IN RE CAMPO LANDFILL PROJECT, CAMPO BAND INDIAN RESERVATION

NSR Appeal No. 95-1

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided June 19, 1996

Syllabus

Petitioners Backcountry Against Dumps and Ed and Donna Tisdale seek review of U.S. EPA Region IX's decision to issue a final new source review preconstruction permit to Mid-American Waste Systems, Inc., authorizing construction of a municipal solid waste landfill in four phases spanning 30 years. The landfill will be built on the Campo Band Indian Reservation, which sits atop an aquifer designated by Region IX as a sole source aquifer. Because the landfill will be located in an area that has not attained the National Ambient Air Quality Standards for ozone, and will be a major source of volatile organic compounds, it is subject to the requirements of Part D of the Clean Air Act, 42 U.S.C. § 7501 *et seq.* Petitioners contend that the Region's permit decision contravenes the Clean Air Act, because it allows Mid-American to obtain the offsetting emissions reductions ("offsets") required under Part D in a "phased" process that corresponds to the landfill's four construction phases. Petitioners contend that Mid-American should instead be required to obtain sufficient offsets for all four landfill phases prior to commencing operation of the first phase. Petitioners also contend that even if a phased offset approach is appropriate, the Region did not require Mid-American to obtain sufficient offsets for the first phase of the project. As a second ground for review, petitioners argue that the Region erred in conducting the "alternatives analysis" required under Part D, because the Region relied on information contained in the Bureau of Indian Affairs' environmental impact statement (EIS) for the project, which did not analyze off-reservation alternative sites, and which did not address the environmental and social costs that petitioners say will be incurred if the sole source aquifer becomes contaminated.

Held: The Clean Air Act's offset requirements do not preclude the phased offset approach utilized by the Region for this multi-phase landfill, in which each phase is independent, so long as the Region conducts a preconstruction review of the proposed offsets for each subsequent phase, and ensures as part of that review that sufficient offsets are obtained for that phase. Review on the basis of that issue is therefore denied. However, because an issue may exist concerning the sufficiency of the offsets for the first phase, the permit is remanded so that the Region can consider and address that issue. As to the second ground for review, the petitioners have not met their burden of showing that the Region erred in conducting the alternatives analysis. Petitioners have not shown that the Region was required to consider off-reservation sites when the primary purpose of the project (development of tribal land) can be served only by locating the project on the reservation. Further, petitioners have not shown that the Region, in reliance on the EIS, incorrectly concluded that the landfill, as proposed, posed an insignificant threat to the aquifer. Therefore, review on the basis of that issue is also denied.

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge Reich:

Before us is a petition for review filed by Backcountry Against Dumps and Ed and Donna Tisdale (collectively "petitioners"), seeking review of U.S. EPA Region IX's decision to issue a final new source review (NSR) permit to Mid-American Waste Systems Inc. ("Mid-American").[1] The permit authorizes Mid-American to construct a municipal solid waste landfill (MSWLF) on the tribal lands of the Campo Band of Mission Indians, located in an area designated as nonattainment for the pollutant ozone. As proposed by Mid-American and approved by Region IX, the landfill will be built in four phases over a 30-year period. The Region determined that the landfill will be a "major" source of volatile organic compounds (VOCs), a precursor of the pollutant ozone, because it has the "potential to emit" more than 100 tons per year (tpy) of VOCs.[2] The Region imposed emissions

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[1] Pursuant to Parts C and D of the Clean Air Act, 42 U.S.C. §§ 7470-7515, the new source review (NSR) program requires new major stationary sources of air pollution and major modifications to such sources to be permitted prior to construction. In "nonattainment areas" (NAA), areas that do not meet the national ambient air quality standards (NAAQS), the permits are generally referred to as NAA permits. *See* New Source Review Workshop Manual at 4. In areas where the NAAQS are met ("attainment" or "unclassifiable" areas), the permits are referred to as prevention of significant deterioration (PSD) permits. In this case, because the proposed facility is to be located in an area that is attainment for some pollutants (*e.g.* particulate matter), but nonattainment for others (*e.g.* ozone), the permit contains both PSD and NAA requirements. The petitioners have not appealed any of the PSD conditions. Because the parties refer to the permit as the "NSR" permit, we will do so as well.

[2] Pursuant to the NAA regulations, a "major" stationary source is one which emits, or has the potential to emit, 100 tpy or more of any regulated pollutant. 40 C.F.R. § 52.24(f)(4)(i)*(a)*. A stationary source that is major for VOCs is considered major for ozone. *Id.* § 52.24(f)(4)(ii). In its response to the petition, Mid-American argues that recent developments in the law suggest that the proposed landfill is not, in fact, a "major" stationary source subject to NSR permit requirements. The basis for Mid-American's argument is a recent decision of the U.S. Court of Appeals for the D.C. Circuit in which the court vacated EPA regulations under the Clean Air Act requiring federal enforceability of emissions controls in determining whether a source's "potential to emit" renders it a "major" source. Mid-American's Response to Petition at 4 (citing *Chemical Mfrs. Ass'n v. EPA*, No. 89-1514 (D.C. Cir. Sept. 15, 1995)); *see* 40 C.F.R. § 52.24(f)(3) (defining "potential to emit"). The proposed landfill in this case was deemed a "major" source because although the Campo Environmental Protection Agency (CEPA) imposed emissions controls on the project via its own air quality requirements, those controls are not federally enforceable because EPA has not finalized regulations governing approval of Tribal Implementation Plans (TIPs) under the Clean Air Act. Despite Mid-American's claim that "it is no longer a major source subject to the pre-construction permitting requirements" of the NSR program, Mid-American has indicated that it "is not requesting any affirmative relief [on this basis] because it is not the Petitioner in this matter, and is not in a procedural position to do so." Mid-American's Supplemental Brief at 2. It is therefore unnecessary for us to address Mid-American's claim.

