, "[i]n the context of an environmental justice analysis, compliance with the NAAQS is emblematic of achieving a level of public health protection that, based on the level of protection afforded by a primary NAAQS, demonstrates that minority or low-income populations will not experience disproportionately high and adverse human health or environmental effects due to exposure to relevant criteria pollutants"); *see also In re MHA Nation Clean Fuels Refinery*, 15 E.A.D. 648, 669 n.59 (EAB 2012). NAAQS are designed to protect public health with an adequate margin of safety, including sensitive populations such as children, the elderly, and asthmatics. *See In re AES Puerto Rico, LP*, 8 E.A.D. 324, 351 (EAB 1999), *aff'd sub nom. Sur Contra La Contaminación v. EPA*, 202 F.3d 443 (1st Cir. 2000); *see also Shell 2010*, 15 E.A.D. at 149 n.72.

The Region has developed its own policy for implementing the Executive Order on Environmental Justice. *See* U.S. EPA Region 2, *Interim Environmental Justice Policy* (Dec. 2000) ("*Region 2's Envtl. Justice Pol.*") *available at* http://www.epa.gov/region2/ej/ejpolicy.pdf (last visited Mar. 20, 2014). As explained in that policy, EPA considers Hispanic residents of Puerto Rico to be a minority community under the Executive Order. *Id.* at 12. The policy states, however, that because every community in Puerto Rico is classified as Hispanic, consideration of that demographic is not particularly useful when analyzing disproportionate impacts to a community of concern. *Id.* at 24. As such, the demographic factor relevant in the environmental justice analysis for Arecibo is whether the community of concern (*i.e.*, the community that is the subject of an environmental justice analysis) is a low-income community.

The Region's interim environmental policy sets forth a six-step procedure for evaluating environmental justice that essentially requires the permit applicant to delineate the boundaries of the community of concern, analyze the demographics of that community as compared with an appropriate statistical reference, and determine whether the community is either minority or low-income (an "environmental justice community"). *See id.* at 15, 26. If the community of concern is an environmental justice community, then the permit applicant should develop a comprehensive environmental load profile ("ELP") and assess whether the burden on that community is disproportionately high or adverse. *Id.* at 20, 26. If it is, then appropriate action should be pursued to minimize or mitigate such concerns. *Id.* at 22-23, 27. In any case, the results of the environmental justice analysis should be summarized and reported, made publicly available, and incorporated into the responsiveness summary of the permitting authority. *Id.* at 23, 27.

With these principles of environmental justice in mind, the Board now turns to the question of whether the Region's environmental justice evaluation was sufficient to comply with the Executive Order.

b. *The Environmental Justice Evaluation for the Energy Answers Facility*

In this case, Energy Answers completed an environmental justice analysis at the Region's request in accordance with the Region's Interim Environmental Justice Policy. *See* RTC at 104. To begin, Energy Answers conducted an environmental justice study to determine if the area most impacted by the proposed facility was an economically disadvantaged area or underrepresented area. *See* Energy Answers Arecibo, LLC, Environmental Justice Evaluation ("Envtl. Justice Eval.") at 2 (Oct. 2011) (A.R. I.A.10.b). The initial study identified the community of concern as Cambalache because that is the barrio (geographical area that is a town division or ward) where the project will be located. *See id.* app. A at 9 (Environmental Justice Study). Cambalache, however, has one of the highest income levels in the municipality and region and is home to less than 65 residents. *Id.* at 2. As a result, the Region directed Energy Answers to expand the focus area to include additional barrios "to make sure that the broader region did not fall into the category of economically disadvantaged or underrepresented." *Id.* After taking into account the socio-economic conditions of Cambalache and all of the barrios in Arecibo, the environmental justice study determined that the Cambalache barrio has "the most favorable socioeconomic condition of all * * *, with its per capita income and median housing income greatly above those of the other barrios." *Id.* at 6. In general, the barrio of Cambalache was determined not to be disadvantaged in terms of its economic situation when compared to the Municipality of Arecibo, the region, or Puerto Rico. *Id.* at 5. Nevertheless, several of the barrios adjacent to the Cambalache barrio were identified as low-income. *Id.* at 7 & fig. 2.[23]

Even though Cambalache is not a "low-income" community as compared to surrounding communities, Energy Answers, at the request of the Region, further evaluated the impacts to the environment for Cambalache, as well as adjacent barrios that were determined to be low-income, to assess whether there would be a disproportionately high or adverse environmental burden on any of the low-income barrios in the area. *Id.* at 7. As part of that determination, Energy Answers

[23] In accordance with its Interim Environmental Justice Policy, the Region used a statistical reference number of 52% of the population at or below the poverty level to define "low income" areas meriting further environmental justice review. *See Region 2's Envtl. Justice Pol.* at 19; RTC at 107.

identified the facilities in the study area that are required to submit TRI Reports to EPA under the Emergency Planning and Community Right to Know Act (in accordance with the Region's Interim Environmental Justice Policy). *Id.* at 7 and fig. 2. Based on mapping using 2008 reporting data, which shows the distribution of TRI reporting facilities across the study area, Energy Answers concluded that there was not a disproportionate number of facilities reporting in the low-income barrios of the study area. *See id.*

Energy Answers also modeled the proposed facility's emissions using EPA-approved modeling and protocols to analyze whether the emissions from the proposed project would cause a disproportionate impact on low-income barrios in the area. *Id.* at 7. Energy Answers looked at the proposed emissions for each of the criteria pollutants that were subject to PSD review (namely, NO_x, SO_2, CO, $PM_{2.5}$, and PM_{10}). *Id.* at 6. For most of the criteria pollutants modeled, the maximum pollutant-specific impact was sufficiently low to be considered to have a de minimis impact on air quality. *Id.* at 7. Each pollutant modeled that did not have a de minimis impact on air quality in the preliminary analysis was subjected to a full, cumulative, multi-source analysis that ultimately showed that concentrations will be below the NAAQS and PSD increment, as applicable, and would therefore not cause or contribute to an exceedance of the NAAQS. *Id.; see also Shell 2010*, slip op at 74-75 (explaining that, in the context of an environmental justice evaluation, demonstrating compliance with the NAAQS is generally sufficient to conclude that there will be no disproportionate adverse health effects due to exposure to the relevant pollutant). At the request of EPA, Energy Answers also prepared maps to illustrate the distribution of the maximum predicted impacts for the area from the multi-source modeling. *See* Envtl. Justice Eval. at 8 and figs. 3-11 (illustrating multi-source modeling), 12-20 (illustrating maximum predicted impacts from multi-source modeling). These maps showed that the predicted impacts of the proposed facility, at their highest levels in terms of area and time, were distributed evenly in and around the Arecibo area without disproportionately impacting low-income communities. *Id.* Taking into account all of these factors, Energy Answers concluded and the Region agreed that there would be no disproportionate impact on the low-income barrios in the area. *Id.* at7.

Additionally, even though lead was not directly regulated in the Permit,[24] Energy Answers modeled the facility's projected impacts from lead.[25] RTC at 108; Envtl. Justice Eval. at 20. The modeled impact of the maximum allowed emissions of lead was projected to be more than 200 times *below* the NAAQS for lead at the Energy Answers fence line.[26] RTC at 108; Envtl. Justice Eval. at 20. Given the very low lead impact, the Region determined that "Energy Answers could not be said to pose a disproportionate or adverse impact even if EPA had authority to regulate [lead] under the PSD permit." RTC at 108.

Energy Answers next completed a human heath risk assessment for the proposed facility, which estimated the health risks associated with the contaminants of potential concern that would be emitted from the facility. Envtl. Justice Eval. at 9. Risks and hazards were evaluated in the potentially most impacted barrios identified for environmental justice consideration. *Id.* at 9-13. Energy Answers' evaluation of health risks included modeling and consideration of predicted lead risks. *Id.* at 14-16, 20, 25. In all health risk assessments, including lead, the assessment concluded that disproportionate impacts were not predicted and emissions from the proposed facility are not likely to pose a concern for human health. *Id.* at 26.

Though Energy Answers' examination of the environmental and health impacts demonstrated that there would be no disproportionately high or adverse

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[24] As explained in Part VII.B.1.a above , although Energy Answers' lead emissions are not subject to PSD regulation, lead emissions will nonetheless be controlled by the pollution control equipment required by the PSD permit for the "municipal waste combustor metals," which include lead. *See* Fact Sheet (English) at 13-14 (discussing the pollution control equipment required for municipal waste combustor metals (which includes lead) and identifying the emissions limitation for municipal waste combustor metals); *see also* Permit at 28, 34; RTC at 41.

[25] As stated above, in the context of an environmental justice analysis, the permit issuer is not required to consider emissions that are beyond the scope of the permit action. *See Shell 2012,* 15 E.A.D. at 500 n.39 (recognizing that the permitting authority need not consider information relating to source emissions that were beyond the scope of the PSD permit); *see also* RTC at 108 (explaining that Energy Answers Arecibo went beyond what the PSD permit regulations require when it modeled its own impacts from lead and volunteered to install a lead monitor in the community).

[26] The Coalition suggests that the modeled impact of lead emissions is incorrect. Coalition Pet. at 17. For reasons further articulated below, the Board declines to second-guess this modeling.

burden on the low-income communities surrounding the community of concern, Energy Answers nonetheless volunteered to install a lead ambient monitor in the community in order to obtain further information on the lead levels in the area. RTC at 108.

Consistent with the Region's Interim Environmental Justice Policy, Energy Answers summarized and reported all of its efforts to identify the potentially affected communities, analyze the demographics, determine whether there would be disproportionate impacts, and minimize those impacts in a 263-page environmental justice evaluation that Energy Answers made publicly available. *See generally* Envtl. Justice Eval. Energy Answers engaged in extensive public outreach and community education efforts to inform and include every barrio within Arecibo. *Id.* at 27*; see also* Part VII.C, below. The Region addressed comments it received that related to environmental justice over the course of twenty pages of the Region's Response to Comments document. RTC 104-24. Ultimately, Energy Answers' environmental justice analysis concluded and the Region agreed that the proposed facility "will not result in disproportionately high and adverse human health or environmental effects on minority and low-income populations." *Id*. at 104.

c. *The Coalition Fails to Demonstrate that the Environmental Justice Evaluation was Insufficient*

Turning now to the challenges the Coalition raises, the Board observes first that the Coalition's very broad assertion that the Region "failed to consider" the environmental justice implications of siting a lead-emitting facility in an area that is in nonattainment for lead is belied by the Region's consideration of Energy Answers' 263-page evaluation and the Region's twenty pages of responses to comments relating to environmental justice concerns, many pages of which specifically relate to concerns regarding lead, notwithstanding the proper exclusion of lead from the PSD Permit as a nonattainment pollutant. *See generally* RTC at 104-24; *see also* Part VII.B.1 above (addressing the Coalition's concerns regarding the exclusion of lead from the Permit). In particular, as discussed at length in Part VII.B.1 above, the Region appropriately excluded lead as a PSD pollutant because the facility will be located in an area that is in nonattainment for lead. Further, as stated above, the Executive Order on Environmental Justice does not require the permitting authority to model source emissions that are beyond the scope of the PSD permit. *See* Part VII.B.3.a, above (citing *Shell 2012,* 15 E.A.D. at 500 & n.39).

Notwithstanding the proper exclusion of lead from this PSD Permit, as explained in the Responses to Comments document, the Region acknowledged the significant level of public concern in the area regarding lead due in large part to the

high lead levels caused by Battery Recycling Company, Inc. ("the Battery Recycling facility"), also located in Cambalache, that led to the designation of nonattainment for lead. RTC at 108. The Region explained that the lead levels from the Battery Recycling facility are being addressed by the PREQB and the Region independently of this PSD action.[27] *Id.* Nevertheless, the Region directed Energy Answers to take additional steps under its environmental justice authority that are not otherwise required under PSD regulations. *Id.* As a result, Energy Answers modeled its potential impacts from lead emissions and, based on that modeled impact, the Region determined that there would be no disproportionate environmental impacts with respect to lead. *Id*. The Region also pointed out that Energy Answers did health and ecological risk assessments of the impacts from lead and, even though not required, volunteered to monitor for lead in the community. *Id.*

The Coalition suggests that the modeled impact of lead emissions is flawed. Coalition Pet. at 17 (urging the EAB to "reject" the Region's approval of the facility's modeling for lead).[28] The Coalition, however, does not identify any particular error in the modeling that could form the basis for concluding that the lead modeling is inaccurate. Rather, the Coalition seems to argue that the Region's conclusion that the impact of lead emissions is essentially zero at the Energy Answers fence line *must* be wrong because the projected emissions from Energy Answers are higher than the emissions of the nearby Battery Recycling facility. In so arguing, the Coalition appears to be confusing the Energy Answers facility's projected lead emissions with the potential *impact* of those emissions.

The Region asserts that the Coalition's comparison of the Energy Answers facility to the Battery Recycling facility ignores the fact that emissions are not proportional to impacts. Region's Resp. Br. at 14. The Region points out that the Coalition's false comparison ignores important differences between the two facilities, including their stack heights and dispersal of fugitive emissions, for example. *Id.* at 15. In any case, the Coalition has not identified or adequately demonstrated any error with respect to the modeling. As modeling is fundamentally

[27] The Region also pointed out that no federal air permit was issued to the Battery Recycling facility. RTC at 108.

