IN RE AVENAL POWER CENTER, LLC

PSD Appeal Nos. 11-02, 11-03, 11-04 & 11-05

ORDER DENYING REVIEW

Decided August 18, 2011

Syllabus

El Pueblo Para El Aire y Agua Limpio ("El Pueblo"), Greenaction for Health and Environmental Justice ("Greenaction"), Sierra Club and Center for Biological Diversity (jointly, "Sierra Club"), and Mr. Rob Simpson petitioned the Environmental Appeals Board ("Board") to review a Clean Air Act ("CAA") prevention of significant deterioration ("PSD") permit that the U.S. Environmental Protection Agency ("EPA" or "Agency") Office of Air and Radiation ("OAR") issued to Avenal Power Center, LLC ("Avenal"). The permit authorizes Avenal to construct and operate a new 600 megawatt natural gas-fired combined-cycle power plant to be located in Avenal, California.

The Board addresses the following three issues the petitions raised (the Board summarily denies review of all other issues):

A. Was the Permit issued by a duly authorized Agency officer or employee?

B. Should the Board exercise its discretion to review the Agency's decision to "grandfather" the Permit from certain recently finalized regulatory requirements?

C. Did the Agency satisfy its obligations to consider environmental justice under Executive Order 12,898?

Held: The Board denies review.

(A) The Assistant Administrator for OAR issued the Permit under authority the Administrator lawfully delegated. The CAA authorizes the Administrator to delegate the authority to issue PSD permits to "any" Agency officer or employee. Here, the Administrator temporarily delegated to the Assistant Administrator for OAR the authority to issue a final permit decision on Avenal's PSD permit application. The Agency was not required to use notice and comment rulemaking procedures to issue the temporary delegation, and the Agency was not required to publish the temporary delegation in the *Federal Register*.

(B) After reviewing the briefs and giving full consideration to the unique circumstances and issues raised by this well-documented permit decision, the time constraints imposed by the federal District Court's May 26, 2011 order, which requires the Agency to issue a final permit decision by August 27, 2011, and the importance of contributing to an orderly and efficient administrative process, the Board declines to exercise its discretion to

review the Agency's decision to "grandfather" the Permit from certain recently finalized regulatory requirements, specifically the recently finalized national ambient air quality standards for hourly concentrations of nitrogen oxides and sulfur dioxide, as well as control of greenhouse gases through application of best available control technology. The grandfathering issues involve multiple standards, with a complex regulatory history for each, and significant scientific and technical issues related to demonstrating compliance with those standards, as well as complex legal issues relating to "grandfathering" itself, all of which impact the Board's ability to constructively consider these issues in a short time frame. The Board's decision not to exercise its discretion to review the grandfathering issues should not be interpreted as Board support for the Agency's decision on these issues, or, conversely, a lack thereof. Rather the Board moves quickly to issue a decision to enable the Agency to meet the court-imposed deadline.

(C) The Board concludes that the Agency's environmental justice analysis and related conclusions comply with Executive Order 12,898. Here, the Agency provided a thirty-one page environmental justice analysis finding no disproportionately high adverse human health or environment effects for most pollutants, coupled with a reasoned explanation for why it concluded that the limited information available prevented the Agency from making a determination regarding potential disproportionate impacts caused by short-term NO_2 emissions. The Executive Order does not mandate that the Agency reach a determinative outcome when it conducts an environmental justice analysis, especially when the available valid data is not sufficient to support a determinative outcome. The Agency appropriately utilized its technical expertise to determine which data should be included in the environmental justice analysis, and to conclude based on the results of its analysis that the available valid data was insufficient to determine whether short-term exposure to NO_2 emissions would disproportionately impact local minority and low-income communities. Where, as here, the Agency conducts a substantive environmental justice analysis that endeavors to include and analyze germane data and the permit issuer demonstrates that it exercised considered judgment when determining that it could not reach a determinative conclusion due to the insufficiency of available valid data, the Board will decline to review the Permit.

Before Environmental Appeals Judges Kathie A. Stein, Anna L. Wolgast, and Charles J. Sheehan.

Opinion of the Board by Judge Stein:

I. *STATEMENT OF THE CASE*

El Pueblo Para El Aire y Agua Limpio ("El Pueblo"), Greenaction for Health and Environmental Justice ("Greenaction"), Sierra Club and Center for Biological Diversity (jointly, "Sierra Club"), and Mr. Rob Simpson each petitioned[1] the Environmental Appeals Board ("Board") to review a Clean Air Act ("CAA" or

[1] El Pueblo's petition was designated as PSD Appeal No. 11-02, Greenaction's petition was designated as PSD Appeal No. 11-03, Sierra Club and Center for Biological Diversity's petition was designated as PSD Appeal No. 11-04, and Mr. Simpson's petition was designated as PSD Appeal No. 11-05.

"Act") prevention of significant deterioration ("PSD") permit, PSD Permit No. SJ 08-01 ("Permit"), that the U.S. Environmental Protection Agency ("EPA" or "Agency") Office of Air and Radiation ("OAR") issued to Avenal Power Center, LLC ("Avenal") on May 27, 2011.

The Permit authorizes Avenal to construct and operate a new 600 megawatt natural gas-fired combined-cycle power plant known as the Avenal Energy Project, located in Avenal, California. *See* Permit at 1 (Administrative Record Index ("A.R.") 259). Both OAR and Avenal responded to the petitions. The Board did not hold oral argument. For the reasons discussed below, the Board denies review of the Permit.