limits in the permit for VOCs as well as other pollutants. Further, the permit requires Mid-American to purchase VOC emissions reduction credits ("offsets") from other sources in an amount that will exceed the landfill's allowable VOC emissions (in a phased process corresponding to the construction plan), in order to further the area's progress toward attaining the National Ambient Air Quality Standards (NAAQS) for ozone. *See* Clean Air Act § 173(a)(1)(A), 42 U.S.C. § 7503(a)(1)(A).[3]

Petitioners contend that the Board should grant review of the Region's permit decision for two reasons.[4] First, petitioners argue that the Region contravened Clean Air Act § 173(a)(1)(A) by implementing a "phased" approach to offsets in the permit, thereby allowing Mid-American to obtain offsetting VOC emissions reductions only as each of the four landfill phases is ready to begin construction. As a supplemental argument, petitioners contend that even if a phased offset approach is permissible under the Clean Air Act, the Region did not require Mid-American to obtain sufficient offsets for the first phase of

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[3] As discussed in more detail below, the Clean Air Act requires the NAA permitting agency to determine that:

> [B]y the time the source is to commence operation, sufficient offsetting emissions reductions have been obtained, such that total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source will be sufficiently less than total emissions from existing sources * * * prior to the application for such permit to construct or modify so as to represent * * * reasonable further progress [toward attaining NAAQS].

Clean Air Act § 173(a)(1)(A), 42 U.S.C. § 7503(a)(1)(A).

[4] Although most NSR permits are issued by states in accordance with State Implementation Plans (SIPs) approved by EPA pursuant to the Clean Air Act, the State of California does not have jurisdiction over tribal lands, and EPA has not yet finalized regulations governing the approval of TIPs, which would allow a tribe to assume the role of a state in issuing NSR permits. Therefore, Region IX issued this permit. Pursuant to 40 C.F.R. § 124.19, permit conditions based on the federal PSD regulations are reviewable by the Board, but the regulations do not expressly confer upon the Board the authority to review NAA permit conditions. The regulations do, however, provide that cases not expressly delegated to the Board by regulation can be assigned to Board by special delegation from the Administrator. *See* 40 C.F.R. § 1.25(e)(2). Because the Region determined that the NAA permit conditions were an appropriate subject for such a special delegation, it advised commenters that any administrative appeal of the permit should be directed to the Board, with the understanding that the Board would request a delegation of authority to decide any such appeal. Upon receipt of this appeal, the Board requested a special delegation of authority from the Administrator to serve as the Agency's final decision maker with respect to the issues raised in the petition. The Administrator approved the special delegation on December 11, 1995.

the project. Second, petitioners argue that the Region erred in conducting the "alternatives analysis" required under Clean Air Act § 173(a)(5), because the Region did not consider off-reservation alternative sites, and because the Region allegedly ignored the "environmental and social costs" imposed by the landfill, which will be located over a sole source aquifer.[5] For the reasons set forth below, we conclude that petitioners have not met their burden of showing that review of the permit is warranted because the Region used a phased offset approach, nor have petitioners shown that review of the Region's alternatives analysis is warranted. However, because petitioners have presented information that suggests the Region's offset calculation for the first phase of the project may be in error, we are remanding the permit for the Region to reconsider its calculation.

I. *BACKGROUND*

The facts leading to the present appeal are uncontroverted, and may be briefly summarized. The Campo Reservation is located approximately 45 miles east of San Diego and one mile north of the Mexican border. About 300 tribal members live on the 16,000-acre reservation. The reservation sits atop the Campo/Cottonwood Creek Sole Source Aquifer, an aquifer underlying a 400 square-mile area encompassing a portion of San Diego County and the U.S./Mexican border.[6] The reservation is in the San Diego Air Basin, an area presently designated as a "serious" ozone nonattainment area.[7] The Campo tribe has experienced very high unemployment, average annual income below the national poverty level, and inadequate housing. The Region represents that the landfill project at issue here evolved as a means of improving the economic circumstances of the tribe, and

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[5] Section 173(a)(5) provides that the Region must determine that:

> [A]n analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction or modification.

Clean Air Act § 173(a)(5), 42 U.S.C. § 7503(a)(5).

[6] Pursuant to a petition filed by BAD, in May 1993 U.S. EPA Region IX made a final determination that the Campo/Cottonwood Creek aquifer is a sole source aquifer under Safe Drinking Water Act § 1424(e), 42 U.S.C. § 300h-3(e). The effect of that designation is that "no commitment for Federal financial assistance * * * may be entered into for any project which the Administrator determines may contaminate such aquifer * * * so as to create a significant hazard to public health * * *." *Id.*

[7] Pursuant to Clean Air Act § 181, ozone nonattainment areas are designated as "marginal," "moderate," "serious," "severe," or "extreme."

to provide job opportunities for tribe members. *See* Region's Response to Petition for Review at 6.

In 1990 the tribe formed the Campo Environmental Protection Agency (CEPA), to draft and enforce environmental regulations for the reservation. That same year, Mid-American and Muht-Hei, Inc. ("Muht-Hei"), a development corporation wholly owned by the Campo Band, entered into a sublease agreement under which Mid-American would construct and operate a solid waste landfill on 400 acres of the reservation.

In connection with its review of the sublease and landfill project proposal, the U.S. Department of the Interior, Bureau of Indian Affairs (BIA), prepared an environmental impact statement (EIS), pursuant to § 102 of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332, and implementing regulations adopted by the Council on Environmental Quality. The Secretary of the Interior approved the proposed landfill project in 1993. *See* Campo Solid Waste Management Project, Record of Decision (June 28, 1993) (hereafter "ROD"). The EIS concluded that implementation of certain mitigation measures to protect groundwater quality (including a double liner system and operational controls) would reduce the groundwater impacts of the landfill "to a level of insignificance." EIS at 4-26. The petitioners challenged the adequacy of the EIS in federal district court. The court upheld the EIS, and that determination was affirmed by the U.S. Court of Appeals for the Ninth Circuit. *See County of San Diego v. Babbitt*, 847 F. Supp. 768 (S.D. Cal. 1994), *aff'd* Case No. 94-55548 (9th Cir. 1995) (unpublished decision).