[28] Energy Answers asserts that the Coalition did not adequately preserve any challenge to the modeled impact of lead. *See* Energy Answers' Resp. Br. at 10; Energy Answers' Opposition to Coalition's Motion for Leave to File a Reply at 1-5. The Coalition disputes that assertion. *See* Coalition's Reply at 4-5. The Board declines to resolve the issue of whether the issue was properly preserved in light of its conclusions above.

technical in nature, the Coalition bears a particularly high burden to overcome the deference the Board would typically afford to the permit issuer's well-reasoned determination. *See* Part III.A, above. Moreover, as already explained, because the Region properly excluded lead from regulation in this Permit, Energy Answers was not required to perform the modeling analysis for lead to comply with the Executive Order on Environmental Justice. In sum, the Board rejects the Coalition's assertion that the impact modeling for lead was inaccurate.

Other than its bald assertion that the modeled impact of lead emissions was somehow flawed, the Coalition does not acknowledge any of the steps that the Region took under its environmental justice authority to evaluate the environmental justice implications with respect to lead. Nor does the Coalition address or explain why the Region's responses are insufficient to meet its environmental justice obligations. Petitioners are required to confront the permit issuer's responses to comments on any given issue and explain why that response is "clearly erroneous or otherwise warrants review." *See* 40 C.F.R. § 124.19(a)(4)(ii); *see also, e.g., In re Prairie State Generating Co., LLC,* 13 E.A.D. 1, 109 (EAB 2006), *aff'd sub. nom Sierra Club v. U.S. EPA*, 499 F.3d 653 (7th Cir. 2007); *see also, e.g., In re City of Pittsfield*, NPDES Appeal No. 08-19, at 6-9, 11 (EAB Mar. 4, 2009), *aff'd*, 614 F.3d 7 (1st Cir. 2010). Notwithstanding the Coalition's failure to confront the Region's responses to comments, given the Region's very thorough consideration of environmental justice, in the context of the facility's potential lead emissions in particular, the Board finds meritless the Coalition's broad assertion that the Region "failed to consider" the environmental justice implications of granting this Permit to Energy Answers.

The Coalition's more specific sub-arguments must also fail. With respect to the Region's reliance on the TRI reporting facilities map and whether that was sufficient to conclude there was no disproportionate distribution of TRI facilities, the Coalition again does not acknowledge the many other aspects of the environmental justice analysis, as described above, that were considered in reaching the Region's ultimate conclusions. *See* Coalition Pet. at 19 ("[Energy Answers] merely prepared a map showing the physical location of five TRI reporting facilities * * * and asserted in a conclusory manner that there was not a disproportionate distribution of TRI facilities in the area. * * EPA apparently accepted this as a sufficient response. EAB should reject this because it was not sufficient to address environmental justice concerns."). As described above, the use of the TRI reporting facilities map was only part of the information that Energy Answers used and the Region considered in weighing the potential impacts on the surrounding barrios. *See* RTC at 109; Envtl. Justice Eval. at 7-25. Additionally, the Region's Interim Environmental Justice Policy specifically identifies the TRI

system as a source of facility information available for conducting environmental justice analyses. *Region 2's Envtl. Justice Pol.* at 14. The Coalition has not met its burden to show that the Region erred by relying on the TRI map or in concluding that there is not a disproportionate distribution of TRI facilities in the area.

Finally, the Coalition also asserts that the Region did not address the cumulative health impacts from the proposed facility, including the underlying health status of the population with respect to lead. Coalition Pet. at 19. In support of this assertion, the Coalition points to public health studies relating to blood lead levels of workers at the Battery Recycling facility and health statistics concerning the prevalence of asthma in Puerto Rico generally and in Arecibo in particular. *Id.* at 19-21. The Region asserts that the documents that the Coalition cites in its petition were not part of the record and do not demonstrate a link between lead exposure and incidence of asthma in general or with respect to specific impacts from the proposed Energy Answers facility. Region's Resp. Br. at 20. As a general matter the Board will not consider extrarecord materials (i.e., data and other information that were not considered by the Agency as part of the permitting decision).[29] *See In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 518-20 (EAB 2006); *In re Gen. Motors Corp.,* 5 E.A.D. 400, 405 (EAB 1994). Regardless, as explained below, the Coalition's failure to confront the Region's responses is fatal to the issue.

The Region responded to concerns regarding the assessment of health impacts from the facility in over sixteen pages of its Response to Comments document and ultimately determined that the facility would not have disproportionate or adverse health impacts. RTC at 108-24. The Region's response includes the many steps the Region took in furtherance of the goals of environmental justice to conduct additional studies on impacted areas and additional health and risk assessments on potential pollutants, including those not emitted in significant amounts or regulated by the PSD Permit, such as lead. *See, e.g.*, RTC at 106-08 (addressing comments related to disproportionate or adverse impacts of criteria pollutants), 108-10 (addressing concerns regarding disproportionate or adverse impacts due to air toxics), and 110-24 (addressing concerns regarding health and ecological risk assessments). With respect to health

[29] Even if the Board were to consider these extrarecord materials, the Coalition does not argue (or provide support for the argument) that these documents concerning the prevalence of asthma in Puerto Rico or Arecibo, or the blood lead levels found in workers at the Battery Recycling facility, somehow require the Region to reach a different conclusion with respect to whether the Energy Answers facility will have disproportionate impacts.

concerns from non-PSD regulated pollutants, the Region pointed out that it does not have the authority to impose permit limits for non-regulated pollutants and also that there is no health based standard in the PSD program for non-PSD regulated pollutants. *Id.* at 109-10. The Region further explained that Energy Answers had, nevertheless, gone beyond the regulatory requirements to perform a human health risk screening assessment and, based on that assessment, the Region concluded that the proposed facility is "not expected to have an adverse impact on human health even when considering pollutants that are not regulated by PSD, such as lead." *Id.* at 112.

The Coalition again does not acknowledge, let alone address, in its petition any of the Region's responses to comments regarding health impacts. In particular, the Coalition makes no attempt to explain how compliance with the NAAQS for lead which, as stated above, is designed to protect public health with an adequate margin of safety, including sensitive populations such as asthmatics, is insufficient to meet the Region's environmental justice obligations.[30] *See AES Puerto Rico,* 8 E.A.D. at 351. Once again, as explained above, petitioners are required to confront the permit issuer's responses to comments on any given issue and explain why that response is "clearly erroneous or otherwise warrants review." *See* 124.19(a)(4)(ii); *see also, e.g., Prairie State,* 13 E.A.D. at 109; *Pittsfield*, at 6-9, 11. The Coalition fails to do so with respect to its arguments concerning the Region's consideration of the health impacts of the Energy Answers facility.

Although the Coalition may disagree with the content or conclusions of the Region's environmental justice analysis in this matter, the Coalition has not demonstrated that their difference of opinion is the equivalent of an insufficient effort on the Region's part in evaluating environmental justice or that the Region failed to properly analyze the impacts. *See Pio Pico*, slip op. at 44 n.30 (explaining that the Executive Order on Environmental Justice does not dictate a particular outcome, but instead gives permitting authorities considerable leeway in determining how best to implement the order's mandate); *Avenal,* slip op. at 24. In sum, the Coalition has not met their burden to show that the Region's environmental justice analysis was insufficient, or that further consideration is warranted on remand.

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[30] Although the Coalition asserts that the modeled impact of lead emissions, on which the Region relied to determine that the facility's impacts would be far below the NAAQS for lead, is flawed, the Board disagrees with that assertion for the reasons stated above.

d. *Ms. Llenza Fails to Demonstrate That the Region Did Not Comply with the Environmental Justice Order in Considering Alternatives to the Project*

Petitioner Llenza seems to argue that the Region failed to consider alternatives to the incinerator project, such as recycling, reusing, reducing, and composting. Llenza Pet. at 8. These alternatives, Ms. Llenza argues, are consistent with the current Administration's policy of "promoting, facilitating and educating communities towards the 3R's and C." *Id.* at 6. Additionally, Ms. Llenza argues, these alternatives are a "less discriminatory alternative" to the incinerator, and thus, the Region's "justification" for authorizing the facility is not "acceptable." *Id.* at 8. The legal authority for Ms. Llenza's argument is not clear from the face of the petition. Given the context of the discussion, however, the Board construes Ms. Llenza's argument to be one based on the Executive Order on Environmental Justice.[31]

EPA wholeheartedly encourages and supports programs for reducing, reusing, recycling and composting, as these practices are certainly the preferable options for managing non-hazardous municipal solid waste. *See* U.S. EPA, Non-Hazardous Waste Management Hierarchy, http://www.epa.gov/waste/nonhaz/municipal/hierarchy.htm (last visited Mar. 20, 2014). The Region stated as much in its Responses to Comments document. RTC at 54. The Region also explained that "the development[] and implementation of waste management plans, including recycling programs * * * are best made by the local government and state government(s) * * * and not by EPA through this PSD permitting action." *Id.* The Region nevertheless also noted that, although it had considered materials separation in the BACT analysis for the Permit, the Region's role in this PSD permitting action is to review Energy Answers' PSD application for the project proposed and to determine whether the project proposed meets Clean Air Act requirements. *Id.* As the Region further pointed out, the Permit contains no provisions that "would prevent [Puerto Rico] communities from implementing strong recycling programs." *Id.* at 55. In fact, the Region added to the Permit a requirement that clarifies how the proposed facility may accept municipal solid waste in a manner that is consistent with the municipal recycling obligations under Puerto Rico law. *Id*.

[31] To the extent that Llenza intended to argue that the Region's consideration of alternatives was insufficient under any other legal authority, that argument is not sufficiently articulated or preserved.

Ms. Llenza's petition again does not acknowledge or confront the Region's responses to comments relating to this issue. The failure to do so is fatal to her arguments. *See* 40 C.F.R. § 124.19(a)(4)(ii); *see also, e.g., Prairie State,* 13 E.A.D. at 109; *Pittsfield*, at 6-9, 11. Moreover, as explained above, the Executive Order on Environmental Justice does not require any particular outcome in a permit decision, but rather gives permitting authorities broad discretion to determine how best to implement its mandate within the confines of existing law. *See Pio Pico*, 16 E.A.D. at 91 n.30; *Avenal*, 15 E.A.D. at 402. Ms. Llenza has cited no other legal basis for her claim. Based on the above, Ms. Llenza has not demonstrated that the Region did not comply with the Executive Order on Environmental Justice. Accordingly, the Board denies review of this issue.

C. *The Region's Compliance with Public Participation Requirements of the PSD Permitting Program*

1. *The Region Appropriately Provided Notice of the Draft Permit and Informed the Public About the Scope of the Permit*

The Board begins its analysis of the Region's compliance with public participation requirements by addressing Ms. Llenza's challenges to the public notice by which the Region informed the public about the Draft Permit and the opportunity to provide comments. Ms. Llenza claims that the public notice failed to provide adequate information about the scope of the permitting decision. Llenza Pet. at 1. She adds that "[p]ublic participation was misguided because the *process lacked* notification informing Arecibo citizens that NAAQS for [l]ead would not be enforced for the incinerator project." *Id*. at 4 (emphasis added).[32]

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[32] In the context of her arguments relating to public participation, Ms. Llenza cites the Executive Order on Environmental Justice. Llenza Pet. at 4, 7. As stated in Part VII.B.3.a above, although the Agency is required to implement the Executive Order on Environmental Justice "consistent with, and to the extent permitted by, existing law," the Order gives federal agencies broad discretion to determine how best to implement it. *See* 59 Fed. Reg. at 7632; *Pio Pico*, 16 E.A.D. at 91 n.30 (EAB 2013). Thus, the Board's consideration of the Region's compliance with the regulatory requirements for public participation encompasses the Region's compliance with the Executive Order on Environmental Justice with respect to public participation.

These allegations require that the Board determine whether the Region complied with the requirements for public notice of draft permits and adequately informed the public of the scope of the Permit, or, as Ms. Llenza suggests, misled the public.

a. *The Public Notices the Region Issued Complied With All Applicable Regulatory Requirements*

Section 124.10 of title 40 of the Code of Federal Regulations, which governs notice of a draft permit and public comments, requires that all public notices generally alert the public to the fact that a draft permit has been issued, briefly describe the permitted activity, inform the public about their opportunity to submit comments or participate at a public hearing on the draft permit, and direct the public to where they can find additional information about the draft permit and the basis for the permitting decision.[33] *See* 40 C.F.R. § 124.10(d)(1)-(2).

The public notice of a draft permit and opportunity for comments need not provide detailed information about specific terms of the permit, the rationale for issuing the permit, or the basis of the permit decision. As explained more fully in the following section, other documents in the administrative record, such as the draft permit itself, the fact sheet or statement of basis, and the application, provide detailed and specific information about the scope of the permit, the basis for the permit decision, and the permit conditions. The public can readily find this more detailed information by following the directions provided in the public notice.