II. *ISSUES*

The Board has determined that the four petitions filed in this case, collectively, present the following three issues that the Board addresses in this decision:

A. Was the Permit issued by a duly authorized Agency officer or employee?

B. Should the Board exercise its discretion to review the Agency's decision to "grandfather" the Permit from certain recently finalized regulatory requirements?

C. Did the Agency satisfy its obligations to consider environmental justice under Executive Order 12,898?

Petitioners raise additional issues but, as explained below, the Board summarily denies review of all other issues raised.

III. *STANDARD OF REVIEW*

As articulated more fully in Part VI.B, below, the Board's review of a PSD permit is discretionary. Ordinarily, the Board will not review a PSD permit unless it 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. *See* 40 C.F.R. § 124.19(a); Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980). Additionally, the Board analyzes PSD permits guided by the preamble to section 124.19, which states that the Board's power of 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; *accord In re Cardinal FG Co.*, 12 E.A.D. 153, 160 (EAB 2005).

The petitioner bears the burden of demonstrating that review is warranted. *See* 40 C.F.R. § 124.19(a) (requiring Petitioner to "demonstrate that any issues being raised were raised during the public comment period" and, to demonstrate that the issue is based on a clearly erroneous "finding of fact or conclusion of law" or is based on an exercise of discretion or an important policy consideration" warranting review); *see also In re BP Cherry Point*, 12 E.A.D. 209, 216-17 (EAB 2005). To meet that burden, Petitioner must not only specify the objections to the permit, but also explain why the permit issuer's previous response to those objections is clearly erroneous or otherwise warrants review. *Id. at* 217 (EAB 2005); *In re Steel Dynamics, Inc.*, 9 E.A.D. 740, 744 (EAB 2001). The petitioner's burden is particularly heavy in cases where a petitioner seeks review of issues that are fundamentally technical or scientific in nature, as the Board typically defers to the expertise of the permit issuer on such matters if the permit issuer adequately explains its rationale and supports its reasons in the record. *See In re NE Hub Partners, L.P.,* 7 E.A.D. 561, 567 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3rd Cir. 1999); *accord In re Dominion Energy Brayton Point*, LLC, 12 E.A.D. 490, 510 (EAB 2006); *In re Peabody W. Coal*, 12 E.A.D. 22, 33-34 (EAB 2005).

In evaluating a permit appeal, the Board examines the administrative record on which the permit was based to determine whether the permit issuer exercised his or her "considered judgment." *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997); *In re Austin Powder Co.*, 6 E.A.D. 713, 720 (EAB 1997). Specifically, the permit issuer must articulate with reasonable clarity the reasons for its conclusions and the significance of the crucial facts it relied upon in reaching those conclusions. *See Ash Grove Cement*, 7 E.A.D. at 417-18; *Austin Powder*, 6 E.A.D. at 720; *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 386 (EAB 2007); *see also In re Russell City Energy Ctr., LLC*, 15 E.A.D. 1, 64-65 (EAB 2010) (determining that record supporting the permitting authority's selected compliance margin did reflect the Agency's "considered judgment" on the matter). As a whole, the record must demonstrate that the permit issuer "duly considered the issues raised in the comments and [that] the approach ultimately adopted by the [permit issuer] is rational in light of all information in the record." *In re Gov't of the Dist. of Columbia Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (2002).

IV. *SUMMARY OF DECISION*

For all of the reasons stated below: (a) the Board concludes that the Assistant Administrator for OAR issued the Permit under authority the Administrator lawfully delegated; (b) the Board declines to exercise its discretion to review the Agency's decision to "grandfather" the Permit from certain recently finalized regulatory requirements; and (c) the Board concludes that the Agency's environmental justice analysis and related conclusions comply with Executive Order 12,898. The Board summarily denies review of all other issues.

V. *PROCEDURAL AND FACTUAL HISTORY*

The procedural and factual history of the Permit is long and, given applicable time constraints, only information essential to this decision is stated here. Petitioners seek review of a PSD permit OAR issued under 40 C.F.R. § 52.21 authorizing Avenal to construct and operate the Avenal Energy Project.

EPA Region 9 notified Avenal that it considered the permit application administratively complete on March 19, 2008. *See* Letter from EPA, Region 9, to Avenal Power Center, LLC, Mar. 19, 2008 at 1 (A.R. 28). Nearly two years later, the permit application remained pending, and Avenal filed a lawsuit against the EPA in the United States District Court for the District of Columbia for failing to act in accordance with CAA section 165(c), 42 U.S.C. § 7475(c). *See Avenal Power Center, LLC v. U.S. EPA*, No. 1:10-cv-383 (D.D.C. filed Mar. 9, 2010). Section 165(c) of the CAA requires that "[a]ny completed permit application * * * be granted or denied not later than one year after the filing of such completed application." CAA § 165(c), 42 U.S.C. § 7475(c). Avenal originally sought a district court order requiring EPA to grant Avenal a PSD permit, but later amended the remedy sought to an order imposing a deadline for final Agency action, inclusive of any Board review. *See Avenal v. EPA*, No. 1:10-cv-383 (D.D.C. Aug. 25, 2010) (Avenal's Motion for Judgment on the Pleadings and Proposed Order); *id.* (Feb. 15, 2011) (Avenal's Supplemental Brief Regarding Remedy).