Mid-American submitted its application for an NSR permit to Region IX in May 1992. After obtaining supplemental information from Mid-American, the Region prepared a draft NSR permit in May 1994, held a public hearing, and accepted public comments on the permit. The Region then determined that it needed to re-propose the permit to add conditions under the PSD program relating to particulate matter emissions.[8] Following re-proposal, a second public hearing and a second comment period, and after considering the comments received on the draft permit and amending certain permit conditions, the Region issued its final permit decision in August 1995.

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[8] According to the Campo Band, the Region was required to re-propose the permit in light of the Board's decision in *In re Masonite Corp.*, 5 E.A.D. 551 (EAB 1994), in which the Board addressed application of the PSD requirements to certain particulate matter emissions. *See* Response of Campo Band of Mission Indians, Muht-Hei, Inc., and CEPA to Petition for Review, at 9-10.

The permit allows the landfill to accept a maximum of 945,000 tons per year of non-hazardous solid waste. The final design capacity of the landfill is approximately 29 million tons of waste. When all four phases of the landfill are complete, it will consist of 19 "cells," each approximately 20 acres in size.[9] In accordance with the permit terms, each cell must be individually covered and capped after its capacity is reached.

As the waste placed in a cell decomposes, it produces "landfill gas" (LFG), comprised of methane and carbon dioxide. VOCs constitute roughly 1.4% of the total LFG volume. Because the LFG is produced as waste decomposes, the construction plan anticipates that VOC emissions will build gradually over time, peaking 32 years after the first waste is accepted. According to the Region, without the emissions controls established in the permit, the project would have the potential to emit approximately 380 tons of VOCs during the peak year.

In accordance with Clean Air Act § 173(a)(2), in order to minimize emissions the landfill is required to comply with the "lowest achievable emissions rate" (LAER). To that end, the permit requires Mid-American to reduce VOC emissions by installing a "state of the art" LFG collection system, and flares to destroy the VOC emissions. To minimize fugitive emissions of VOCs, Mid-American must apply daily cover on the waste, install impermeable caps on closed landfill cells, and conduct surface monitoring for leaks of LFG. In this manner, the Region contends that the potential emissions of VOCs from the project will be limited to only 39.2 tons of VOCs during the peak (32d) year.[10] The Region retains the authority to set lower VOC emissions limitations for each future phase of the landfill, based on contemporaneous performance test results and emissions projections at the beginning of the phase. *See* Permit Condition XI.D.14. Phase I of the landfill (years 0-3.1) includes cells 1-3, representing 9.84% of the total anticipated waste volume; Phase II (years 3.1-10.6) includes cells 4-8, representing 24.30% of waste volume; Phase III (years 10.6-20.4) includes cells 9-15, representing 31.53% of waste volume; and Phase

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[9] Mid-American explains that it "designed the project in phases to avoid constructing the project in its entirety, only to have portions of the operation lie fallow for several decades or more." Mid-American's Response to Petition at 6.

[10] The Region contends that "the controls in the NSR permit are among the most stringent conditions in any air quality permit that has been issued for the construction of a municipal solid waste landfill to date, and * * * many of the NSR permit requirements are establishing new standards for future landfill air permits." Region's Response to Petition at 11. The petition for review does not challenge the permit's control requirements.

IV (years 20.4 through closure) includes cells 16-19, representing 34.33% of waste volume. *See* Permit Condition XI.D.1.

With respect to the offset requirement imposed by Clean Air Act § 173(a)(1)(A), the Region required Mid-American to obtain offsets at a 1.2 to 1 ratio for the first phase of construction (cells 1-3). This means that 4.7 tpy of offsets were required for the anticipated 3.9 tpy of VOC emissions from Phase I (*i.e.* 1.2 x 3.9 tpy) in years 0- 3.1. That ratio was the ratio in effect for the San Diego County Air Basin at the time the offsets were approved by Region IX.[11] Mid-American obtained the offsets from the shutdown of the Calbiochem/ Novabiochem facility in La Jolla, California. The permit prohibits Mid-American from constructing any further phase of the landfill without obtaining additional offsets. Specifically, Mid-American must submit an offset proposal 18 months before beginning construction of each subsequent phase. Mid-American must propose offsets in an amount representing the offset ratio then in effect for the San Diego County Air Basin; the ratio may be the same, higher or lower than the ratio utilized for Phase I. Upon submission of an offset proposal, the Region will issue a preliminary offset decision, and publish the decision for public comment. In order to receive approval, the offsets must be surplus, federally-enforceable, permanent, and quantifiable. Further, the offsets must be in effect, achieved, and enforceable by the time Mid-American begins placing waste in the new cells. The permit also requires Mid-American to seek a permit modification and obtain additional offsets if it, or Region IX or CEPA, projects that actual VOC emissions will exceed the cumulative VOC emissions predicted in the permit. *See* Permit Conditions XI.D.1.-14.