[33] Specifically, section 124.10 requires that all public notices provide: (1) the name and address of the office processing the permit action; (2) the name and address of the permittee or permit applicant and, if different, of the facility or activity regulated by the permit; (3) a brief description of the business conducted at the facility or activity described in the permit application or the draft permit; (4) the name, address and telephone number of a person from whom interested persons may obtain further information; (5) a brief description of the comment procedures; (6) the time and place of any hearing that will be held; (7) the location of the administrative record, and the times at which the record will be open for public inspection; (8) a statement that all data submitted by the applicant is available as part of the administrative record; and (9) any additional information considered necessary or proper. 40 C.F.R. § 124.10(d)(1). For public hearings, the notice must include: (1) a reference to the date of previous public notices relating to the permit; (2) the date, time, and place of the hearing; and (3) a brief description of the nature and purpose of the hearing, including the applicable rules and procedures. *Id*. § 124.10(d)(2).

In this case, the Region issued two public notices, each available in Spanish and English.[34] As explained previously, the Region's efforts to translate relevant documents into Spanish in this permitting proceeding went beyond what is required by statute, regulation, or the Executive Order on Environmental Justice. *See* Part IV, above. The First Public Notice alerted the public of the Region's intention to issue a permit and of the availability of the Draft Permit. The notice also informed the public of the opportunity to submit comments on the Draft Permit, participate at the first public hearing, and attend a public availability session. *See, e.g.*, El Vocero Press-Spanish Ad Copy of First Public Notice (May 15, 2012) (A.R. IV.8). The Second Public Notice notified the public of the extension of the public comment period and of the Region's decision to schedule five new public hearings. *See, e.g.*, El Vocero Press-Spanish Ad Copy of Second Public Notice (July 23, 2012) (A.R. IV.17). Both notices described the permitted activity, listed the pollutants the permit regulates,[35] and disclosed (1) the rules and procedures that apply; (2) where to obtain access to the administrative record; (3) the times during which the record will be open for public inspection; (4) the date, time, and place of the public hearings; (5) required information about the permittee; and the (6) name and contact information of the EPA person from whom additional information could be obtained.

Because the public notices incorporated all of the required regulatory elements, as described above, the Board rejects Ms. Llenza's assertions to the contrary.

b. *The Region Informed the Public of the Scope of the Permit, Including That Lead Emissions Are Not Regulated Under This PSD Permit*

Ms. Llenza's claims that the public notice failed to adequately inform the public about the scope of the Permit and that "the process lacked notification informing Arecibo citizens" that lead emissions will not be regulated under this

[34] Copies of the public notices were circulated in local and general newspapers of daily and weekly circulation. *See* note 2, above.

[35] *See, e.g.*, First Public Notices (describing the proposed facility and explaining that facility is subject to PSD regulations, including best available control technology ("BACT") requirements for: nitrogen oxides; carbon monoxide; volatile organic compounds; sulfur dioxide; PM and PM with an aerodynamic diameter equal to or less than 2.5 and 10 micrometers ("$PM_{2.5}$" and "PM_{10}"); fluorides; sulfuric acid mist; municipal waste combustor organics (dioxin and furans); municipal combustor metals; municipal waste acid gases; and greenhouse gas emissions); Second Public Notices (same).

Permit are inaccurate. Llenza Pet. at 1, 4. Contrary to her allegations, the Region did alert the public that the Permit will not regulate lead emissions from the proposed facility. Specifically, the Fact Sheet noted that while "Pb is a PSD regulated pollutant, [] it is not included in this permit because the applicant proposes to locate the source in a nonattainment area" for this pollutant.[36] Fact Sheet (English) at 13 n.1 (May 2012) (A.R. IV.4).

Her claims, however, erroneously assume that the public notice must include this type of information. The fact that a proposed permit will not regulate a criteria pollutant is the type of information typically found in the fact sheet or statement of basis, and not necessarily in the public notice.[37] The public notice serves to alert the public that a draft permit has been issued and that the public has the opportunity to comment on, and to obtain additional information about, the draft permit. The fact sheet, on the other hand, sets forth "the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit." 40 C.F.R. § 124.8(a).[38] The factual and legal considerations that determine what criteria pollutants are regulated under a permit are therefore appropriately found in the fact sheet. Accordingly, the Region had no obligation to refer to lead or to provide the rationale for why the Permit does not cover lead emissions from the proposed facility in the public notice of this Permit.

In addition, by providing a list of the pollutants the Permit regulates in the public notice that did not include lead,[39] the Region informed the public of the scope of the Permit and apprised it of the fact that the Permit would not regulate lead. The public notices also mentioned that the PREQB would issue a separate permit to address other pollutants from the proposed facility. *See* First Public Notice

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[36] As explained previously, the area where Energy Answers proposes to build the facility is classified as being in "nonattainment" for lead, which means that the proposed facility is subject to NNSR (or nonattainment New Source Review) regulations for its lead emissions, rather than PSD regulations. *See* Part VII.B.1.a, above.

[37] A permit issuer may, however, exercise its discretion and decide to include this level of information in a public notice.

[38] For example, the regulations require that fact sheets include the following: (1) type and quantity of pollutants proposed to be emitted; (2) degree of increment expected to be consumed from operations of the proposed facility; (3) basis for the draft permit conditions; and (4) reasons why any requested variances or alternatives to required standards do or do not appear justified. 40 C.F.R. § 124.8(b).

[39] *See* note 35, above.

(English and Spanish) (May 2012) (A.R. IV.6-.7); Second Public Notice (English and Spanish) (July 19 & 23, 2012) (A.R. IV.14 -.15). While it might have been clearer to expressly mention in the notices that the Permit would not regulate lead, the Region had no obligation to do so. In light of all this, the Board concludes that the Region notified the public of the scope of this permit decision, including that this Permit does not regulate lead emissions.

In sum, the Region complied with all regulatory requirements for public notice, the fact sheet explained why lead is not a regulated pollutant under this Permit, and the public notices informed the public of the scope of this Permit. Therefore, the Board concludes that the public was not misled as Ms. Llenza suggests.

2. *The Region Gave the Public Sufficient Opportunity to Consider the Draft Permit and to File a Permit Appeal*

The Board next examines whether the public received adequate opportunity to participate in the decisionmaking process of this Permit. Ms. Llenza seems to question such opportunity by claiming that the Permittee had more time than the public to "analyze" and "file" documents. *See* Llenza Pet. at 7 (claiming that Permittee "was given ample opportunity to collect information and to analyze documents" while the "community was forbidden [from] assessing meaningful data"); *id*. at 11 (claiming that "the same problem arises with the [a]ppeal procedure," because the Permittee was given "plenty of room to file documents, with no size restrictions and without time deadlines," apparently referring to 40 C.F.R. § 124.19(a)(3), which establishes a 30-day deadline to file a petition seeking review of a final permit decision, and § 124.19(d)(3), which requires petitions and response briefs not to exceed 14,000 words). While her petition does not explicitly challenge the length of the public comment period or the regulations that govern the filing of petitions before the Board, at bottom her claims suggest a challenge to both the opportunity to comment on the Draft Permit and to file a permit appeal.[40] These claims do not withstand scrutiny.

[40] Ms. Llenza's claims can also be interpreted as challenging the permitting process itself in that the evaluation process permit issuers conduct after an applicant applies for a permit allows for information exchanges and is not as constrained in terms of time as the opportunity for the public to comment on a permit decision or to file an appeal seeking review of that decision. *See* note 43, below (addressing this challenge).

The public had ample time to consider the Draft Permit and to provide verbal and written comments.[41] In fact, the Board agrees with the Region that "the public outreach and public comment process provided by EPA on the proposed [] permit went beyond the regulatory requirements set forth in 40 CFR 124 for PSD permit proceedings." RTC at 68.

First, the public comment period allowed for this Permit exceeded the time granted in most permit proceedings. As the Region explained in the Response to Comments document, the regulations that govern permit proceedings "require a public comment period which typically is open for 30 days." RTC at 69; *see* 40 C.F.R. § 124.10(b)(1) ("Public notice of the preparation of a draft permit * * * shall allow at least 30 days for public comment."). In this case, the public comment period lasted 105 days. *See* RTC at 69, 106.

Second, the Region held several public hearings. EPA regulations at 40 C.F.R. § 124.12 state that "[t]he Director shall hold *a* public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest in a draft permit." (Emphasis added). Recognizing the significant interest from the public and wanting to ensure that the public had meaningful opportunities to participate in the public review process, the Region arranged not for one, but for six hearings. The Region even scheduled hearing "sessions in the day, evening and the weekend [] to accommodate the various schedules of citizens." RTC at 106.

Third, not only did the Region extend the public comment period and arrange for six public hearings, the Region also conducted two availability sessions.[42] These sessions are not required by law or Agency regulations. The Region conducted them "to provide a forum to hear the public's concerns, and allow informal conversations to better inform the [public]" about the proposed project and permit. *Id.* at 105. The Region also went beyond its obligations under the statute and regulations that govern permit decisionmaking (40 C.F.R. part 124) and the Executive Order on Environmental Justice by translating relevant permit documents into Spanish and by providing simultaneous English and Spanish translations at all the hearings and public availability sessions. *See id.;* Part IV, above.

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[41] Notably, Ms. Llenza does not claim that she requested additional time to submit public comments or to participate at the hearings.

[42] *See* note 3, above, and accompanying text.

In light of this, the Board rejects Ms. Llenza's suggestion that the public lacked adequate opportunity to consider the Draft Permit. To the contrary, the record demonstrates the opposite.[43]

The Board also rejects Ms. Llenza's suggestions that the public's opportunity to file an appeal was inadequate and somehow less favorable than the Permittee's. Both the general public and the Permittee are subject to the same Part 124 regulations. Therefore, the 30-day deadline to file a petition for review before the Board as well as all the content and form requirements on briefs filed before the Board apply equally to the general public and permittees. *See* 40 C.F.R. § 124.19(a)(3), (d)(3). In addition, in this particular case the Board extended the deadline to file a petition an additional five days. The extension applied equally to all petitioners. *See* Order on Timeliness of Petitions Filed and Denying Region's Motion to Dismiss (Aug. 2, 2013) (applying extra five days to petitions that otherwise would have been considered untimely filed).

For the foregoing reasons, the Board concludes that the public received sufficient opportunity to comment on the Draft Permit and to file a permit appeal. Ms. Llenza has not demonstrated otherwise.

3. *Ms. Llenza Has Not Demonstrated That the Region Failed to Make the Administrative Record of the Draft Permit and Final Permit Decision Appropriately Available*

Ms. Llenza also questions the availability of the administrative record during the public comment period. Ms. Llenza claims that the public never had the opportunity "to know the full content of the statements to EPA regarding this permit" and that the documents the Region evaluated in connection with this Permit were in New York, whereas only a selection was available in Puerto Rico. Llenza Pet. at 9-10.

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[43] To the extent that Ms. Llenza seeks to challenge the permitting process itself, *see* note 40, above, this is an untimely challenge to the regulations that govern permit decisionmaking (i.e., 40 C.F.R. part 124). As explained above, absent "exceptional circumstances" where an "extremely compelling argument is made," the Board will not entertain such a challenge. *See* Part VII.A.1.a, above. Ms. Llenza has not presented the "exceptional circumstances" required to compel the Board to entertain such a challenge. Similarly, to the extent that Ms. Llenza attempts to challenge the provisions that establish a deadline to file appeals of final permit decisions and set limits on the length of briefs filed before the Board, her challenge is untimely, as well as misplaced.

Ms. Llenza, however, has failed to demonstrate that the record was not appropriately made available to the public. The public notices the Region issued in English and Spanish clearly stated that anyone interested in reviewing the administrative record could do so by *visiting* the Region's Air Program Branch, located in New York, New York, or the Region's Caribbean Environmental Protection Division, located in Guaynabo,[44] Puerto Rico.[45] Significantly, Ms. Llenza does not claim that she requested documents from the administrative record available at the Caribbean Environmental Protection Division or the New York City offices, or that the Region denied access to the record or refused to make available a document that she had requested.

Ms. Llenza's allegations, however, appear to be based on the record's online availability. *See* Llenza Pet. at 9. Ms. Llenza correctly observes that only certain documents were available online at the Region's and the Interamerican-University's websites.[46] Ms. Llenza, however, erroneously assumes that permit issuers are required to provide online access to the entire administrative record of a permit proceeding.

While having online access to the entire administrative record in a permit proceeding would be desirable, and in fact today most EPA Regions are working towards that goal, permit issuers, like the Region in this case, are not legally required to post the administrative record of a permit proceeding online. *In re Russell City Energy Ctr. ("Russell City II")*, 15 E.A.D. 1, 97 (EAB 2010), *petition denied sub nom. Chabot-Las Positas Cmty. Coll. Dist. v. EPA*, 482 F. App'x 219

[44] Guaynabo is a municipality in the northern part of Puerto Rico located approximately 40 to 50 miles east of the municipality of Arecibo.

[45] U.S. EPA Region 2, First Public Notice (English and Spanish) (May 2012) (A.R. IV.6-.7); El Vocero Press-Spanish Ad Copy of Second Public Notice (July 23, 2012) (A.R. IV.17).

[46] The Region made available selected documents that comprise the administrative record for the Draft Permit at a "website at the local university in Arecibo for ease in obtaining information from any location." *See* RTC at 106; Universidad Interamericana de Puerto Rico, Recinto de Arecibo, Reserva Virtual-EPA-Energy Answers-Renewable Energy Project, http://www.arecibo.inter.edu/reserva/epa/epa.htm# (last visited Mar. 20, 2014). Selected additional documents that comprise the administrative record for the final permit decision were available at the Region's website at http://www.epa.gov/region02/air/permit/energyanswers. For a description of what should be included in the administrative record of a draft permit and of a final permit decision, see 40 C.F.R. §§ 124.9, .18.