While the permit application and the litigation were still pending, EPA issued a National Ambient Air Quality Standard ("NAAQS") for hourly concentrations of nitrogen oxides ("hourly NO_2 standard"), supplementing the existing annual average standard. Primary National Ambient Air Quality Standards for Nitrogen Dioxide, 75 Fed. Reg. 6,474 (Feb. 9, 2010) (promulgating the hourly NO_2 standard, effective Apr. 12, 2010). In addition, EPA issued a NAAQS for hourly concentrations of sulfur dioxide ("hourly SO_2 standard"). Primary National Ambient Air Quality Standard for Sulfur Dioxide, 75 Fed. Reg. 35,520 (June 22, 2010) (promulgating the hourly SO_2 standard, effective Aug. 23, 2010). EPA also announced that, "barring any [grandfathering provision that exempts pending permit applications from the onset of greenhouse gases ("GHGs") requirements,] PSD permits * * * issued on or after January 2, 2011 * * * will be required to contain provisions that fulfill the applicable [PSD] requirements for GHGs."[2] *See* Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by CAA Permitting Programs, 75 Fed. Reg. 17,004, 17,022 (Apr. 2, 2010). .

[2] The January 2, 2011 date triggering GHGs requirements in PSD permits was based on the effective date of then-anticipated emissions standards for light duty vehicles. 75 Fed. Reg. at 17,007 (explaining that when the emissions standards for light duty vehicles become effective, GHGs would become "subject to regulation" under the CAA for purposes of the PSD program).

On January 31, 2011, the Agency filed in the Avenal federal district court litigation a declaration by the Assistant Administrator for OAR, Regina McCarthy, which stated, among other things, that the Agency had "determined that it is appropriate, under certain narrow circumstances, to grandfather certain PSD applications from the requirement to demonstrate that the proposed facility will not cause or contribute to a violation of the hourly NO_2 standard." *Avenal v. EPA*, No. 1:10-cv-383, ¶¶ 6,8 (D.D.C. Jan. 31, 2011) (Supplemental Declaration of Regina McCarthy) (later amended as Corrected Second Declaration of Regina McCarthy (D.D.C. Feb. 4, 2011)) ("McCarthy Declaration"). The Agency then stated that the Avenal Permit was among such applications, and that it would issue a supplemental statement of basis for the Permit seeking comments on its proposal to grandfather the Avenal Permit from the hourly NO_2 standard, as well as from the hourly SO_2 standard and the BACT requirement for GHGs. *Id.*

Following the declaration, Administrator Jackson transferred authority to issue the Avenal Permit from the Regional Administrator to the Assistant Administrator for OAR. Memorandum from Lisa P. Jackson to Gina McCarthy, Assistant Adm'r, OAR (Mar. 1, 2011) (A.R. 116). As anticipated, the Agency also issued a supplemental statement of basis for the Permit explaining its decision to grandfather the Avenal Permit from the hourly NO_2, hourly SO_2, and GHG requirements. *See* Supplemental Statement of Basis at 1-11 (Mar. 4, 2011) (A.R. 114). The Supplemental Statement of Basis also provided the Agency's environmental justice analysis. *Id.* at 11-28.

On May 26, 2011, the federal District Court issued an order requiring the Agency to issue a final Agency action, either granting or denying the Avenal Permit, inclusive of any Board review,[3] no later than August 27, 2011. *See Avenal v. EPA*, No. 1:10-cv-383 (D.D.C. May 26, 2011) (Order Granting in Part and Denying in Part Avenal's Motion for Judgment on the Pleadings); *see also id.* (Memorandum Opinion) (ordering the EPA Administrator to issue "a final, non-appealable, agency action either granting or denying [Avenal's] permit application, no later than August 27, 2011").

[3] EPA argued to the District Court in *Avenal v. EPA* that the Agency's CAA § 165(c) obligation to "grant or deny" a completed permit application within one year is satisfied by a permit decision issued by the permitting authority under 40 C.F.R. § 124.15, which would then be subject to administrative review by the Board under 40 C.F.R. § 124.19, which is not required to be completed within the one-year statutory mandate. *See Avenal v. EPA,* No. 1:10-cv-383, at 13-17 (D.D.C Mar. 1, 2011) (Defendants' Response to Plaintiff's Supplemental Brief Regarding Remedy). The District Court, however, disagreed. *See id.* (May 26, 2011) (Memorandum Opinion) (concluding that the one-year mandate in CAA § 165(c) included the resolution of any appeal to the Board and ordering the Agency to issue a final agency action, either granting or denying the permit application, not later than August 27, 2011).

OAR issued the Permit on May 27, 2011. Between June 25 and June 28, 2011, the Board received four petitions seeking review of the Permit. OAR responded to the petitions on July 11, 2011. Avenal filed a response to the petitions on July 12, 2011.[4] The Board analyzes and sets forth its determinations regarding these petitions below.

VI. *ANALYSIS*

As stated above, the Board has determined that the four petitions filed in this matter present three issues that the Board addresses below. The Board summarily denies review of all other issues raised. *See* Order Governing Petitions for Review of CAA New Source Review Permits (EAB Apr. 19, 2011) (explaining that in order to facilitate the expeditious resolution of NSR appeals, the Board may summarily deny review as appropriate).