As part of its NSR permitting process, the Region was also required to comply with Clean Air Act § 173(a)(5), by determining that an "an analysis of alternative sites, sizes, production processes, and environmental control techniques" demonstrated that the benefits of the landfill significantly outweighed the environmental and social costs imposed by it. *See* Clean Air Act § 173(a)(5), 42 U.S.C. § 7503(a)(5). Based on its review of information submitted by Mid-American, including the information contained in the BIA's EIS, the Region determined that the benefits of the proposed landfill did significantly outweigh the costs. This determination was memorialized in a memorandum, and made part of the administrative record for the

[11] In order to show reasonable progress toward attainment of the NAAQS, the ratio of required emissions offset to the permitted source's emissions must be greater than one. New Source Review Workshop Manual at G.6.

permit decision. *See* Memorandum from Steve Ringer, Region IX Environmental Engineer, to Administrative Record (May 22, 1995) (hereafter "Alternatives Analysis Memorandum").[12]

II. *STANDARD OF REVIEW*

Pursuant to the special delegation of authority under which this appeal is being considered, the Board must exercise its authority "in a manner consistent with the procedures described in 40 C.F.R. Part 124." Paragraph 3, Clean Air Act Delegation of Authority to Environmental Appeals Board from Administrator Browner (Dec. 11, 1995). Thus, although Part 124 does not otherwise expressly apply to nonattainment area (NAA) permits, for purposes of this appeal the Board will apply the standard of review set forth therein. In accordance with the Part 124 regulations, a Region's permit decision will ordinarily not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. *See* 40 C.F.R. § 124.19; 45 Fed. Reg. 33,412 (May 19, 1980). The preamble to these rules states that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level." *Id.* The burden of demonstrating that review is warranted is on the petitioner. *In re Masonite Corp.*, 5 E.A.D. 551, 557 (EAB 1994); *In re Inter-Power of New York, Inc.*, 5 E.A.D. 130, 144 (EAB 1994).

III. *DISCUSSION*

A. The Region's Use of "Phased" Offset Requirements

As support for their argument that the Region's allowance of phased offsets "directly conflicts" with Clean Air Act § 173(a)(1)(A), petitioners point to the "plain and unambiguous" language of the statute. Petition for Review at 4-5. As set forth *supra*, note 3, the statute states that permits to construct new major sources in nonattainment areas may be issued if "*by the time the source is to commence operation, sufficient offsetting emissions reductions have been obtained* such that total allowable emissions from existing sources in

[12] In addition to the NSR permit, Mid-American is required to obtain other permits prior to commencing construction of the landfill. CEPA has issued its own air quality permit for the project. Further, in 1995, CEPA received EPA approval of its MSWLF permit program, pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. § 6945(c)(1)(B) and 40 C.F.R. Part 258. *See* 60 Fed. Reg. 21,191 (May 1, 1995). Mid-American has applied to CEPA for a permit under the MSWLF program. According to the Region, petitioners have challenged EPA's approval of CEPA's MSWLF program in the United States Court of Appeals for the District of Columbia Circuit.

the region * * * and from the proposed source will be sufficiently less than total emissions from existing sources * * * so as to represent * * * reasonable further progress" toward meeting the NAAQS. Clean Air Act § 173(a)(1)(A), 42 U.S.C. § 7503(a)(1)(A) (emphasis added). Petitioners contend that the italicized phrase on its face requires that *all* reductions for the permitted source be "obtained" prior to commencement of first operation of the source, regardless of whether construction and operation, and the emissions to be offset, will occur over a period of many years. Petition for Review at 3-5. In petitioners' view, the statutory language does not confer upon the Region the discretion to allow offsets to be acquired as the subsequent phases of the landfill are constructed. Petitioners state that the facility could, instead, deal with the phased nature of the construction by obtaining "offset futures, options or purchase and lease-back" agreements for the facility's lifetime emissions prior to commencement of any operations. Petitioners' Reply Memorandum at 4, note 4.

In response,[13] the Region explains that it used phased offsets for this project because of the particular nature of landfill development and operation, including the 30-year time frame for construction, the fact that the project can be constructed in four discrete phases, and the fact that the VOC emissions result from decomposition of waste well after the waste is placed in the landfill cells. Region's Response to Petition at 13-14. The Region contends that a phased offset approach is environmentally superior to requiring that all offsets for the entire lifespan of the landfill be obtained prior to construction because:

> (1) By providing more precise estimates of future emissions, and the flexibility to revise the offset requirements, the phased approach enables Region 9 to ensure that allowable emissions from the project will always be lower than the amount of offsets obtained. This will ensure reasonable further progress in attaining the NAAQS * * *.
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> (2) The phased approach creates a powerful incentive for Mid-American to aggressively seek out new and more efficient controls for future project phases. More

[13] Pursuant to the Board's request, the Region filed a response to the petition for review. In addition, Mid-American and the Campo Band filed responses to the petition, the petitioners filed a reply to the responses, and the Region, Mid-American, and petitioners filed supplemental briefs.

> effective controls would reduce the number of offsets required for, and thus the cost associated with, the construction of future phases.
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> (3) The phased offset approach provides Mid-American with additional flexibility to decide not to construct future phases of the landfill if the market demand for landfills declines in the future. If Region 9 required complete offsetting for the entire project before issuing the NSR permit, then Mid-American would have a vested financial interest in constructing those future phases. The phased offset approach thus avoids encouraging emissions growth that might not otherwise occur.
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> (4) Under the phased approach, Region 9 may also require Mid-American to reevaluate LAER for future phases of the project. * * * The likely result of such a reevaluation would be stricter controls on VOC emissions.

Id. at 15-16.

The Region argues that its phased approach is both consistent with the language of the Clean Air Act, and reasonable in light of the particular nature of landfill construction. With respect to petitioners' "plain language" argument, the Region notes that the statute requires that a source obtain emissions reduction credits sufficient to offset "*total allowable emissions*" from existing sources and the proposed source, prior to commencing operation. Region's Response at 17 (quoting Clean Air Act § 173(a)(1)(A)) (emphasis in Region's Response).[14] The Region states that, in this instance, "allowable emissions" are a function of the maximum rated capacity of the source and "[t]he emissions rate specified as a federally enforceable permit condition, including those with a future compliance date." *Id.* (quoting 40 C.F.R. § 51.165(a)(1)(xi)(C)). The Region argues that the enforceable conditions of this permit limit allowable VOC emissions from Phase I (years 0-3.1) to 3.9 tpy. Since those allowable emissions have been offset by 4.7 tpy of emissions reductions obtained by Mid-American, and the permit prohibits construction of the next phase of the landfill

[14] The "source" in this instance comprises the entire landfill as permitted. *See* 40 C.F.R. § 52.24(f)(1) & (2).