(9th Cir. 2012) (noting that the regulations do not require that the administrative record be electronically available; only requirement is that administrative record be available for review). Under EPA's current regulations, providing online access to the administrative record is still a discretionary matter.[47] A permit issuer, however, is required to provide physical access to the administrative record,[48] which the Region provided in this case. Therefore, the Region's decision to provide online access of a selection of documents, as opposed to the entire administrative record of this permit proceeding, does not constitute clear error.

Nonetheless, language in the public notices may have implied that the entire record was available online.[49] Because of that, the Board also examines whether this representation harmed or prejudiced Petitioner Llenza or the public. Upon examination, the Board finds that while the Region should have been clearer in its notice of the Draft Permit that the documents available online did not comprise the entire administrative record of the permit decision, the Region provided sufficient information for the public to submit meaningful comments on the Draft Permit and to file meaningful petitions.

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[47] The Executive Order on Environmental Justice does not alter the Region's obligation with respect to online access. While the Executive Order on Environmental Justice seeks to increase public participation in the permitting process, as stated previously, the order does not dictate how federal agencies are to comply with its mandate.

That being said, one of EPA's goals is "to enable overburdened communities to have full and meaningful access to the permitting process and to develop permits that address environmental justice issues to the greatest extent practicable under existing environmental laws." EPA's Plan EJ 2014 at 11. In this case, even though Cambalache, the area where Energy Answers proposes to build the facility, is not considered an overburdened community, the Region engaged in enhanced public outreach to allow all the surrounding communities, and indeed every barrio within the municipality of Arecibo, an early opportunity to learn about the project and voice their concerns, as well as to allow the permit applicant and the permit issuer to address those concerns early in the process. *See* RTC at 104-105, 107; *see also* Envtl. Justice Eval. at 27.

[48] *See* 40 C.F.R. § 124.10(d)(vi) (requiring permit issuer to include in the public notice of a draft permit the location of the administrative record and the times at which the record will be open for public inspection).

[49] *See* U.S. EPA Region 2, First Public Notice (English) (May 2012) (A.R. IV.6) (stating that "[t]he administrative record will be also available on the Interamerican University-Arecibo Campus website").

A closer look at the Interamerican-University website, where the Region made a selection of the record for the Draft Permit available, reveals that the most significant documents, which provided the basis for the Draft Permit decision, were available online. These documents included (1) the permit application and supplemental information; (2) the air quality modeling protocol and its various revisions and addendums (*e.g.*, $PM_{2.5}$ and PM_{10} modeling, NAAQS modeling, and NO_2); (3) the environmental justice evaluation; (4) the BACT analysis; (5) the preconstruction monitoring waiver request; (6) responses to EPA's comments regarding modeling; (7) a general project description; (8) the Fact Sheet; (9) the Draft Permit; and (10) the First and Second Notices.[50] Under this scenario, the Board cannot conclude that having only a partial record available online deprived the public of the opportunity to submit meaningful comments on the Draft Permit. Ms. Llenza has not demonstrated otherwise by specifying or explaining how her comments would have been any different had the entire administrative record for the Draft Permit would had been available online. Nor has she identified specific documents related to the Draft Permit missing from the Interamerican-University website that would have impacted her comments. *See In re ConocoPhillips Co.*, 13 E.A.D. 768, 779 n.12 (EAB 2008) (finding no actual prejudice in case where petitioners suggested prejudice but failed to substantiate suggestion by specifying how they were harmed or prejudiced by the permit issuer's actions). In fact, Ms. Llenza does not allege actual prejudice; rather her contention is a generalized claim that the record was not adequately made available to the public.

Likewise, the Board finds that the public's opportunity to file meaningful petitions seeking review of the final permit decision was not impaired by a partial record available at the Interamerican-University website. While the Permit and Response to Comments document were not available at the Interamerican-University website, the documents were available on the Region's website,[51] as well as at the two locations mentioned above. In addition, Ms. Llenza, and other members of the public received personal notice of the final permit decision. *See*

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[50] In sum, a total of 36 documents were available on this website. *See* Universidad Interamericana de Puerto Rico, Recinto de Arecibo, Reserva Virtual-EPA-Energy Answers-Renewable Energy Project, http://www.arecibo.inter.edu/reserva/ epa/epa.htm#. Significantly, this case involved a voluminous record as evidenced by the 3,280 comments on the Draft Permit and the 62-page Certified Index to the Administrative Record. To expect the permit issuer to make the entire administrative record electronically available in a case with such a voluminous record would appear to place an undue burden on the permit issuer.

[51] *See* note 46, above.

Interested Parties Final Permit Notification Letters (June 11, 2013) (A.R. V.7). The notice specifically provided a link to the final permit decision and Response to Comments document. *Id.*; Final Permit E-mails and Interested Parties Letter (June 1, 2013) (A.R. V.4). While the comments submitted during the different hearings and the public comment period were not available online, the public was aware that all these documents would be made part of the administrative record.[52] It is therefore reasonable to conclude that, if an interested person who participated at the hearings or submitted comments on the Draft Permit wanted to examine the hearing transcripts or comments others submitted during the public comment period, that person would have contacted the Caribbean Environmental Division or the New York office to try to gain access to such documents after realizing that they were not included in the Interamerican-University and the Region's website. As noted above, Ms. Llenza does not claim that she engaged in this course of action, or that any of the documents she requested were not made available to her after having placed a request.

In sum, this is not a case where the public lacked total access to the documents that formed the basis of the Draft Permit and final permit decision. The key documents relevant to the preliminary determination to approve the permit (e.g., the Draft Permit) as well as the Response to Comments and final permit decision were available online, and the entire administrative record of the permit decision was available in two different locations. Ms. Llenza has not demonstrated that the Region failed to comply with a legal obligation, or denied access to public documents available in the New York or Puerto Rico offices, nor has she identified specific harm or prejudice. Therefore, the Board has no reason to question the availability of the administrative record during the permitting process leading up to this permit appeal. Consequently, the Board declines to remand the permit decision on this particular basis.

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[52] *See, e.g.*, First Notice (English) (May 2012) (A.R. IV.6) (noting that the hearing transcripts and any other documents submitted during the hearings will become part of the administrative record of the permit procedure); El Vocero Press-Spanish Ad Copy of First Public Notice (May 15, 2012) (A.R. IV.8) (same); Second Public Notice (English) (July 19, 2012) (A.R. IV.14) (noting that all comments received would be made part of the administrative record); El Vocero Press-Spanish Ad Copy of Second Public Notice (July 23, 2012) (A.R. IV.17) (same); *see also* Certified Index to the Administrative Record at 27-61 (Section VIII - Public Comments).

D. *Content of the Administrative Record*

Next, the Board examines Ms. Quiñones' challenges to the content of the administrative record. Ms. Quiñones appears to argue that the administrative record is inadequate because the Region failed to include "information needed for the people to participate in the public hearings," such as: (1) "what EPA offices do to evaluate" the permit application; (2) information about the ash handling process, including fugitive emissions at the facility and the ash disposal site and its associated health impacts; (3) information about the intake of water for cooling process, including fugitive emissions;[53] and (4) information about how emissions from the proposed facility will affect the Puerto Rican Parrot Recovery Program and other species found nearby.[54] *See* Quiñones Pet. at 4, 7, 8-9.

In light of these claims, the Board examines whether the record reflects the Region's rationale for issuing the Permit and includes information about the ash handling process and ash disposal, the intake of water for the cooling tower, and the ecological risks to species found in nearby areas, including parrots in the Río Abajo Forest and other species in the Caño Tiburones Natural Reserve. In doing so, the Board must determine whether any such information is, in fact, missing from the administrative record, and, if so, whether Ms. Quiñones has demonstrated that the Region was obligated to include such information in the record.

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[53] On page 7 of her petition, Ms. Quiñones claims that comments and discussion about the issues she raises "were not possible because [the Permittee]" did not provide details. Quiñones Pet. at 7. Ms. Quiñones' petition, however, does not clarify what specific arguments were not possible to be raised in comments below. The Board interprets her claim to encompass all the arguments she raises in Section B of her petition. *See* Quiñones Pet. at 6-7. The Board has examined Ms. Quiñones' arguments and found that some of the issues she raised in Section B of her petition were either raised or are closely related to issues raised during the public comment period. The Board addressed these issues above. For those issues that were not raised, the Board examines whether the issues were reasonably available. If not reasonably available the Board examines the merits of the issue, otherwise the Board denies review of the issue.

[54] Co-petitioners Flores and Centeno also seem to argue that the Region failed to include, in the record of this permit decision, reports of pollutant emissions from nearby incinerators. *See* Flores/Centeno Pet. at 17. The Board addresses these arguments in Part VII.E.1.a, below.

1. *The Record Reflects the Region's Rationale for Issuing the Permit*

As noted above, Ms. Quiñones claims that the administrative record for the Draft Permit failed to include "what EPA offices do to evaluate" the permit application. It is unclear what Ms. Quiñones means by this statement;[55] the Board nonetheless construes the argument as a claim that the record does not reflect the permit issuer's rationale or basis for issuing the Draft Permit.

Contrary to Ms. Quiñones suggestion, examination of the record shows that the Region included all the information necessary for the public to participate during the public comment period and public hearings, including its rationale for issuing the Draft Permit and establishing permit conditions. First, the Region complied with 40 C.F.R. § 124.9, which requires the administrative record of a draft permit to include (1) the application and any supporting data the applicant furnished; (2) the draft permit; (3) the statement of basis or fact sheet; (4) all documents cited in the statement of basis or fact sheet; and (5) other documents contained in the supporting file for the draft permit. The Region also included in the administrative record all the communications between EPA and the applicant regarding the permit application. *See, e.g.*, Supplemental Project and BACT Information-Emails (Apr. 2010 to Sept. 2010) (A.R. I.B.6.1-.16); Supplemental Air Quality Analysis Information-Emails (Mar. 2010 to Nov. 2010) (A.R. I.B.1-.20).

Significantly, the Fact Sheet and the communications between the Region and Energy Answers regarding the air quality modeling (including the protocol used), BACT analyses, completeness of the PSD application, and the preconstruction monitoring waiver reflect the permit issuer's analysis and rationale for imposing permit conditions and granting the permit application.[56] As explained earlier in this decision, fact sheets, which are required by 40 C.F.R. § 124.8, describe the principal facts and the significant factual, legal, methodological and policy questions considered in preparing a draft permit. The Fact Sheet in this case provided a description and identified the location of the project, explained the basis

[55] As explained previously, the Board does not expect the petitions of those unrepresented by counsel, like Ms. Quiñones, to contain sophisticated legal arguments or to employ precise technical or legal terms. *See* Part III.B, above. The Board, however, does expect such petitions to provide sufficient specificity to apprise the Board of the issues being raised and to articulate some supportable reason or reasons as to why the permitting authority erred or why review is otherwise warranted. *See, e.g., In re Sutter Power Plant,* 8 E.A.D. 680, 687-88 (EAB 1999).

[56] *See, e.g.*, A.R. I.2.a, I.A.5.a-.6, I.A.10.c, I.B.2.a, I.B.3.a, I.B.5., and II.A.1-.7.

of the permit conditions, and provided a summary of the BACT, ambient air quality, NAAQS, and PSD increment analyses. Fact Sheet (English) at 3, 10, 18-21.

In light of this extensive information in the administrative record, the Board concludes that the record for the Draft Permit included all the documents the regulations require, including the Region's rationale for issuing the final permit decision. The Board, therefore, has no reason to conclude that the public did not have information necessary to participate at the public hearings, as Ms. Quiñones claims.

2. *The Record Provided Adequate Information About Ash Handling and Associated Health Impacts*

Ms. Quiñones also claims that the administrative record of the Draft Permit omitted information about the ash handling process and that the Region failed to evaluate fugitive emissions from ash handling at the proposed facility and at the ash disposal site, and the health impacts from fugitive emissions. *See* Quiñones Pet. at 7 (claiming that there is no information in the record evaluating dispersion of contaminants from the ash handling process, that fugitive emissions from this process must be considered in this Permit, and that the Region had an obligation to evaluate fugitive emissions at the ash disposal site).