A. *The Permit Was Issued Under Lawfully Delegated Authority*

Mr. Simpson and El Pueblo challenge the Permit, arguing that the Assistant Administrator for OAR lacked authority to issue the Permit. Simpson Pet. at 7-9; El Pueblo Pet. at 23-25. They argue that 40 C.F.R. § 124.15, which grants permit issuing authority to the Regional Administrators, bars the Administrator from temporarily delegating PSD permitting authority to the Assistant Administrator for OAR without first providing notice and an opportunity for public comment on the rulemaking and then publishing the final temporary delegation in the *Federal Register*. Simpson Pet. at 7-9; El Pueblo Pet. at 23-25. Petitioners' arguments raise an issue that goes to the heart of the Permit's validity: was the Permit issued by an Agency officer or employee with lawfully delegated authority to issue the Permit? For the following reasons, the Board concludes that the Assistant Administrator for OAR issued the Permit under authority the Administrator lawfully delegated and, therefore, the Board denies review on this issue.

The CAA authorizes the Administrator to issue PSD permits and to delegate that authority to "any" Agency officer or employee. CAA § 301, 42 U.S.C. § 7601(a)(1). By memorandum dated March 1, 2011, the Administrator temporarily delegated to the Assistant Administrator for OAR the authority to issue a final

[4] On July 19, 2011, Sierra Club filed a Motion for Leave to File a Reply Brief (and a reply brief) to respond to Avenal's argument, in its response brief, that the "grandfathering" issue is not properly before the Board. Avenal opposed Sierra Club's motion on July 20, 2011. The Board grants Sierra Club's motion and addresses the underlying substance of the reply brief in footnote 17, below.

permit decision on Avenal's PSD permit application.[5] Memorandum from Lisa P. Jackson to Gina McCarthy, Assistant Adm'r, OAR (Mar. 1, 2011) (A.R. 116) (authorizing the Assistant Administrator for OAR "to exercise authority applicable to PSD permit applications that is assigned to the regional administrator under the terms of 40 CFR Part 124"). The Administrator issued this temporary delegation without providing prior notice and opportunity for public comment and without publishing the delegation in the Federal Register.

Notice and comment rulemaking is not required for "rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). This exception to notice and comment rulemaking under the Administrative Procedure Act ("APA") applies to EPA rules issued under the CAA.[6] Similarly, APA section 552 exempts from the requirement to publish final rules in the *Federal Register* those "matters that are related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2).

The "distinctive purpose" of APA section 553(b)(A)'s exemption for "'rules of agency organization, procedure, or practice,' is to ensure 'that agencies retain latitude in organizing their internal operations.'" *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987) (quoting *Batterton v. Marshall,* 648 F.2d 694, 707 (D.C. Cir. 1980)). A delegation of authority "aimed at agency organization" does not require notice and comment rulemaking. *United States v. Am. Prod. Indus., Inc.*, 58 F.3d 404, 407-08 (9th Cir. 1995). Further, courts have frequently rejected arguments that the validity of a delegation turns on whether it is published in the *Federal Register*.[7] *See United States v. Saunders,* 951 F.2d 1065,

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[5] The Administrator stated: "This temporary delegation of authority will remain in effect for one year from the date of approval unless extended or superceded by a subsequent delegation(s)." Memorandum from Lisa P. Jackson to Gina McCarthy, Assistant Adm'r, OAR (A.R. 116).

[6] The notice and comment rulemaking requirements the Agency must ordinarily follow when promulgating rules under the CAA are set forth in CAA section 307(d), 42 U.S.C. § 7607(d), which states that such requirements "shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5." 42 U.S.C. § 7607(d)(1).

[7] Notably, Congress amended the APA in 1966 to delete certain language that previously required publication of "delegations by agency of final authority." The effect of the 1966 amendment and the codification in section 552(a)(1) is described in the U.S. Dept. of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June 1967), available at http://www.justice.gov/oip/67agmemo.htm. The Attorney General explained that this amendment "leav[es] to each agency discretion to determine what delegations it should include in its descriptions of agency organization." *Id.* More important, in 1947, the Attorney General described the meaning of the previous requirement as follows:

> It is only delegations of *final* authority which need be listed. In this connection, it should be noted that there is no requirement * * * that isolated instances of delegation made on an *ad hoc* basis be published.

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1068 (9th Cir. 1991) (holding that "failure to publish * * * does not affect the validity of the Secretary's delegation of authority to the Commissioner"); *Lonsdale v. United States,* 919 F.2d 1440, 1446 (10th Cir. 1990) (APA does not require *Federal Register* publication of delegation of authority to enforce the Internal Revenue laws); *United States v. Goodman*, 605 F.2d 870, 887-88 (5th Cir. 1979) (internal delegations of authority need not be published and do not "adversely affect" the public); *Hogg v. United States*, 428 F.2d 274, 280 (6th Cir. 1970) (same).

A March 3, 2011 Memorandum to the permitting file explains that part 124's identification of the Regional Administrators as Agency personnel who are authorized to issue PSD permits is a rule of Agency "organization" or "procedure" falling within the APA section 553(b)(A) exception to notice and comment rulemaking.[8] Memorandum to File at 2 (Mar. 3, 2011) ("Delegation of PSD Permit Authority to Assistant Administrator") (A.R. 117) [hereinafter "March 3, 2011 Memorandum"].[9] The Memorandum also explains that the Administrator's decision to authorize the Assistant Administrator for OAR to issue the Permit in this case is a rule of procedure or organization that did not alter the rights or obligations of the public or change the substantive standards by which the permitting decision must be made. *Id.* at 2-3. As detailed in the March 3, 2011 Memorandum, applicable case law supports the Agency's determination that the temporary delegation is a personnel action that was not required to be published in the *Federal Register* and is a procedural or organizational rule not requiring notice and comment rulemaking. *See* March 3, 2011 Memorandum and cases cited therein.