(and thus emissions from the next phase) unless and until Mid-American provides offsets sufficient to account for the VOC emissions expected to result from the next phase, the Region argues that the requirements of Clean Air Act § 173(a)(5) have been fulfilled. As a safeguard, the permit includes a requirement that Mid-American provide reports every two years projecting VOC emissions, and that in the event EPA, CEPA, or Mid-American project that emissions will exceed the cumulative offset amounts for any phase, Mid-American must acquire additional offsets. Permit Condition XI.D.14.

Other than citing the language of the statute itself, petitioners have cited no authority to support their claim that the Region's phased offset approach is clearly in error. Based upon our review of the language of the statute, and the purposes underlying the offset requirement as reflected in the legislative history, we agree with the Region that its decision to link the permit's offset requirements to construction phases does not, in this instance, obviously conflict with the statute, and furthers the goals of the Clean Air Act's nonattainment provisions. While petitioners suggest that alternative mechanisms ("futures, options, and purchase and lease-back agreements") would allow Mid-American to obtain all necessary offsets prior to constructing the first landfill phase, the fact that such alternatives may exist does not persuade us that petitioners' approach is superior to the Region's, or that the Region's approach is unsupportable under the statute.

In our view, the language of § 173(a)(5) is not free from ambiguity.[15] It does not, by itself, compel the result petitioners seek. Rather, we conclude that the requirement that "by the time the source is to commence operation, sufficient offsetting emissions reductions have been obtained" may properly be interpreted in a manner that accounts for the nature of the source being constructed and operated. We do not believe that the statute inflexibly constrains the Region's ability to craft appropriate offset requirements for a project that will be constructed and "commence operation" in discrete phases over the course of many years. We believe that the statute does provide the Region with the flexibility to implement phased offsets in an appropriate case, so long as the Region conducts a preconstruction review of the pro-

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[15] Petitioners contend that the Region's approach impermissibly treats each phase as a separate "source," rather than requiring all offsets to be obtained before the *"source"* is to "commence operations." *See* Petitioners' Reply Memorandum at 13 (citing Clean Air Act § 173(a)(1)). The Region, however, acknowledges that the entire landfill is one source, but notes further that "operations" at this particular source will "commence" in four phases. *See* Region's Supplemental Brief at 5, n.2. This exchange highlights our point that the statute is not unambiguous as applied to this particular project.

posed offsets for each subsequent phase, and ensures that sufficient offsets will be acquired to fulfill the statutory mandate of "reasonable further progress" toward achieving the NAAQS.[16]

The Region's use of phased offsets appears to appropriately serve the overriding need to achieve progress toward attaining the NAAQS, while accommodating the particular and complicated air emissions issues posed by a municipal waste landfill. The permit's offset requirements reflect an attempt to establish a lifetime VOC emissions profile for the landfill, correlate those emissions to the four landfill phases, and require greater than one-for-one offsetting emissions reductions before allowing construction of any phase. In our view, the Region's method does not contravene the Clean Air Act's goals of controlled "clean growth."[17]

Our conclusion that the Region's approach in this case is legally supportable rests upon the nature of the project at issue, specifically the fact that the project can be constructed in four discrete phases that are independent of each other. Provided that sufficient offsets are in place to account for all anticipated VOC emissions from a particular phase, progress toward attaining the NAAQS will be made even if Mid-American decides not to construct future phases (as Mid-American has the right to do), or such construction is disallowed by the Region. The Agency has, for other purposes, recognized a distinction between multi-phase projects that are independent of each other (where construction of one phase does not necessitate the construction of another in order to complete a project or provide the intended service), and those that are mutually-dependent (where construction of one phase necessitates construction of another). *See* Memorandum from John Seitz, New Source Review Program Supplemental Transitional Guidance on Applicability of New Part D NSR Permit

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[16] Although there is little legislative history directly addressing the offset requirement, the Region's phased approach appears consistent with the purposes underlying the nonattainment provisions of the Clean Air Act, as reflected in the legislative history. The nonattainment provisions enacted in the Clean Air Act of 1977 were developed in recognition of the need to allow some industrial growth while ensuring continued progress toward attaining the NAAQS. To that end, Congress allowed the development of new major stationary sources of air pollution in nonattainment areas, provided that case-by-case preconstruction review of such proposed sources, coupled with greater than one-for-one emissions offsets, demonstrated that progress was made toward attaining the NAAQS. *See, e.g.*, Senate Debate on S. 252, 123 Cong. Rec. § 91-2-225 (1977) (statement of Senator Muskie). The emphasis on case-by-case preconstruction review suggests both a concern that proposed new sources be carefully reviewed to ensure that no source causes a degradation of air quality, as well as a recognition that proposed new sources could present unique and individual emissions reduction and offset requirements. *See id.*

[17] *See supra* n.16.

Requirements, p. 3 (Sept. 3, 1992) (explaining how new Part D NSR permit requirements will apply to multi-phase projects). The Region's use of phased offsets recognizes the distinctive nature of a multi-phase project consisting of independent phases, where clear checkpoints exist that allow adequate preconstruction review of offset proposals for future phases, and disallowance of further construction if necessary, without wholly undermining the purposes of the project. We believe that this approach is fully consistent with the intent of § 173(a)(1)(A), which is to ensure that no construction begins until adequate offsets have been identified for the emissions that will result from the project being constructed. For independent phases of a project where the Region has yet to approve construction of future phases, it is reasonable to analyze the offset requirement in terms of the construction being approved.

We also agree with Mid-American that the Region's phased approach reflects the unusual nature of a MSWLF in a manner that is analogous to the Agency's phased approach to emissions controls set forth in the recently promulgated New Source Performance Standard (NSPS) for municipal solid waste landfills. Recognizing that landfill emissions change over time due to a variety of factors, the NSPS apply only after a certain emissions threshold is reached, not before the emissions are generated. *See* 61 Fed. Reg. 9905 (March 12, 1996) (final rule); 56 Fed. Reg. 24468 (May 30, 1991) (proposed rule). The NSPS thus reflect the Agency's desire to establish control requirements that reasonably conform to the practicalities of landfill operation, while preserving the goal of improving the nation's air quality.