The Region disagrees with Ms. Quiñones. On appeal, the Region explains that documents were available during the public comment period that addressed (1) the ash handling system; (2) fugitive particulate emissions at the proposed facility, including fugitive emissions from ash handling; (3) permit conditions for the ash handling system, including conditions for addressing fugitive ash emissions; and (4) potential landfills for ash disposal. Region's Resp. Br. at 21-22. The Board examines these arguments in turn.

a. *The Record Explained How the Region Addressed Fugitive Emissions from Ash Handling at the Proposed Facility and Took Into Account Associated Health Considerations, It Also Explained Why this Permit Does Not Regulate Fugitive Emissions at the Ash Disposal Site*

Examination of the documents that the Region identifies shows that, in fact, documents available during the public comment period provided the information Ms. Quiñones claims the record lacks. With respect to the ash handling process and emissions from this process, the Fact Sheet described the type of ash that would result from the municipal waste combustor (i.e., bottom and fly ash) and the ash handling process, and the Draft Permit established conditions for the ash handling system and for fugitive particulate emission sources at the facility, including

fugitive emissions from ash handling. Fact Sheet (English) at 5-6; Draft Permit at 12-13 (Condition VII.B), 18-20 (Condition VII.G). For fugitive emissions at the ash disposal site, the Draft Permit made it clear that ash disposal depended upon PREQB approval and that the Permittee would not get specific information about fugitive emissions at the ash disposal site until closer to the start-up date.[57] In addition, the Final Materials Separation Plan disclosed that the permit applicant had not selected an ash disposal site, but had engaged in discussions with multiple landfill owners in Puerto Rico, and noted that the permit applicant did not intend to build a landfill in Puerto Rico or use the Arecibo landfill for ash disposal.[58] Final Materials Separation Plan app. 8 at 22-23 (Apr. 2012) (A.R. I.B.8) ("Materials Separation Plan"). Information about health impacts from the project, including fugitive emissions from ash handling, was also available during the public comment period of the Draft Permit. The Fact Sheet, for example, explained that "the proposed emission rates are considered [BACT] and they will not cause or contribute to an exceedance of any [national ambient] air quality standards [NAAQS] or [PSD] increment," and that "[t]he [NAAQS] are health based air quality concentrations established by the Clean Air Act to protect public health and welfare."[59] Fact Sheet (English) at 18, 21.

Furthermore, the Response to Comments document clarified and elaborated on this information. In response to specific comments about the particulate

[57] *See* Draft Permit at 13 (Condition VII.B.5) ("At least 6 months prior to the anticipated startup date, the Permittee shall submit a bottom and fly ash characterization study plan to the Puerto Rico Environmental Quality Board (PREQB) for review and approval. The Permittee shall not send any ash or Boiler Aggregate™ for either disposal or beneficial use, without receiving prior approval from the PREQB.").

[58] Ms. Llenza seems to take issue with the decision to dispose of ash at an outside location. *See* Llenza Pet. at 8. Relying on Title VI of the Civil Rights Act, 42 U.S.C. §§ 2000d-d7, and 40 C.F.R. § 7.35(b), Ms. Llenza alleges discrimination against Puerto Ricans because of their national origin. *Id*. ("diverting the ash through the island is discriminatory against Puerto Ricans."). This issue, however, was not raised below. Nor has Ms. Llenza provided any basis for the Board's jurisdiction over such a claim. Therefore, the Board declines to consider Ms. Llenza's arguments based on Title VI of the Civil Rights Act.

[59] As the Region correctly points out, NAAQS are standards designed to protect public health, including the health of "sensitive" populations such as asthmatics, children, and the elderly, with an adequate margin of safety, and to protect public welfare, including protection against visibility impairment and damage to animals, crops, vegetation, and buildings. *See* CAA § 109(b)(1)-(2), 42 U.S.C. § 7409(b)(1)-(2).

emissions resulting from the project, the Response to Comments document explained that (1) the Region is very sensitive to the health of the residents and understands their concerns about the health risks from exposure to particulate emissions resulting from combustion sources; (2) the Region sought to ensure that health-based NAAQS would be met for all criteria pollutants, including PM_{10} and $PM_{2.5}$; (3) *the air quality impacts analysis for* PM_{10} *and* $PM_{2.5}$ *included the particulate emissions associated with the ash generated at the project's site*; and (4) compliance with NAAQS sufficiently demonstrates that emissions from a proposed facility will not have adverse health or environmental effects.[60] RTC at 59-60 (emphasis added). In response to specific concerns about "the health effects associated with the ash disposal, and with the use of the bottom ash as construction material," the Region explained that (1) "ash disposal, ash beneficial uses, [and] ash sampling are not implemented through a PSD permit," but instead "these requirements should be addressed by the appropriate permits issued under the authority of PREQB." *Id*. at 79-80. The Region clarified further that, while the Permit does not address fugitive emissions at the ash disposal site, the Permit does cover several other aspects of ash handling, including treating fugitive emissions as potential sources of particulate emissions. The Permit covers bottom and fly ash handling and conveying system, ash processing, and ash storage. The Permit also establishes BACT limits for the particulate emission rates, opacity of emissions, and visible emissions associated with combustors-generated ash, and establishes continuous monitoring requirements of the filtering parameters, which would ensure the BACT limits are met on a continuous basis. *Id*. On appeal, the Region adds that the landfill location for ash disposal has not been chosen yet and therefore it is impossible to determine whether the impacts will be the same as in the general area of the proposed facility. Region's Resp. Br. at 23.

It is evident from the above discussion that the administrative record for the permit decision provided information about the ash handling process, including how the Permit would address fugitive emissions from ash handling at the proposed

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[60] In response to another comment, the Region explained that (1) municipal waste combustors must satisfy many requirements under the Clean Air Act beside PSD; (2) maximum achievable control technology ("MACT") standards are one of the many requirements municipal waste combustors must satisfy; (3) MACT standards make today's municipal waste combustor facilities safer than in pre-MACT days; (4) many of the same pollutants subject to MACT standards are also PSD regulated pollutants subject to BACT; (5) from a human health perspective, BACT for this Permit is more stringent than MACT; and (6) based on the air quality impact analysis, the anticipated air quality impacts from the project will not cause or contribute to an exceedance of any NAAQS or PSD increments. *See* RTC at 62-63.

facility (i.e., as a source of particulate emissions) and how the Permittee and the Region took into account health considerations when evaluating effects from particulate emissions.[61] The administrative record also explained why this Permit does not regulate fugitive emissions at the ash disposal site. Therefore, Ms. Quiñones' allegations that the record omitted information about the ash handling process are incorrect.

b. *Ms. Quiñones Has Not Demonstrated That the Region Clearly Erred by Deciding Not to Regulate Fugitive Emissions at the Ash Disposal Site*

Relying on the definition of the term "site," codified at 40 C.F.R. § 124.2, Ms. Quiñones argues that the ash disposal site is part of the project and therefore the Region had to evaluate fugitive emissions at this location. Quiñones Pet. at 7. Ms. Quiñones, however, does not directly address the Region's responses to comments by explaining why the Region clearly erred in concluding that ash disposal is not implemented through the PSD program, that instead PREQB should address these requirements. The applicable regulations require that "if the petition raises an issue that the [permit issuer] addressed in the response to comments document * * * then petitioner must * * * *explain why the [permit issuer's] response to the comment was clearly erroneous or otherwise warrants review*. 40 C.F.R. § 124.19(a)(4)(B)(ii) (emphasis added).[62] Ms. Quiñones has failed to meet this requirement.

In addition, to the extent that Ms. Quiñones relies on section 124.2 to demonstrate clear error, her attempt falls short. Section 124.2 defines the term site as "the land or water area where any 'facility or activity' is physically located or conducted, *including adjacent* land used in connection with the facility or activity." 40 C.F.R. § 124.2 (emphasis added). As explained above, the Permittee has not selected an ash disposal site, and Ms. Quiñones has presented no evidence that the disposal site will be located adjacent to the proposed facility. Without more, the Board has no basis to second-guess the Region's determination or to determine that the Region was obligated to evaluate fugitive emissions at the ash disposal site.

[61] Ms. Quiñones does not claim that the Region's approach of addressing fugitive emissions from ash handling as a source of particulate emissions is clearly erroneous.

[62] As explained in Part III.B of this decision, petitioners may not simply reiterate comments made during the public comment period. Petitioners are expected to substantively confront the permit issuer's explanations and explain why the permit issuer's response to comments is clearly erroneous or otherwise warrants consideration.

Consequently, the Board declines review of the permit decision on the basis Ms. Quiñones proposes.

3. *The Record Provided Adequate Information About the Intake of Water for, and Fugitive Emissions at, the Cooling Tower, and Ms. Quiñones Has Not Demonstrated that the Issue Concerning Fugitive Emissions at the Pump Station Was Preserved for Board Review*

Ms. Quiñones argues that information about "the intake of water for cooling process," including fugitive emissions from "its operation,"[63] is missing from the record. Quiñones Pet. at 7.

The Region disagrees, explaining that the permit application briefly described the water intake source for the cooling tower and that the Materials Separation Plan provided information about the location of the water intake. Region's Resp. Br. at 22. The Region also explains that the Draft Permit included conditions for particulate emissions from the cooling tower. *Id*.

As the Region correctly points out, these documents, which were available during the public comment period, provided information about the water source for cooling purposes and the location of the water source. For example, the permit application identified "brackish water discharged from Caño Tiburones" as the water supply for "the cooling tower and boilers." Energy Answers' PSD Permit Application at 2-21 (Feb. 2011) (A.R. I.B.1.a) ("Permit Appl."). The Materials Separation Plan, for its part, provided details about the location from which the cooling water would be taken. Materials Separation Plan app. 8 at 21 ("[T]he water

[63] The petition does not make clear the scope of Ms. Quiñones' argument. *See* Quiñones Pet. at 7 ("[T]he intake of water for cooling process is propose[d] to be located at Jariales Pump Station, connected to the stack area with pipes. This part of the project and fugitive emissions of [its] operation ha[ve] not been describe[d] in any part of documents in [the] administrative record."). In particular, her reference to "this part of the project" and "its operation" is ambiguous. Her arguments can be read as a claim that the record failed to describe the intake of water for the cooling tower; the location where the pipe connects at the facility; fugitive emissions from the cooling process itself; or fugitive emissions at the pump station where water will be routed for cooling purposes. Petitioners are reminded of the importance of clarity and specificity in their petitions. The specificity with which the Board can address an issue raised on appeal entirely depends on the degree of clarity and specificity of the petition itself.

that will be used at the plant comes from the El Vigia Pump Station,[64] which discharges water from Caño Tiburones to the Atlantic Ocean. It's not water from Caño Tiburones, but the water that is already draining from the Caño for purposes of flood control."). In addition, the Draft Permit established conditions to control fugitive emissions from the cooling tower.[65] Thus, contrary to Ms. Quiñones' suggestions, the record for the Draft Permit included information about the intake of water for the cooling tower and fugitive emissions from the cooling process itself.

Ms. Quiñones also seems to argue that the Region failed to address fugitive emissions at the pump station where water will be routed to the cooling tower.[66] The Region claims that this argument is raised on appeal for the first time. Ms. Quiñones claims that "comments and discussion about this issue[] w[as] not possible because [the Permittee] never g[a]ve detail[s]." Quiñones Pet. at 7.

The Board disagrees with Ms. Quiñones. As already noted, the record for the Draft Permit described the water source for the cooling tower and the location of the water intake. Therefore, it would appear that her concerns about fugitive emissions at the location of the water intake could have been raised below. Without any other explanation from Ms. Quiñones, the Board has no basis to conclude that the argument was not reasonably available. Therefore, because the issue was not preserved for Board review, the Board declines to examine the merits of this particular argument.

4. *The Record Provides Sufficient Information About the Ecological Risks to Species Found Nearby*

Ms. Quiñones claims that the record does not provide information about the impact of pollutant emissions over protected ecosystems and species in nearby habitats. *Id*. at 8-9. Of particular interest to Ms. Quiñones are the impacts on

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[64] In its response to the petitions, Energy Answers clarifies that the cooling water pump will be located at "El Vigia" pump station, not at the Jariales Pump Station as Ms. Quiñones asserts. Energy Answers' Resp. Br. at 29 n.4.

[65] *See* Draft Permit at 17-18 (requiring Permittee to install high efficiency drift eliminators for the cooling tower and imposing conditions for inspection).

[66] *See* note 63, above.

species in the Caño Tiburones Natural Reserve,[67] and on the Puerto Rican Parrot Recovery Program, which seeks to reintroduce the Puerto Rican parrot into the Río Abajo Forest.[68] *Id*. Both the Río Abajo Forest and the Caño Tiburones Natural Reserve are close to the proposed facility. According to Ms. Quiñones, the Screening Level Ecological Risk Assessment ("SLERA")[69] that the Permittee conducted, and the Region approved, does not include the Río Abajo Forest or the Caño Tiburones Natural Reserve. *Id*. at 9.

The record, however, demonstrates otherwise. Contrary to Ms. Quiñones' claims, the SLERA included both the Río Abajo Forest and the Caño Tiburones Natural Reserve in its evaluation of potential adverse effects to ecological receptors.[70] *See* U.S. EPA Summary and Evaluation of EA's Human Health Risk Assessment and Screening Level Ecological Risk Assessment at 11 (Jan. 18, 2013) (A.R. III.1) [hereinafter Region's Evaluation of the SLERA]. Specifically, the SLERA identified the Río Abajo Forest and the Caño Tiburones Natural Reserve

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[67] Located in the north coastal plain of the island near Arecibo, the Caño Tiburones Natural Reserve is the largest wetland in Puerto Rico.

[68] The U.S. Fish and Wildlife Service, in cooperation with the U.S. Forest Service, the Puerto Rico Department of Natural and Environmental Resources, and the U.S. Geological Survey, created the Puerto Rican Parrot Recovery Program as an effort to conserve, protect and manage the wild and captive populations of the Puerto Rican parrot, a species currently listed as endangered. The program seeks to reintroduce the parrot into its natural habitat to create a wild population, downlist the species from endangered to threatened, eventually delist the species, and assure its long-term viability in the wild. The program identifies the Río Abajo Forest as the preferred habitat for reintroduction. *See* U.S. Fish and Wildlife Service, Environmental Assessment, Reintroduction of the Puerto Rican Parrot, Río Abajo Commonwealth Forest Puerto Rico (Aug. 2006), *available at* http://www.fws.gov/southeast/prparrot/.