The Agency explained that the Administrator made the temporary delegation decision "[b]ecause of the national implications of the Agency's changed position on the applicability of the revised NO_2 NAAQS." *Avenal v. EPA,* No. 1:10-cv-383, at 4 n.2 (D.D.C. Mar. 1, 2011) (Defendant's Response to Plaintiff's Supplemental Brief Regarding Remedy); *see also* Supplemental Statement

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(continued)
Attorney General's Manual on the Administrative Procedure Act 19-20 (1947). Thus, agencies have discretion whether to publish a particular delegation in the *Federal Register*, and the law never required publication of *ad hoc* delegations or delegations that were not of final authority.

[8] The March 3, 2011 Memorandum states that certain other aspects of the part 124 rules are "substantive." March 3, 2011 Memorandum at 2 (part 124 "contains substantive provisions that (a) vest in the public rights to participate in the decisionmaking process, including the right to appeal certain permits to the Board and (b) establish obligations regarding the content and timing of the public comment process and petitions for an appeal."). Specifically, part 124 grants certain individuals who have participated in the permitting process, among others, the right to file a petition asking the Board to review a final permitting decision issued under section 124.15. 40 C.F.R. § 124.19(a); *see also* note 13, below.

[9] The Response to Comments relies upon the March 3, 2011 Memorandum. *See* Response to Comments at 71.

of Basis at 11 (explaining that the delegation would allow the Assistant Administrator for OAR "to effectuate the refinement of the previous Agency interpretations"). In the March 3, 2011 Memorandum, the Agency also explained that "the Administrator's decision to direct one Agency official rather than another to propose and issue this permit reflects an assessment of procedural efficiency." March 3, 2011 Memorandum at 3. Thus, the Administrator recognized that assigning a national-level decisionmaker would promote efficiency and appropriately address the national implications of the Agency's newly proposed means for reaching a final decision on Avenal's permit application.[10] Efficiency in arriving at a permit decision was especially important here where permit issuance was long delayed.

In these circumstances, the Agency had the authority to use section 553(b)(A)'s latitude to make, without delay, a personnel and organizational change to the Agency's internal operations so that the Agency could most efficiently complete the needed steps to issue the final permit decision.[11] Petitioners have not identified in their briefs to the Board any burden the temporary delegation placed on Petitioners or any substantive impact the temporary delegation made.[12] Accordingly, the Board concludes that the mere fact the Permit was issued by the Assistant Administrator for OAR, rather than the Regional Administrator, does not establish a clearly erroneous finding of fact or conclusion of law, or involve a matter of policy or exercise of discretion that warrants Board review.

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[10] *See* Supplemental Statement of Basis at 2.

[11] The Board, thus, rejects as meritless Mr. Simpson's argument that the Administrator was required, but failed, to provide a reasoned basis for her decision to issue the temporary delegation. Simpson Pet. at 7-9.

[12] El Pueblo arguably intended to assert a substantive impact when, in a footnote, it stated that "EPA's response to comments lacked any reasoning or detail demonstrating that OAR has established a regular, fair, and systematic approach to permit review." El Pueblo Petition at 23 n.7. The Board rejects this assertion. As the Response to Comments states, "EPA headquarters offices have substantial experience with PSD permits. These offices oversee and coordinate the PSD program on [a] nationwide basis and are well-acquainted with the procedures and practices for reviewing PSD permit applications applied across all Regions in EPA, as well as many states." Response to Comments at 71. El Pueblo has identified no facts showing that the Response to Comments is inaccurate. More important, El Pueblo has not, by its argument in the footnote, identified a substantive impact of the temporary delegation on the Permit decision. Avoiding further delay in the Agency issuing its final permit decision does not, on its own, convert the temporary delegation into a substantive rule. *See James v. Hurson Assocs., Inc. v. Glickman,* 229 F.3d 277, 282 (D.C. Cir. 2000) (holding that "the fact that the agency's decision was based on a value judgment about procedural efficiency does not convert the resulting rule into a substantive one" when applying standards that look to whether there is a "substantial impact" on the parties or more broadly whether the rule "encodes a substantive value judgment"); *Public Citizen v. Dep't of State,* 276 F.3d 634, 641 (D.C. Cir. 2002) (same). Moreover, here, the Agency is expressly required to avoid further delay in issuing its decision. *Avenal v. EPA*, No. 1:10-cv-383 (D.D.C. May 26, 2011) (Order Granting in Part and Denying in Part Avenal's Motion for Judgment on the Pleadings); *see also id.* (Memorandum Opinion) (ordering the EPA Administrator to issue "a final, non-appealable, agency action either granting or denying [Avenal's] permit application, no later than August 27, 2011").

The Assistant Administrator for OAR issued the Permit under authority the Administrator lawfully delegated.