Based on the foregoing, we conclude that petitioners have not met their burden of showing that the Region's use of phased offsets is clearly inconsistent with the Clean Air Act.[18] However, with the Board's leave the petitioners filed a reply to the Region's response to the petition for review. In that reply, the petitioners challenge the claim made by the Region in its response to the petition that sufficient emissions reductions have been obtained to offset "allowable emissions" for Phase I, assuming no further landfill phases are built. Specifically, petitioners contend that Mid-American's cell-by-cell emis-

[18] In addition to their statutory argument, petitioners contend that even if a phased approach to offsets is permissible under the Clean Air Act, it diverges from longstanding Agency practice, and thus reflects an exercise of discretion or important policy consideration which the Board should review. As grounds for this argument, petitioners rely only on selected portions of statements made by the Region in its Response to Comments. We have reviewed the excerpts quoted by petitioners, and find that, read in context, they do not support petitioners' claim. We therefore conclude that petitioners' argument is without merit, and review on the basis of this issue must be denied.

sions estimates show that if only Phase I of the landfill is built and operated, VOC emissions from Phase I (cells 1-3) will exceed the level assumed by the Region beginning in year 6. *Id.* at 11. Based on Mid-American's emissions estimates, petitioners calculate that Phase I emissions will peak at 6.2 tpy (assuming no future phases are built and additional offsets acquired), which, at the currently applicable offset ratio, would require approximately 7.5 tpy of offsets. *Id.* at 12. The Region, in contrast, had looked at Phase I as covering only years 0-3.1, on the assumption that Phase II (with additional offsets) would begin in year 3.1. However, since the permit allows the construction of cells 1-3, which will generate emissions beyond year 3.1, those emissions must be considered at this point rather than as part of the offset proposal review for Phase II.

In response, the Region and Mid-American do not directly dispute the substance of petitioners' argument. The Region states that it "is willing to consider the merits of [petitioners'] argument," but that the issue was not preserved for review because no commenters challenged Mid-American's emissions estimates or the Region's offset calculations. Region's Supplemental Brief at 3. The Region and Mid-American argue that if any shortfall in offsets occurs it can be addressed through the mechanism provided in Permit Condition XI.D.14. Petitioners state that they did not provide comments on the offset calculation, because the Region's claim that the offsets required in the permit are sufficient for the allowable Phase I emissions was not "reasonably ascertainable" at the time the draft permit was issued. Petitioners contend that the Region's claim that no emissions from future construction are yet "allowed" is a "new theory" that petitioners did not have the opportunity to address during the public comment period. Petitioners' Reply Memorandum at 10.

In accordance with 40 C.F.R. § 124.13, a commenter on a draft permit must raise "all reasonably ascertainable issues" during the public comment period in order to preserve an issue for administrative review. *See In re Ogden Martin Systems of Onondaga, Inc.*, 4 E.A.D. 405, 407 n.4 (EAB 1992). Petitioners acknowledge that neither they nor other commenters challenged Mid-American's emissions estimates, or the resulting offset calculations for Phase I, during the permit review process, nor did petitioners raise the issue in their petition for review. We find that these facts are not fatal to our consideration of the issue because, based upon our review of the record, we conclude that this issue was not so clear as to be "reasonably ascertainable" during the public comment period. We agree with petitioners that the offset calculations presented by the Region during the permit review process showed that the offset schedule would always remain

"ahead of the emissions curve," because they included anticipated offsets for each phase sufficient both to account for the cumulative emissions from existing phases *as well as* to account for emissions from the phase under review. *See* Petitioners Supplemental Reply Memorandum at 2; Permit Condition XI.D.1. Based on the Region's analysis, the apparent shortfall for Phase I now identified by petitioners was masked, because the schedule does not account for the possibility that future phases will not be constructed. The Region has not identified any place in the record where it considered the potential air quality effects that would result if landfill phases beyond Phase I are not constructed and additional offsets obtained.

The Region has defended its phased offset approach by contending that Mid-American has obtained sufficient emissions reductions to offset emissions from cells 1-3 in Phase I, and that no further construction is yet allowed. As such, the importance of the calculations as they relate solely to cells 1-3 now becomes clearly apparent in a way in which it may not have been during the public comment period. Given the importance of the offset requirement, we choose to resolve any ambiguity as to whether this issue was reasonably ascertainable in favor of the petitioner.[19]

Further, in light of the overriding importance of ensuring that sufficient offsets are obtained *before operations begin* so as to represent reasonable further progress toward attaining the NAAQS, and the fact that the permit is not yet final, we do not believe that the corrective mechanism contained in the permit can serve as a substitute for careful preconstruction calculation of offsets for each landfill phase. Accordingly, given that the Region has not disputed that an issue about the adequacy of Phase I offsets may exist, we are remanding the permit so that the Region can consider and address the issue raised by petitioners.

B. The Region's Alternatives Analysis Under § 173(a)(5)

As noted earlier, Clean Air Act § 173(a)(5) provides that the Region may issue a NAA permit if, *inter alia*:

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[19] Moreover, as petitioners point out, in unusual circumstances the Board has exercised its discretion to consider issues that might not have been preserved for review, even though they may have been reasonably ascertainable at the time. *See In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 763 n.11 (EAB 1995) (Board exercised discretion to consider certain issues because of significance of issues, and fact that Region addressed the merits in its response). Although we conclude that the issue raised by petitioners was not "reasonably ascertainable" during the public comment period, we note that, given the importance of the offset requirement, we can exercise our discretion to consider the issue on that basis as well.

> [A]n analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification.