[69] The Response to Comments document explains that the pemittee prepared a SLERA to determine the risks to the environment associated with exposure to combined emissions of pollutants for which no NAAQs exist, such as dioxins, furans, and metals. RTC at 116.

[70] Ecological receptors are ecological species, such as mammals, birds (including parrots), reptiles (e.g., snakes), aquatic species (e.g., turtles, fish, amphibians), and other organisms, and plants, "which potentially could be found in habitat areas located within 10 km radius of the project" and the proposed project's emissions could potentially affect. Region's Evaluation of the SLERA at 10, 12.

as two of nine ecologically sensitive areas ("ESAs") within a ten-kilometer radius of the proposed facility.[71] *Id*.

The SLERA serves as a tool to evaluate potential adverse effects or ecological risks on ecological receptors that may be present in ESAs located within a ten kilometer radius from the proposed facility. The SLERA compares estimated concentrations of chemicals of potential ecological concern ("COPECs") in soil, surface water, and sediment that may result from the proposed combustors, with ecological-based screening level ("EBSLs")[72] for different classes of ecological receptors. *Id*. at 10. EBSLs are meant to be protective of the species of animals and plants that live in ESAs. *Id*. at 11. The SLERA, therefore, "provide[s] information on potential impacts to ecological receptors and form the basis for assessment of ecological risks." *Id*. at 10.

In this case, the SLERA showed that "the estimated concentration of all COPECs (for soil, surface water, and sediment) in the ESAs are much lower than their appropriate ESBLs screening values." *Id*. at 12 (noting that COPECs are more than 3 orders of magnitude less for soil and sediment, and more than one order of magnitude for surface water). Based on this finding, the Region determined that it does not expect "potential for risk to ecological receptors exposed to soil, surface water, and sediment" or "adverse health effects in the ecological receptors." *Id*.

It is clear from the above discussion that the Region considered the impact emissions from the proposed facility could potentially have on species that may be present in the Río Abajo Forest, which include parrots and other species in the Caño Tiburones Natural Reserve. While the SLERA does not explicitly mention the Puerto Rican Parrot Recovery Program or the Puerto Rican parrot per se, it is evident that the scope of the review included this species as well. Significantly, the Fish and Wildlife Service in Puerto Rico, which manages the Puerto Rican Parrot Recovery Program, provided comments on the proposed project and expressly stated that it does not anticipate adverse effects for species under its jurisdiction. *See* Supplemental to Application: Responses to EPA Comments to the PSD Application (June 2011) app. D (A.R. I.B.2.a).

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[71] ESAs are areas where ecological receptors may be present. Region's Evaluation of the SLERA at 12.

[72] EBSLs are "media-specific COPEC concentrations above which there is sufficient concern regarding adverse ecological effects to warrant further investigation." Region's Evaluation of the SLERA at 11.

The Board, therefore, concludes that Ms. Quiñones has not demonstrated that the Region failed to include required information in the administrative record of the Draft Permit and denies review on the grounds Ms. Quiñones propounds.

E. *The Region's Substantive Consideration of the Permit and Specific Permit Conditions*

1. *Petitioners Have Not Demonstrated Clear Error in the Air Quality Analysis*

The Board examines next the different challenges three of the petitioners appear to make to the air quality analysis. PSD permit applicants must provide an air quality analysis of the ambient impacts associated with constructing and operating a proposed facility. *NSR Manual* at C.1. Generally, the analysis will involve assessing existing air quality, which may include reviewing ambient monitoring data and air quality dispersion modeling results, and predicting, using dispersion modeling, ambient concentrations that will result from the applicant's proposed project and future growth associated with the project. *Id*. Among other things, the air quality analysis must take into account emissions from nearby sources.

Co-petitioners Flores and Centeno ("Co-Petitioners"), Ms. Galán, and Ms. Quiñones appear to challenge different aspects of the air quality analysis. The Co-Petitioners and Ms. Galán seem to challenge the assessment of existing air quality, the Co-Petitioners by arguing that the air quality analysis does not account for pollutant emissions from nearby facilities, and Ms. Galán by raising the concern that the current air quality might not have been considered before the Region issued the Permit. Ms. Quiñones, for her part, challenges the dispersion modeling results by questioning the representativeness and currentness of the meteorological data used as input for dispersion modeling. The Board examines these arguments below.

a. *Co-Petitioners Flores and Centeno Have Not Demonstrated That the Air Quality Analysis Failed to Consider Pollutant Emissions From "Nearby Sources"*

The Co-Petitioners claim that the Region "erred when [it] determined that all sources were in the file of this permit." *See* Flores/Centeno Pet. at 4-6. The Co-Petitioners then identify two facilities, Safetech Corporation Carolina ("Safetech") and the Battery Recycling facility. *Id*. With regard to Safetech, the Co-Petitioners claim that this facility began operating in 1996 without a permit, "was legalized as Title V emission source in 2010," and has been in noncompliance with reporting requirements since. *Id*. With regard to the Battery Recycling facility, the Co-Petitioners argue that this facility received a permit in 2010 to manage lead and

hazardous materials, that there were no hearings conducted for, or public notification of, the permit to the Battery Recycling facility, and that there is no public record of emissions from this facility. *Id*. at 5. The Co-Petitioners then add that they "were induced to participate in a hearing in violation of their constitutional right to know the real emissions" and "in violation of the constitutional rights to speech and due process." *Id*. The Co-Petitioners request that the Board order the Region "to include in its review of the permit the determination of case EPCRA-02-2011-4301, that determined that in Arecibo, [the Battery Recycling facility] emitted 13,000,000 pounds of lead in 2007; 16,000,000 pounds of lead in 2008; 19,000,000 pounds of lead in 2009; and that during these years there were also emissions of antimony in the amount of 605,000 [pounds]." *Id*. Later, in their petition, the Co-Petitioners claim that the Region erred by not including other incinerators from the area. *Id*. at 17. The Co-Petitioners identify incinerators from four facilities that operate in the Arecibo area, which, according to the Co-Petitioners, emit air pollutants and are subject to environmental reporting requirements. *Id*. The Co-Petitioners claim that none of the reports from these facilities were made part of this permit's record. Finally, the Co-Petitioners claim that the Region erred in determining "that there are not excessive emissions." *Id*. at 18.

As can be observed from the above summary, it is difficult to decipher exactly what the Co-Petitioners seek to challenge in the Permit. The Co-Petitioners do not explicitly challenge the validity of any particular provision of the Permit and fail to articulate clear and specific challenges to the core elements that comprise PSD review.[73]

As the Board has stated on numerous occasions, to warrant review, allegations must be specific and substantiated.[74] However, because the Co-Petitioners are not represented by counsel, the Board has, as in previous cases,

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[73] *See NSR Manual* at 6-7 (identifying the BACT analysis, the ambient air quality analysis, the impacts analysis, and adequate public participation as core elements of PSD review).

[74] *See, e.g., In re Chevron Mich., LLC*, 15 E.A.D. 799, 814-16 (EAB 2013) (declining to examine arguments on appeal that lacked specificity); *In re New Eng. Plating Co*., 9 E.A.D. 726, 737-39 (EAB 2001) (finding that petition lacked sufficient specificity for the Board to make a determination on the issue petitioner presented; stating that to warrant review allegations must be specific and substantiated); *see also In re Envotech, LP*, 6 E.A.D. 260, 267 (EAB 1996) (denying review of petitions for lack of specificity).

endeavored to construe their objections generously so as to identify the substance of their arguments.[75]

Piecing together their arguments, the Co-Petitioners appear to argue that pollutant emissions from nearby facilities were not accounted for in the air quality analysis and are not part of the record of this permit decision. *Id*. at 4-5. Therefore, the Board construes the Co-Petitioners' arguments as a challenge to the air quality analysis and examines whether the Co-Petitioners have demonstrated that the air quality analysis failed to consider emissions from nearby sources.[76]

In the Responses to Comments document, the Region addressed similar concerns raised during the public comment period. There, the Region addressed a more generalized comment, which argued that "existing contaminates [sic] were not considered" and that only emissions from the proposed facility were considered in the air quality analysis. RTC at 96. In addressing this specific comment, the Region (1) explained that the multi-source modeling analysis considered emissions

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[75] *See, e.g., In re Federated Oil & Gas*, 6 E.A.D. 722, 727 n.5 (EAB 1997); *Envotech*, 6 E.A.D. at 268 & n.13.

[76] To the extent that the Co-Petitioners are trying to argue that the Region was obligated to include, in the administrative record of this Permit, environmental reports from other incinerators that operate in the Arecibo area, *see* Flores/Centeno Pet. at 17-18, the Co-Petitioners have failed to identify a statutory or regulatory provision that imposes such requirement on the permit issuer. Therefore, the Co-Petitioners have failed to meet their burden of demonstrating that review is warranted on this issue because they have provided no legal basis for the Board to require the Region to include such documents. Without a legal obligation, the Board cannot conclude that the Region clearly erred. The permit record of a PSD permit, however, must contain an air quality analysis that, among other things, takes into account emissions from "nearby sources." The record of this Permit shows that the Permittee conducted, and the Region reviewed and approved, the required air quality analysis.

In addition, without a legal obligation to include in the administrative record of this Permit environmental reports from other facilities, and without demonstrating that the Permittee and the Region failed to meet their obligation to consider emissions from "nearby sources," the Board does not see how the Region could have violated any constitutional rights. Therefore, the Board rejects the Co-Petitioners' arguments that "they were induced to participate at a hearing in violation of their constitutional right to know the real emissions" and "in violation of the constitutional rights to speech and due process" for failure to establish a viable constitutional claim. The Co-Petitioners have not provided the support required to prove their claim.

from existing facilities;[77] (2) identified the pollutants from nearby sources that the multi-source modeling analysis considered (i.e., NO_2, SO_2 and $PM_{2.5}$); (3) described the criteria for determining what is considered a "nearby source" and explained that "nearby sources" must be explicitly modeled;[78] (4) explained that the Permittee's multi-source analysis included sources both near the proposed facility and further away; (5) explained that the most important sources to include are those with impacts that may potentially overlap with the proposed source's maximum impact and that in this case the Permittee opted to include all the major sources rather than eliminate any that do not overlap; and (6) explained that the Permittee included sources that were possibly not necessary since their impacts could be accounted for in the background ambient monitor, which contributes to double counting and a more conservative maximum impact. *Id*.

The Co-Petitioners do not explicitly address this response by explaining why the Region's rationale is erroneous. Their claim is that the Permit does not consider all "sources," specifically Safetech and the Battery Recycling facility. The multi-source modeling analysis, however, shows that the Permittee and the Region, in fact, considered certain pollutant emissions (specifically NO_2, SO_2, and $PM_{2.5}$) from Safetech, the Battery Recycling facility, and several other facilities, including Merck Sharp and Dome.[79] *See* Revised PSD Air Quality Modeling Analysis app. D (Oct. 2011) (A.R. I.A.10.a,.c) (listing 34 offsite sources in inventory for multi-source modeling and identifying sources within 57-kilometer radius). Thus, contrary to the Co-Petitioners suggestions, the air quality analysis considered pollutant emissions from "nearby sources," including Safetech and the Battery Recycling facility.

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[77] When a full impact analysis is required for any pollutant, the permit applicant is required to create the necessary inventories of existing sources and their emissions. *See NSR Manual* at C.31. These inventories are used to conduct the NAAQS and PSD increment analyses. *Id*.

[78] Appendix W of 40 C.F.R. Part 51, also known as "Guidelines on Air Quality Models," [hereinafter Appendix W], defines "nearby sources" as "[a]ll sources expected to cause a significant concentration gradient in the vicinity of the source or sources under consideration for emission limit(s)." 40 C.F.R. pt. 51 app. W § 8.2.3.

[79] The Co-Petitioners identify Merck Sharp and Dome on page 17 of their petition as one of the facilities operating incinerators in the Arecibo area. *See* note 76, above (addressing specific challenge the Co-Petitioners make regarding other incinerators in the Arecibo area).

One of the arguments the Co-Petitioners raise on appeal seems to relate to the pollutants considered in the air quality analysis, as opposed to the emitting facilities per se. The Co-Petitioners seem to argue that the Region erred by failing to consider lead and antimony emissions from the Battery Recycling facility.[80] *See* Flores/Centeno Pet. at 5. By requesting that the Region consider lead emissions from the Battery Recycling facility, the Co-Petitioners seem to question the Region's determination that this Permit will not regulate lead emissions from the proposed facility. As explained earlier in this decision, the Region properly excluded lead from regulation in the Energy Answers Arecibo PSD permitting process. Therefore, the Region did not have to review, or require the permit applicant to include in the air quality analysis, lead emissions from other facilities.

With respect to antimony, the Region explains that this appeal proceeding is the first time this issue was raised and that antimony is neither a PSD pollutant, nor a pollutant that will be emitted from the proposed facility. Region's Resp. Br. at 34. Petitioner has not demonstrated otherwise. In light of this, the Board concludes that the Region had no obligation to require the permit applicant to include antimony in the air quality analysis.