B. *The Board Declines to Exercise Its Discretion to Review the Agency's Decision to "Grandfather" the Permit*

Sierra Club and El Pueblo each contend that the Agency clearly erred by failing to require Avenal to demonstrate compliance with the hourly NO_2 and SO_2 NAAQS, as well as by failing to require Avenal to demonstrate that the source will meet the BACT requirement for GHGs. Instead, the Agency determined that these recently promulgated requirements, which became effective while the Agency was considering the permit application, would not be "applicable" to this particular Permit. The Agency's decision to apply the prior standards in place has been commonly referred to as the Agency's decision to "grandfather" the Avenal Permit.

The Board's review of a PSD permit under part 124 is discretionary. That discretion is manifest in the language of section 124.19, which characterizes the appeal as a "request" or "petition" for review. 40 C.F.R. § 124.19(a). That language also denotes the Board's "discretion" to review challenges based on the permitting authority's exercise of discretion or important policy considerations, authorizes the Board to review matters on its own initiative, and provides no other standard for review. *See id.* § 124.19(a)-(b). When it promulgated this regulatory language, the Agency further amplified the intended discretionary nature of permit review:

> [The Agency] agree[s] with the commenters who stated that the Administrator has a broad power to review decisions under these programs. However, EPA's intent in promulgating these regulations is that (1) this power should be sparingly exercised; (2) most permit conditions should be finally determined at the Regional level; and (3) review by the Administrator should be confined to cases which are important for the program as a whole, or are especially important in their own right. The proposed threshold showing [required of petitioners to justify review] is intended to further that purpose and has been retained.

45 Fed. Reg. at 33, 412; *see also In re Multitrade Ltd.*, 4 E.A.D. 24, 25 (EAB 1992) (explaining that petitioners do not have a right to the administrative review

of a PSD permit).[13]

This particular PSD appeal presents unique circumstances. Petitioners seek Board review of a PSD permit that was under consideration by Region 9 for more than three years after the Region deemed the permit application complete. *See* Letter from EPA, Region 9, to Avenal Power Center, LLC, at 1 (Mar. 19, 2008) (notifying Avenal that its PSD permit application was administratively complete) (A.R. 28); Avenal Energy Project (SJ 08-01) PSD Permit (issued May 27, 2011) (A.R. 259).[14] As explained in Part V above, this lengthy decisionmaking process led Avenal to seek and obtain a federal district court order imposing a deadline for final Agency action of August 27, 2011, inclusive of any Board review, based on CAA § 165(c), 42 U.S.C. § 7475(c). *See Avenal v. EPA*, No. 1:10-cv-383 (D.D.C. May 26, 2011) (Order Granting in Part and Denying in Part Avenal's Motion for Judgment on the Pleadings); *see also id.* (Memorandum Opinion). As discussed in Part VI.A above, the Administrator transferred the permit-issuing authority for the Avenal PSD application, from the Regional Administrator for EPA Region 9 to the Assistant Administrator for OAR, to enable consideration at the national level of the implications of certain issues in the case and to promote greater efficiency in decisionmaking. For example, the Agency determined that it would not be appropriate or equitable to require Avenal to meet recently promulgated regulations that took effect following the one-year statutory deadline, while the Agency was still in the process of reviewing this application. *See* Response to Comments at 4-10, 53-66. As such, the Agency decided – based on these circumstances that are unique to this case – to "grandfather" the Avenal permit from the hourly NO_2 and SO_2 NAAQS, and from the requirement to demonstrate that its source will meet the BACT requirement for GHGs. *See id.*; *see also* McCarthy Declaration ¶¶ 6, 9. This determination constituted an acknowledged change in Agency position. *See* Response to Comments at 70; *see also* McCarthy Declaration ¶¶ 6-7. That change in Agency position resulted in the issuance of a Supplemental Statement of Basis and additional public comment period before a final determination was made on the Permit. *Id.*; *see also* Supplemental Statement of Basis at 1-11.

After reviewing the briefs in this case and giving full consideration to the unique circumstances and issues raised by this well-documented permit decision,

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[13] The fact that the Board's *review* of a permit is discretionary in no way limits or impinges upon the right of persons who participated in the public comment process on a draft permit, under section 124.19, to *petition* the Environmental Appeals Board to review the permit's conditions. The right to *petition* for review, however, does not equate to a right to have that permit reviewed by the Board. *See* 40 C.F.R. 124.19; 45 Fed. Reg. at 33,412; *Multitrade*, 4 E.A.D. at 25.

[14] The Permit for Avenal was subsequently amended to correct certain typographical errors in the original. *See* Cover Letter from EPA to Avenal Energy Center, LLP, Accompanying Final Amended PSD Permit (SJ 08-01) (June 21, 2011) (A.R. 299); Avenal Energy Center LLP, Final Amended PSD Permit (SJ 08-01) (June 21, 2011) (A.R. 300).

the time constraints imposed by the U.S. District Court for the District of Columbia on the Agency (including the Board), and the importance of contributing to an orderly and efficient administrative process,[15] the Board declines to exercise its discretion to review the "grandfathering" issues presented in this case. The grandfathering issues involve multiple standards, with a complex regulatory history for each, and significant scientific and technical issues related to demonstrating compliance with those standards, as well as complex legal issues relating to "grandfathering" itself, all of which impact the Board's ability to constructively consider these issues in a short time frame. Further, these issues have been carefully considered legally and technically at high levels within the Agency that the Agency has documented in excess of twenty single-spaced pages in the Response to Comments document. Given all of these factors, the Board cannot constructively consider these issues in the short amount of time available.[16] The Board's decision not to exercise its discretion to review the grandfathering issues should not be interpreted as Board support for the Agency's decision on these issues, or, conversely, a lack thereof. Rather, the Board moves quickly to consider the petitions, issue a decision and, thereby, enable the Agency to meet the court-imposed deadline.[17]