Clean Air Act § 173(a)(5), 42 U.S.C. § 7503(a)(5).[20] The statute contains no express requirements concerning the particular contents of the Region's "alternatives analysis," nor has the Agency promulgated regulations addressing the required analysis.

Petitioners' objections to the Region's alternatives analysis are premised on the fact that the proposed landfill is sited over a sole-source aquifer that serves an extensive area surrounding the reservation, in both the U.S. and Mexico. Petitioners argue that the Region should have considered off-reservation sites that would not impact the aquifer as appropriate alternatives to the on-reservation site. Petitioners allege that the Region erred in relying on the BIA's EIS in conducting its analysis, since the purposes of NEPA's EIS requirement are different than those of the alternatives analysis required by the Clean Air Act. Petitioners further contend that the Region did not adequately weigh the social and environmental costs associated with potential loss of the sole-source aquifer due to contamination from the landfill, although petitioners provided the Region with information concerning the substantial cost of providing an alternative water source. Petition for Review at 5-8.

As explained earlier, the Region memorialized its § 173(a)(5) analysis in a brief memorandum that concluded that, based on its review of information in the record from BIA's EIS, "the benefits of the proposed Project significantly outweigh the environmental and social costs that are likely to result from its construction and operation." Alternatives Analysis Memorandum (May 22, 1995). The memorandum recited some of the benefits to be conferred by the project, such as developing and diversifying the economic base of the tribe, and providing long-term employment opportunities. *Id.* The memorandum also stated that the EIS addressed "the potential environmen-

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[20] Mid-American contends that an alternatives analysis was not required for this permit, because § 173(a)(5) does not apply to permit applications pre-dating the effective date of the 1990 Clean Air Act amendments. Mid-American's Response to Petition for Review at 13. Because Mid-American did not appeal the Region's alternatives analysis, and also contends that the Region satisfied the alternatives analysis requirement, it is unnecessary to address this claim (with which the Region disagrees).

tal and social costs of the project, noting that the landfill will meet or exceed all Federal regulatory standards." *Id.*

We emphasize again the heavy burden petitioners bear under the regulations in showing that they are entitled to review of the Region's alternatives analysis. Petitioners "may only prevail if the evidence in the record in support of their view clearly *outweighs* the evidence presented by the Region in support of its decision." *In re Inter-Power of New York, Inc.*, 5 E.A.D. 130, 144 (EAB 1994) (emphasis in original); *see* 40 C.F.R. § 124.19(a). Our decisions have distinguished between instances where a permit issuer has failed to undertake an analysis required by the Clean Air Act, and instances where the analysis was performed but the permit issuer arrived at a conclusion that a petitioner disagrees with. *See Inter-Power* at 144. Where a permit issuer has failed to undertake any required analysis, a remand is usually appropriate so that the analysis may be performed. In contrast, when an analysis has been performed and a determination made, those favoring a different outcome must show that the evidence "for" the outcome *clearly outweighs* the evidence "against" the outcome. *See id.* That heavy burden is particularly appropriate where, as here, the nature of the decision to be made is inherently subjective.

In this instance, we cannot say that the Region failed to undertake the analysis required by § 173(a)(5). Although the Region's memorandum documenting its analysis is brief, it does demonstrate that an analysis was performed, and that, based on the information reviewed, the Region concluded that the benefits of the landfill significantly outweighed its environmental and social costs.[21] We disagree with petitioners' claim that by relying on the EIS, the Region abrogated its responsibilities under § 173(a)(5). Petitioners argue that a NEPA EIS cannot serve as a substitute for a § 173(a)(5) analysis because § 173(a)(5) "expressly requires an alternative *sites* analysis, as well as an analysis of the environmental and social *costs* of the project as

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[21] The Region also explained in its response to comments that:

> EPA required Mid-American to supplement its permit application by submitting supporting documents from the EIS concerning, for example, the alternatives analysis. EPA has included that support in the administrative record and has concluded, independent of the EIS, that with respect to potential alternative sites, sizes, production processes, and environmental control techniques, the benefits from the project as proposed significantly outweigh the environmental and social costs imposed as a result of its location, construction or modification.

Region's Response to Comments at 32.

compared to purported benefits," and also requires an affirmative showing that the benefits of the project "significantly" outweigh the costs. Petitioners' Reply Memorandum at 18 (emphasis in original). Petitioners say that, in comparison, a NEPA EIS "requires simply a discussion of 'alternatives to the proposed action.'" *Id.* at 17-18 (quoting NEPA, 42 U.S.C. § 4332(C)(iii)). Petitioners acknowledge, however, that a NEPA document might be relied upon "if it also meets the criteria of Section 173(a)(5)." Petitioners Reply Memorandum at 18. The Region similarly contends that it was appropriate for it to rely on the EIS "provided the information contained therein was adequate." Region's Response to Petition at 21. Because the Region reviewed the EIS and concluded that it was adequate for certain purposes under § 173(a)(5), it is incumbent upon petitioners to provide evidence that the portions of the EIS relied on by the Region were clearly insufficient for purposes of the § 173(a)(5) analysis.

Petitioners argue that the Campo EIS is "flawed" for purposes of the Region's § 173(a)(5) analysis because it did not analyze alternative landfill sites that would not impact the aquifer. Because the entirety of the reservation sits atop the aquifer, such sites would necessarily be off-reservation. Petitioners contend that the Region was advised that appropriate off-reservation alternative sites exist in the San Diego area "that would have sharply decreased impacts as compared to the proposed project." Petitioners' Reply Memorandum at 20.