In sum, the Co-Petitioners failed to demonstrate clear error in the air quality analysis, and therefore, have failed to provide the Board with a basis to conclude that remand on this issue is warranted.

b. *Ms. Galán Has Not Demonstrated That the Air Quality Analysis Failed to Consider the Existing Air Quality, or That the Existing Air Quality Assessment Is Clearly Erroneous*

Ms. Galán appears to challenge the air quality analysis, although in a very general way. In her petition, Ms. Galán expresses the concern that "the current air

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[80] Notably, except for lead and antimony emissions from the Battery Recycling facility, the Co-Petitioners do not identify pollutants from Safetech, or other nearby sources, as not being considered in the air quality analysis. This is important because air quality analyses are pollutant-specific. *See NSR Manual* at C.1 (noting that "[a] separate air quality analysis must be submitted for each regulated pollutant if the applicant proposes to emit the pollutant in a significant amount"). In this case, the multi-source analysis was performed for the 1-hr NO_2, 1-hr SO_2, and the 24-hr and annual average $PM_{2.5}$ NAAQS. RTC at 96. Therefore, if the Co-Petitioners believe that other pollutants should have been modeled, they should have clearly stated so. For that reason, the Board only evaluates the Co-Petitioners' claim about lead and antimony from the Battery Recycling facility.

quality [of Arecibo]" was not taken into account when issuing the Permit. Galán Pet. at 1.

The record shows that the Permittee conducted, and the Region reviewed and approved, the required air quality analysis. As mentioned earlier in this decision, the air quality analysis involves assessing existing air quality. In analyzing air quality, the Permittee considered emissions from existing nearby sources and other background sources, including natural, minor and major distant sources, as well as monitored ambient data of existing ambient conditions. *See* RTC at 94, 96. Therefore, contrary to Ms. Galán's suggestion, the air quality analysis took into account the existing air quality.

To the extent that Ms. Galán is trying to argue that the Region erred by inadequately assessing the existing air quality, her claim falls short. Absent a specific challenge to the ambient monitoring data or the air quality dispersion modeling results used in assessing existing air quality, the Board has no basis to second-guess the Region's assessment. Therefore, the Board rejects the argument and concludes that Ms. Galán has not demonstrated that the Region failed to consider existing air quality, or that it inadequately assessed existing air quality.

c. *Ms. Quiñones Has Not Demonstrated That the Region Clearly Erred in Determining That the Meteorological Data Used in the Air Quality Analysis Is Spatially and Temporally Representative*

The Board next examines Ms. Quiñones' challenge to the meteorological data Energy Answers used as input in the dispersion model employed in the air quality analysis.[81] *See* Quiñones Pet. at 2, 5-6. In this case, the Permittee used, and the Region approved the use of, 20-year-old meteorological data collected between 1992 and 1993 in Cambalache, Arecibo.

Ms. Quiñones questions the currentness of the meteorological data, arguing that the data are old and do not represent the current meteorological characteristics of the municipality of Arecibo. *Id*. at 5 (also claiming that the permit applicant had an obligation to consider data representative of the municipality of Arecibo). In support of her claim, Ms. Quiñones presents data from AROP4, a National Oceanic and Atmospheric Administration ("NOAA") meteorological station, located approximately 2.5 kilometers from the site of the project. *Id*. at 6. She adds that

[81] Dispersion models are the primary tools used in air quality analysis. *NSR Manual* at C.24. These models estimate the ambient concentrations that will result from the proposed facility in combination with emissions from existing sources. *Id*.

recent data from this station show that the wind direction and velocity measured at AROP4 are different from the data used in the dispersion model. *Id.*[82]

The Region disagrees with Ms. Quiñones' claim that the meteorological data must be representative of the municipality of Arecibo, and clarifies that applicable guidelines require that meteorological data be representative of the *location of the project*. Region's Resp. Br. at 30. The Region also disputes the recent meteorological data from NOAA station AROP4 that allegedly show a difference in wind direction and velocity compared to the 1992-1993 Cambalache data.[83]

These allegations require that the Board examine applicable guidelines on air quality modeling to determine whether Ms. Quiñones has demonstrated that the Region clearly erred in concluding that the 20-year-old Cambalache data are spatially and temporally representative.

Appendix W[84] establishes guidelines on air quality models, including requirements for the data used in dispersion modeling. Section 8.3 of Appendix W, which specifically addresses "meteorological input data," explains that "[t]he meteorological data used as input to a dispersion model should be selected on the basis of *spatial and climatological (temporal) representativeness* as well as the ability of the individual parameters selected to characterize the transport and dispersion conditions in the area of concern." 40 C.F.R. pt. 51 app. W § 8.3

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[82] Ms. Quiñones also claims that "there is no evidence that [Energy Answers] attempt[ed] one of the problem[s] in the modeling process: needed to input for AERMET module of vertical and horizontal profile of turbulence when modeling complex terrain." Quiñones Pet. at 6. While it is hard to understand what argument Ms. Quiñones is trying the make, the Board reads the petition as arguing that the Permittee failed to consider certain parameters AERMET – one of the programs the air model used – requires. *Id.* at 6; *see also* Region's Resp. Br. at 31 (reading petition as asserting that "there is no evidence that [Energy Answers] considered the vertical and horizontal profile of turbulence in AERMET when modeling complex terrain").

[83] With regard to Ms. Quiñones' argument about AERMET, *see* note 82, the Region claims that this is a new issue not raised during the public comment period and it is also incorrect. Region's Resp. Br. at 31. The Region adds that the Permittee did model the vertical and horizontal turbulence and even used direct measurements of these parameters to calculate vertical and horizontal turbulence in AERMET when even less information would have sufficed. *Id.*

[84] *See* note 78, above.

(emphasis added). According to Appendix W, "[s]patial or geographical representativeness is best achieved by collection of all the needed model input data *in close proximity to the actual site of the source*." *Id.* § 8.3.3.1.a (emphasis added). Temporal representativeness, Appendix W explains, "is a function of the year-to-year variations in weather conditions." *Id.* § 8.3.a. With regard to the length of record of meteorological data, the Appendix recommends "the use of 5 years of N[ational] W[eather] S[ervice] meteorological data *or* at least 1 year of site specific data * * *," and states that "[s]ite specific measured data are [] preferred as model input * * *." *Id.* §§ 8.3.1.2(b) (emphasis added), 8.3.3.1(a).

It is evident from the above discussion that the representativeness of meteorological data is a highly technical determination. As explained in Part III.A of this decision, a petitioner challenging an issue that is fundamentally technical in nature bears a particularly heavy burden because the Board will typically defer to a permit issuer's technical expertise and experience, as long as the permit issuer adequately explains its rationale and supports its reasoning in the administrative record.

That being said, the Board takes a careful look at technical issues and will not hesitate to order a remand when a Region's decision on a technical issue is illogical or the record provides inadequate support. *See, e.g., In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-19 (EAB 1997) (remanding permit limits for mercury and thallium at cement kiln; holding that the administrative record must reflect the considered judgment necessary to support the Region's permit determination); *In re Austin Powder Co.*, 6 E.A.D. 713, 719-20 (EAB 1997) (remanding permit for permit issuer to reconsider whether to include action levels governing corrective action in light of concern regarding multiple-contaminant risks). With this as background, the Board examines the parties' arguments.

In its response to comments, the Region addressed concerns about the spatial and temporal representativeness of the meteorological data. *See* RTC at 87. With respect to the spatial representativeness of the data, the Region noted the Cambalache data, which were collected from a station in close proximity to the proposed project, are more spatially representative than data from the National Weather Service in San Juan.[85] *Id.*; *see* Brief of Energy Answers Arecibo, LLC in Response to Petitions for Review at 24 (noting that the Cambalache station is located approximately 1.6 kilometers from the proposed project). With respect to the temporal representativeness of the Cambalache data, the Region explained that,

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[85] Notably, the comments below focused on the adequacy of the Cambalache data in comparison to San Juan data. *See* RTC at 87.

even though the data are 20 years old, the data still are temporally representative because the Caribbean is subject to little variability from one year to the next. RTC at 87. To support this conclusion, the Region explained that (1) the Caribbean is noted for its persistent weather patterns over time; (2) examination of weather patterns at a location in Puerto Rico shows that over time the patterns are not different enough to lead to a different conclusion; (3) the wind roses developed for San Juan[86] between 2005 and 2009 demonstrate little temporal variability over a period of 5 years; and (4) examination of meteorological data at other Caribbean sites, including data measured at the Aguadilla[87] airport and the U.S. Virgin Islands, show little variability over a year and over time as well. *Id.* at 87-88.

As can be observed, the Region gave consideration to the issue of data representativeness. The Region approved the use of data collected in close proximity to the proposed facility and evaluated the data's temporal representativeness by examining weather patterns, wind roses, and meteorological data in the Caribbean. The Region then made a determination based on its technical judgment. In essence, the record explains why the Region concluded that the 20-year-old meteorological data are still temporally representative and provides support for this conclusion. Ms. Quiñones does not directly address the Region's response to comments or explain why that particular analysis is clearly erroneous. Absent such challenge, the Board declines to second-guess the Region's technical determination.

Ms. Quiñones also presents recent meteorological data from Arecibo to support her argument that the Cambalache data does not represent the characteristics of the municipality of Arecibo. The data and 2010 wind rose Ms. Quiñones presents to support her claim appears to be new information, brought to the Region's attention for the first time on appeal. Existence of this data should have been brought to the Region's attention before closure of the public comment period, so that the Region could have considered the merits of such data at the same time it was considering the adequacy of the Cambalache data. As explained earlier, the Board frequently rejects appeals where issues and/or arguments, including supporting information, were reasonably available or ascertainable during the comment period and were not raised at that time but instead were presented for the first time on appeal. Of relevance here, the Board has declined to consider issues and/or arguments where a petitioner challenged a permit issuer's determinations

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[86] San Juan is the capitol of Puerto Rico located in the north coast, east of Arecibo.

[87] Aguadilla is a municipality of Puerto Rico located in the west coast, west of Arecibo.

based on documents that had existed at the time of the public comment period and whose applicability could have been raised in timely comments.[88] In this case, the Arecibo data appear to have been available before the close of the public comment period, and Ms. Quiñones does not claim that this information was not reasonably available or ascertainable at that time. Because this information was not preserved for Board review, the Board declines to examine the merits of this particular argument.[89] Consequently, Ms. Quiñones has failed to demonstrate that the Region clearly erred in its determination that the meteorological data used are spatially and temporally representative.[90]

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[88] *See, e.g., In re Russell City Energy Ctr., LLC*, *("Russell City II")*, 15 E.A.D. 1, 34 n.35 (EAB 2010), *petition denied sub nom. Chabot-Las Positas Cmty. Coll. Dist. v. EPA*, 482 F. App'x 219 (9th Cir. 2012) (declining to review issue to extent petitioner was arguing about the applicability of a certain workbook to the permit issuer's decision; such argument was reasonably ascertainable during the comment period), 57 n.46 (declining to review where petitioner rebutted a permit issuer's response by citing a press release that had been available at the time of the public comment period); *In re Kendall New Century Dev.*, 11 E.A.D. 40, 54-55 (EAB 2003) (declining to review an argument that relied on a published report and a copy of testimony; both documents could have been, but were not, submitted during the public comment period for the permit in question); *see also In re Bear Lake Props., LLC*, 15 E.A.D. 630, 646 (EAB 2012) (declining to consider documents on appeal that were not part of the administrative record).

[89] While not reaching the merits, the Board notes that on appeal the Region argues that the data Ms. Quiñones now provides are inadequate. According to the Region, the data are not spatially representative of the location of the proposed project site: (1) because the data were obtained by the NOAA Buoy Center, which is located on the coast of Arecibo; (2) the coast area has a very specific land/sea microclimate; and (3) the proposed facility is not located on the coast. Region's Resp. Br. at 31. In addition, the Region adds, the data do not comply with the 90% data capture requirement for PSD permitting. *Id*.

[90] The Board also declines to examine the merits of the argument Ms. Quiñones seems to be making regarding consideration of the vertical and horizontal profile of turbulence in AERMET when modeling complex terrain. *See* notes 82-83, above. As with the recent Arecibo data, this argument appears to be raised on appeal for the first time, and therefore, was not preserved for review.

2. *Co-Petitioners Flores and Centeno Have Not Demonstrated That the Region Clearly Erred by Allowing the Permittee to Demonstrate Compliance with Permit Conditions VII.E.1.a, and VIII.C.1 using Supplier Certification, and By Requiring Only One Combustion Demonstration Period in Condition VIII.A.4 and Inspections of Roadways and Parking Areas Once a Day in Condition VII.G.1.c*

The Co-Petitioners appear to challenge the Region's response to concerns raised during the public comment period about permit conditions VII.E.1.a, VII.G.1.c, VIII.A.4, and VIII.C.1. *See* Flores/Centeno Pet. at 10-11. On pages 10 and 11 of their petition, the Co-Petitioners explain why they believe that the Region erred in responding to those concerns. *Id*.