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[15] The Board has emphasized the importance of an efficient, orderly administrative process in multiple contexts, such as in the context of examining the requirement that issues raised in petitions must have been properly preserved for review during the public comment period. *See In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 (EAB 1999) (explaining that the "effective, efficient and predictable administration of the permitting process demands that the permit issuer be given the opportunity to address potential problems with draft permits before they become final); *BP Cherry Point*, 12 E.A.D. at 219-20 (explaining in depth how the requirement to properly preserve issues for review is imperative to the "efficiency, predictability, and finality" of the permitting process). The Board has also discussed the need for efficiency in the administrative process in the context of granting a permitting authority's opposed motion for voluntary remand to further consider a permit application. *See In re Desert Rock Energy Co., LLC*, 14 E.A.D 484, 496 (EAB 2009) (noting federal court recognition of the "wisdom of granting [voluntary] remand motions because it allows an agency to correct its mistakes, thereby promoting good government and judicial efficiency"). Finally, and most recently, the Board cited the need for efficiency in the administrative process when it issued the Board's Standing Order applicable to new source review cases such as this PSD Appeal. *See* Order Governing Petitions for Review of CAA New Source Review Permits (EAB Apr. 19, 2011) (explaining that in order to facilitate the expeditious resolution of NSR appeals, the Board may, among other things, summarily deny review as appropriate).

[16] Completion of briefing, not including Sierra Club's Motion for Leave to File a Reply Brief and the opposition thereto, occurred on July 12, 2011. The court-ordered deadline for final non-appealable agency action by the Administrator, which takes place following the Board's decision, is August 27, 2011.

[17] The Board rejects Avenal's contention that the "grandfathering" issue is not properly before the Board. Avenal argues that the Agency finally determined or "resolved" the issue when it represented in federal district court litigation its intention to grandfather the Avenal Permit, and that those representations in Court were final and binding on the entire Agency, including the Board. *See* Avenal's Response Br. at 8-12. Avenal selectively quotes the EPA's declaration, which states that the Agency "has determined that it is appropriate, under certain narrow circumstances, [such as the Avenal

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C. *The Agency's Environmental Justice Analysis and Related Conclusions Comply with Executive Order 12,898*

El Pueblo, Sierra Club, and Greenaction[18] challenge the Agency's environmental justice analysis and argue instead that the proposed facility will have disproportionately high and adverse human health or environmental effects on residents of Avenal, Huron, and Kettleman City, the three communities in closest proximity to the proposed facility. The Agency argues that the environmental justice analysis itself and the conclusions the Agency made based on that analysis comply with Executive Order 12,898, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" ("Executive Order"). Thus, the central question the Board must resolve is: did the Agency meet its obligation to comply with the Executive Order?

Section 1-101 of the Executive Order states the following:

> *Agency Responsibilities*. To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environ-

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Permit] to grandfather certain PSD applications from the requirement to demonstrate that the proposed facility will not cause or contribute to a violation of the hourly NO_2 standard." *See id.* (quoting McCarthy Declaration ¶ 6). Avenal, however, omits the portion of the declaration that states, "[T]he Agency reads applicable regulations and case law to require that the EPA provide the public with an opportunity to comment on this proposed action before the Agency can issue a final decision on the pending permit application that exempts Avenal from these additional requirements." McCarthy Declaration ¶ 7. Avenal also omits the portion that states, "After consideration of public comments the Agency may receive in response to this public notice, EPA will be able to issue a final permit decision in accordance with 40 CFR 124.15 on this Permit application by May 27, 2011[.]" McCarthy Declaration ¶ 13 (emphasis added).

Avenal's reliance on the District Court's Order is equally flawed. The Order establishes a deadline for "final, non-appealable, agency action, *either granting or denying* [Avenal's] permit application." *Avenal v. EPA*, No. 1:10-cv-383 (D.D.C. May 26, 2011) (Order) (emphasis added). The deadline provided in no way dictates what that final agency action will be, and definitively did not preclude the filing of petitions for Board review. *See id.* at 7 (May 26, 2011) (Memorandum Opinion) (extending the Administrator "an additional 90 days to issue her final permit decision, either with or without the EAB's involvement").

In short, when read in their entirety, both the declaration and the Order very clearly set forth a process for making an anticipated final determination that included a public comment period and time to consider any comments received. They did not "resolve" the grandfathering issue or bind the Agency to any particular outcome. *See id.*

[18] Greenaction's petition simply endorses and incorporates El Pueblo's petition. *See* Petition for Review (June 27, 2011) ("Greenaction Petition"). Thus when the Board addresses El Pueblo's arguments in this section, the Board also addresses Greenaction's arguments.

> mental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations * * * .

Exec. Order 12,898, 59 Fed. Reg. 7629, 7629 (Feb. 16, 1994). Federal agencies are required to implement the Executive Order "consistent with, and to the extent permitted by, existing law." *Id.* at 7632; *see also In re Shell Gulf of Mexico, Inc. & Shell Offshore, Inc.*, 15 E.A.D. 103, 148-49 (EAB 2010) ("*Shell II*"). 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. 59 Fed. Reg. at 7632-33. Additionally, 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 that is the subject of a PSD permit proceeding. *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 69 n.17 (EAB 1997); *see also Shell II*, 15 E.A.D. at 148-49 & n.71 (citing PSD cases).