Based upon the particular purposes of this project, petitioners have not persuaded us that any alternative sites analysis beyond that contained in the EIS, and reviewed by the Region, is required under § 173(a)(5).[22] In the section entitled "Purpose and Need for the Action," the EIS reviewed the economic circumstances of the Campo Band, noting that the Band "lives under socioeconomic circumstances that include exceptionally high unemployment due to lack of job opportunities, an average annual income of those employed that is below the U.S. definition of the poverty level, and substandard housing." EIS at 1-3. The EIS concluded that:

> The portion of the reservation proposed for project development has remained undeveloped and unused since the creation of the reservation, except for occasional cattle grazing. With the exception of the project proposed, the Campo Band has been unable to iden-

[22] The EIS included an analysis of alternative *on-reservation* sites, although those sites were ultimately rejected in favor of the proposed site. EIS at 4-17, 4-19; ROD at 6.

> tify an economically viable use for the area. The integrated solid waste management project has been identified by the Campo Band as an appropriate means of addressing their long-standing objective and need to establish a strong and diverse economic base to improve the poor socioeconomic position of the Band and strengthen the infrastructure of the tribal government. Through a combination of lease revenues, tipping-fee arrangements, and resales into the recycling market, the proposed project would provide long-term revenue to the Campo Band that would enable them to increase funding to education, housing, medical benefits, and other programs and developments needed to improve tribal living conditions. In addition, the proposed project would provide job opportunities both needed by and suitable for Campo Band members.

EIS at 1-3. Petitioners have provided no evidence that contradicts the purposes underlying the project, as described in the EIS. Petitioners litigated the issue of the alleged need to analyze off-reservation alternative sites in their federal court challenge to the EIS. *See County of San Diego v. Babbitt*, 847 F.Supp. 768 (S.D.Cal. 1994), *aff'd*, Case No. 94-55548 (9th Cir. 1995). The district court concluded that "the purpose of the Project is to provide a significant economic development opportunity for the Campo Band. * * * Because the Project was designed to further [the goals of promoting self-determination and self-sufficiency among Indian Tribes], the BIA reasonably limited the range of alternative sites to those located on the Reservation only." *Id.* The issue thus becomes whether a Clean Air Act § 173(a)(5) site analysis would require anything different. Petitioners have provided no authority that, in these circumstances, where the primary purpose underlying the proposed project (economic development of fallow tribal land) can be served only by an on-reservation site, the Clean Air Act would require analysis of off-reservation alternative sites. We instead find the reasoning of the district court to be highly persuasive. We therefore conclude that petitioners have not met their burden of showing that the Region relied on a "flawed" EIS in conducting the § 173(a)(5) analysis because the EIS did not include an analysis of off-reservation sites.

Petitioners next argue that the "second flaw in the Campo project EIS when viewed under the criteria of Section 173(a)(5) is the failure of the EIS to address the environmental and social costs from putting the sole source aquifer under the project at risk through possible con-

tamination." Petitioners' Reply Brief at 21.[23] The "costs" referred to by petitioners are the substantial costs required to provide an alternative source of water to the area served by the aquifer, in the event the aquifer becomes contaminated. Petitioners provided the Region with an estimate by the San Diego County Water Authority that extending a pipeline to provide water to the Campo area would cost at least $195 million. *Id.*

Central to petitioners' claim is petitioners' conclusion that the landfill, as proposed, does in fact pose a threat to the continued use of the aquifer. However, the EIS concluded that, with appropriate control measures, the water quality impacts posed by the landfill would be reduced "to a level of insignificance." EIS at 4-21.[24] Petitioners have provided no evidence to suggest that the conclusion in the EIS is incorrect. Absent such a showing, we cannot say that the EIS is "flawed" for purposes of § 173(a)(5) because it did not address the costs that petitioners contend would be incurred due to loss of the aquifer. Petitioners therefore have not shown that the Region erred by relying on the conclusions in the EIS, nor have they shown that the Region erred by disregarding the replacement water supply figures in its § 173(a)(5) analysis. Review on the basis of this issue must therefore be denied.[25]

IV. *CONCLUSION*

For the foregoing reasons, the petition for review is hereby denied with respect to petitioners' claims that the Region erred in utilizing a phased approach to the offsets required for the project under Clean Air Act § 173(a)(1)(A), and erred in performing the alternatives

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[23] This argument seems directed at whether the landfill should be located *anywhere* on the reservation since, as previously noted, the whole reservation overlies the aquifer. An analysis in the EIS of alternative sites on the reservation concluded that "[t]he potential for groundwater impacts presented by each of the alternatives (with the exception of the No-Action Alternative) [is] similar." ROD at 13. Thus, this issue is largely a restatement of the previous issue, *i.e.*, whether off-reservation sites should have been considered.

[24] As noted above, the adequacy of the EIS was litigated by petitioners, and upheld on review. *County of San Diego v. Babbitt*, 847 F. Supp. 768 (S.D. Cal. 1994), *aff'd*, Case No. 94-55548 (9th Cir. 1995). Moreover, as the district court observed, although the EIS was prepared prior to the aquifer's sole-source designation, the EIS "specifically states that the aquifer underlying the Campo reservation is the region's only or primary source of water. * * * This is the premise underlying much of the analysis contained in the EIS." *San Diego v. Babbitt* at 772-73.

[25] We note that, as the Region explained in its response to comments, "[i]ssues of groundwater protection were addressed through the RCRA [MSWLF] program approval process." Region's Response to Comments at 23. As explained *supra*, note 12, Mid-American must obtain a MSWLF permit from CEPA, in which groundwater protection measures will be addressed.

analysis required by Clean Air Act § 173(a)(5). The permit is remanded, however, so that the Region may reconsider its calculation of the amount of offsets required for Phase I of the project. Upon completion of remand proceedings, an appeal to the Board will *not* be necessary to exhaust administrative remedies. *See* 40 C.F.R. § 124.19(f).[26]

So ordered.

[26] Although 40 C.F.R. § 124.19(c) contemplates that additional briefing will be submitted upon the grant of a petition for review, a direct remand without additional submissions is appropriate where, as here, it does not appear that further briefs on appeal would shed light on the issues to be addressed on remand. *See, e.g., In re Masonite Corp.*, 5 E.A.D. 551, 586 (EAB 1994).