The permit conditions the Co-Petitioners appear to challenge establish (1) the percentage of ammonia by volume of solution to be used as reagent for the Regenerative Selective Catalytic Reduction ("RSCR") units (i.e.,19%) (Condition VII.E.1.a); (2) the requirement to perform daily inspections of selected roadways and parking areas (Condition VII.G.1.c); (3) the requirement to conduct a combustion demonstration period prior to using any supplementary fuel (Condition VIII.A.4); and (4) the sulfur content in the fuel oil and propane the RSCR units will burn (Condition VIII.C.1). *See* Permit at 16, 19, 25, 27. The Permit allows the Permittee to demonstrate compliance with conditions VII.E.1.a and VIII.C.1 by supplier certifications,[91] only requires a combustion demonstration period to be conducted at the outset,[92] and requires daily inspections of roadways and parking areas.

The decisions that underlie these permit requirements are inherently technical. How often a permittee should conduct a combustion demonstration period or perform inspections of roadways and parking areas, and how best to demonstrate compliance with permit requirements, involve the kind of technical judgment to which the Board typically defers to the Region's expertise. As stated earlier in this decision, a petitioner challenging technical issues bears a particularly heavy burden. To overcome this heavy burden, a petitioner must support his or her

[91] *See* Permit at 16 ("Compliance with the 19% ammonia by volume requirement of this permit shall be demonstrated by ammonia supplier certification of each ammonia delivery."), 27 ("Compliance with this requirement shall be demonstrated by fuel supplier certifications for each distillate fuel oil and propane delivery.").

[92] In the Response to Comments document, the Region clarified that the supplementary fuels combustion period is required "only once, at the outset," as opposed to every time the facility plans to combust supplementary fuel. RTC at 10.

allegations with solid evidence that demonstrates how the permit issuer clearly erred in its decisionmaking. *In re City of Attleboro*, 14 E.A.D. 398, 421-22 (EAB 2009). For instance, in a challenge to technical issues, the Board expects a petitioner to provide references to studies, reports, or other materials in the administrative record that provide relevant, detailed, and specific facts and data about permitting matters that the permit issuer did not adequately consider. *Id*. In this case, the Co-Petitioners failed to meet their burden.

First, the Co-Petitioners' arguments about condition VIII.G.1.c (the roadway/parking areas inspection requirement) lack required specificity and fail to establish clear error. The Co-Petitioners argue that "[t]ropic climate has a highly variant climate in temperature, exposition to sunlight, rain, wind and dry seasons[,]" and that "[v]ehicular transit with MSW, ASR, PUWW, TDF,[93] and [] other material[s] will affect emissions to the air." Flores/Centeno Pet. at 10-11. It is unclear from these arguments whether the Co-Petitioners are making an observation or attempting to provide a "rationale for supporting [a] request for increasing the number of inspections."[94] If the latter, not only the Co-Petitioners have failed to clearly articulate a challenge to the Region's decision to only require inspections once a day, they have failed to demonstrate clear error. In the Response to Comments document, the Region explained that "[t]he purpose of the roadways/parking areas daily inspections *is to assess whether the areas require treatment that particular day*." RTC at 11 (emphasis added). The Co-Petitioners do not articulate why daily checks are insufficient to satisfy this purpose. The Region also noted that it does "not anticipate changes occurring, regularly throughout the day, which would require inspection, and respectively treatment of the facility's paved roadways/parking areas, more than once a day." *Id*. Simply noting that the tropic has a variant climate and implying that emissions will vary based on vehicular transit and the type of supplemental fuel the facility burns do not provide a basis for the Board to second-guess the Region's judgment. As the Board has stated in other cases, general allegations of error, without a more specific

[93] MSW stands for municipal solid waste; ASR stands for automotive-shredder residue; PUWW stands for processed urban wood waste; and TDF stands for tire-derived fuel. These are the types of supplementary fuels the Permit allows the Permittee to combust. *See* Permit at 22 (Condition VIII.A.2).

[94] In response to concerns raised during the public comment period about the frequency of the roadways and parking areas inspections, the Region noted that the commenters did not provide information or rationale to support the request to increase "the number of inspections from daily and weekly to, respectively, six times and twelve times per day." RTC at 11.

showing, are not sufficient to obtain Board review. *See Ash Grove*, 7 E.A.D. at 404.

Similarly, the Co-Petitioners have failed to support their claims about conditions VII.E.1.a, VIII.C.1, and VIII.A.4. With regard to condition VII.E.1.a, the Co-Petitioners argue that the Permittee "has the responsibility to guarantee that [ammonia] is 19%[,]" presumably challenging the Region's determination that the Permittee can demonstrate compliance with the 19% ammonia by volume requirement "by ammonia supplier certification." Flores/Centeno Pet. at 10; Permit at 16. The Co-Petitioners raise a similar argument with regard to condition VIII.C.1, claiming that it is an error to authorize the use of supplier certifications to demonstrate compliance with the sulfur content requirement. Flores/Centeno Pet. at 11. In the Co-Petitioners' view, the Permittee is required to "verify" the sulfur content. *Id*. The Co-Petitioners, however, do not cite to a statutory or regulatory provision mandating that the Permittee make such verifications itself or prohibiting reliance on supplier certifications. Nor do they explain how the Permittee could or should independently verify such content.

With regard to permit condition VIII.A.4, the Co-Petitioners disagree with the Region's determination that the supplementary fuels combustion period should be conducted only once, as opposed to every time the proposed facility plans to combust supplementary fuel oil. Flores/Centeno Pet. at 10; RTC at 10 (explaining why Agency believes that requirement is sufficient to ensure compliance with the permitted emissions limits). As the Board has stated in other cases, merely disagreeing with the Region's conclusion and alleging error is insufficient to overcome a petitioner's burden of demonstrating that the permit issuer clearly erred. *See*, *e.g.*, *Russell City II*, 15 E.A.D. at 68-69 n.83. A petitioner must support his or her allegations with evidence that demonstrates clear error. The Co-Petitioners did not provide such evidence.

The Co-Petitioners' failure to support their claims, either by identifying a legal obligation or by providing solid evidence that demonstrates the Region clearly erred, is fatal. Therefore, the Board declines to remand permit conditions VII.E.1.a, VII.G.1.c, VIII.A.4, and VIII.C.1.[95]

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[95] On page 11 of their petition, the Co-Petitioners appear to challenge Draft Permit condition XI.A.11.a.i, which required the Permittee to conduct performance tests of dioxin and furans ("D/F") emissions from Boilers 1and 2 *on a calendar year basis*. *See* Flores/Centeno Pet. at 11 (claiming that "EPA erred when [it] authorized dioxin/furans once every year"); Draft Permit at 40 ("Following the date of the initial performance tests, the Permittee shall conduct performance tests * * * [o]n a calendar year basis * * * [f]or *

3. *The Coalition Has Not Demonstrated That the Region Was Required to Conduct a Materials Balance Analysis in the Course of Considering the PSD Permit*

The Coalition asks the Board to remand the Permit to the Region and to require a "meaningful" or "complete" materials balance analysis of the municipal waste combustion so that EPA can "fully determine air emissions and confirm the accuracy" of the inputs and outputs of combustion. Coalition Pet. at 35-36. The Region acknowledges that it did not do a materials balance analysis, explaining that a materials balance analysis is not required and that the Region used another approach for determining boiler-related emissions of regulated PSD pollutants. Region's Resp. Br. at 40. If the Region was not required to do a materials balance analysis as the Coalition seeks, then the Board cannot conclude that remand is warranted on this issue. As explained below, the Coalition has not met its burden to show that the Board should require the Region to conduct a materials balance analysis.

The Coalition's argument centers on demonstrating that the inputs and outputs of combustion described in the Permit do not add up and thus the Region failed to provide a meaningful materials balance analysis. Coalition Pet. at 35-36. The Coalition, it seems, views a materials balance analysis as necessary to determine whether emissions have been accurately accounted for and limited. The Coalition identifies no statutory or regulatory provision requiring the Region to conduct a materials balance analysis in the course of considering a PSD permit. In responding to the petition, the Region explained that none is required. Region's Resp. Br. at 40.

The Region also explains that, rather than performing a materials balance analysis to accurately determine or verify boiler-related emissions of PSD-regulated pollutants, the Region used a different, widely accepted approach. Region's Resp. Br. at 40. The Region states that it "calculated the boilers' emissions, and established limits based on the following: (1) manufacturer's emissions specifications[], after application of BACT, or EPA established emission

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* * D/F emissions (Boiler 1 and Boiler 2)"). This issue however is moot. In response to concerns raised during the public comment period about the frequency of D/F testing, the Region amended this permit condition to require testing "[o]n a *calendar quarter* basis." RTC at 24 (emphasis added); Final Permit at 42 (Condition XI.A.11.c.iii -.iv). The Co-Petitioners do not challenge this new requirement or explain why the Region's response to comments is clearly erroneous. Therefore, the Board declines to remand this permit condition.

factors; and (2) stack gas flow rate, and heat input rates, which are continuously measured." *Id.; see also* Energy Answers' Resp. Br. at 22. Energy Answers is required to comply with the emissions limits for the regulated pollutants as set forth in the Permit. Although the Coalition is clearly concerned about potential emissions that are not accounted for, the Coalition does not explain how a materials balance analysis is required to ensure that regulated PSD pollutants are properly limited, or explain how the Region's approach is otherwise clearly erroneous.

In sum, the Coalition has failed to meet its burden to demonstrate that the Board should remand on this issue because it has provided no legal basis for the Board to require the Region to conduct a materials balance analysis of the municipal waste combustion for this Permit.

4. *The Region Took Into Account "Malfunctions, System Failures, and Breakdowns" in Its Decisionmaking*

Ms. Galán expresses the concern that the Region did not take into account "malfunctions, system failures, and breakdowns" in its decisionmaking. Galán Pet. at 2.[96] The record, however, demonstrates otherwise.

Both the Permit and the Response to Comments document reflect the Region's consideration of unexpected events, such as upset, accidental interruptions, and malfunctions. In particular, the Response to Comments document explains that (1) the warmup and shutdown periods do not include unexpected events or accidental interruptions; (2) the Permit does not allow the Permittee to avoid, or exempt the Permittee from, compliance with emission limits during unexpected events or accidental interruptions, such as malfunctions or upset events; (3) the Permit "does not establish less stringent emission limits for unexpected or accidental interruptions;" (4) the Permit requires that the Permittee report all malfunctions and submit written reports of all excess emissions events; and (5) any exceedances of emission limits, whether due to malfunction or other

[96] The Region reads the petition as raising the concern that the permitting process did not take into account malfunction and system failures at *other* municipal waste combustors. Region's Resp. Br. at 42. The Board disagrees with this reading of the petition. The petition does not mention other municipal waste combustors in the area. The petition simply makes the general observation that "incinerators are prone to various types of malfunctions, system failures and breakdowns," and argues that "[t]his [] was left out while emitting the permit." Galán Pet. at 2. The Board reads this as raising the concern that the Region did not consider malfunctions, system failures, and breakdowns at the proposed facility before it issued the Permit.

events, will be considered violations subject to enforcement. RTC at 28-29, 31; Permit at 53 (Condition XV).

The Response to Comments document also explains that the facility is subject to other regulatory programs and that compliance with such programs should ensure (1) proper operation of the municipal waste combustor, which should avoid the occurrence of upset events; and (2) proper handling of any upset events, which should reduce the duration of these events. RTC at 31.

Thus, contrary to Ms. Galán's suggestion, the Region considered the likelihood of malfunctions, system failures, and breakdowns in its decisionmaking, and Ms. Galán has not demonstrated that the manner in which the Permit addresses them is clearly erroneous. The Board denies remand of the Permit on the basis Ms. Galán proposes.

F. *All Remaining Issues*

The Board has endeavored to liberally construe the petitions in this matter to fairly identify the substance of the issues being raised, particularly in light of the significant public interest involved and the fact that most of the petitioners are unrepresented by counsel. *See* Part III.B, above. The Board denies review of any other issues, that petitioners may have intended to raise but that the Board does not otherwise identify in this decision.[97]

VIII. *CONCLUSION AND ORDER*

For the reasons stated above, the Board remands the Permit for the limited purpose of incorporating the regulation of biogenic CO_2 emissions as proposed in the December 6, 2013 Draft Revised Permit (Dec. 6, 2013) (Attachment 2A to the Region's Reply to Petitioners' Responses to the Region's Motion for Limited Remand). The Region need not reopen the permit proceedings for public comment on the proposed revisions. The Board concludes that remand is not warranted on any other ground the petitions raise and, thus, denies review on all other grounds.

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[97] The Coalition requests a determination by the Board as to whether the final permit decision in this matter is one of "local or regional applicability" or one of "nationwide scope or applicability," in order for the Coalition to identify in which U.S. Circuit Court of Appeals to file any subsequent appeal seeking judicial review of the final permit decision. Coalition Pet. at 5 (citing CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1)). The Board declines to make any such determination and simply refers the Coalition back to CAA § 307, as the statute speaks for itself.

The Board is not requiring an appeal to the Board on the final permit decision issued following remand.[98]

So ordered.

[98] Because the Board is remanding for the limited purpose of incorporating the regulation of biogenic CO_2 emissions, no further review will be allowed, absent a showing that, on this narrow issue, the permit issuer has clearly erred in the reissued permit. Accordingly, the Board would expect that upon permit reissuance, petitioners' administrative remedies will have been exhausted. *See* 40 C.F.R. § 124.19(l).