1. *Agency's Environmental Justice Analysis*

The Agency included in the Supplemental Statement of Basis a thirty-one page environmental justice analysis that collected and analyzed demographic,[19] health-related, and air quality data. *See* Supplemental Statement of Basis at 12-30 & Appxs. 1-3; *see also* Response to Comments at 82-99 (responding to comments on environmental justice analysis and related issues). The demographic analysis indicates that the communities of Avenal, Huron, and Kettleman City contain minority and low-income populations that may be impacted by emissions from the proposed facility.[20] *See* Supplemental Statement of Basis at 16-18 & Appx. 1.

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[19] The Agency chose to examine an area encompassed by a twenty-five kilometer radius from the proposed facility for its environmental justice analysis, but it also provided comparative demographic information for areas within fifteen and fifty kilometer radii of the proposed facility and for Kings County and Fresno County. Supplemental Statement of Basis at 17; *id.* Appx. 1. As relevant areas of comparison, the Agency provided the demographic information for the eight-county area that comprises the San Joaquin Valley, as well as for the State of California. Supplemental Statement of Basis at 17; *id.* Appx. 1.

[20] Within the twenty-five kilometer radius of the proposed facility, 82% of the population is identified as minority, compared with 55% in the San Joaquin Valley and 53% in California as a whole. Supplemental Statement of Basis at 17; *id.* Appx. 1, at 2. The average median household income within a twenty-five mile radius of the proposed facility is more than $10,000 lower than in the San Joaquin Valley, and almost $20,000 lower than the state average. Supplemental Statement of Basis at 17; *id.* Appx. 1, at 7. The Agency also identified significantly higher percentages of linguistic isolation and a low percentage of high school diplomas in the twenty-five kilometer radius surround-

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After the demographic analysis, the Agency described the status of air quality in the area, explaining that it is designated as extreme non attainment for ozone and as nonattainment for $PM_{2.5}$, and that it is designated in attainment or unclassifiable for PM_{10}, annual average NO_2, carbon monoxide, SO_2, and lead. *See id.* at 15. The Agency next addressed the limited availability of hourly NO_2[21] monitoring data from Agency-approved monitoring sites, and explained that it decided to use hourly NO_2 monitoring information from Hanford and Visalia, the two closest EPA-approved monitors located twenty-eight and forty-six miles from the proposed facility, respectively, to analyze background levels of hourly NO_2 at the project site. *See id.* at 18-19, 26-27. The Agency concluded that the design values monitored at the Hanford site (50 ppb) and the Visalia site (61.3 ppb), which equal 50% and 61% of the hourly NO_2 NAAQS, respectively, are on par with measured levels of hourly NO_2 statewide, and thus background levels of hourly NO_2 in the general area surrounding the facility are not disproportionately high as compared to communities throughout California. *See id.*

The Agency also examined various sources of NO_2 emissions, including utilities and industrial sources, and explained that motor vehicle emissions are by far the greatest concern, particularly with respect to short-term NO_2 exposure; motor vehicles account for 61% of NO_2 emissions nationwide and 91% of NO_2 emissions locally in Kings County. *Id.* at 19. The Agency further explained that NO_2 concentrations on or near major roadways are appreciably higher than those measured at monitors in the current Agency-approved network, and stated that "near-roadway concentrations have been measured to be approximately 30 to 100% higher than those measured away from major roads." *Id.*

In the first part of its environmental justice analysis, the Agency determined that the proposed facility's projected emissions for NO_2 (annual average), carbon monoxide (1-hour and 8-hour average), and PM_{10} (24-hour average) will not cause or contribute to a violation of the applicable NAAQS. *See id.* at 26. The Agency concluded that compliance with these NAAQS is sufficient to demonstrate that the proposed emissions for these pollutants over these averaging times will not result in disproportionately high and adverse human health or environmental effects on minority and low-income populations residing near the proposed facility. *See id.*

In the second part of its environmental justice analysis, the Agency considered the hourly impacts of NO_2 concentrations, explaining that despite its propo-

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ing the proposed facility as compared to both the San Joaquin Valley and the State of California. Supplemental Statement of Basis at 17; *id.* Appx. 1, at 5-6.

[21] As explained in Part V, above, the recently issued hourly NO_2 standard of 100 parts per billion ("ppb") supplements that existing annual average standard of 53 ppb.

sal to grandfather the facility from demonstrating compliance with the hourly NO_2 NAAQS, the Agency nevertheless included an analysis of impacts from hourly NO_2 emissions based on the Administrator's recent determination that the annual average NO_2 standard alone is not sufficient to protect public health with an adequate margin of safety against effects associated with short-term exposures to NO_2. *See id.* at 26. The Agency briefly reiterated its previous conclusion that the limited data available from the Hanford and Visalia monitors located closest to the proposed facility indicate that background levels of hourly NO_2 "are on par with measured levels of NO_2 statewide," and thus background levels of hourly NO_2 in the general area of the facility are not disproportionately high as compared to communities throughout the state. *Id.* at 26-27. The Agency also explained that together with the hourly NO_2 monitoring data from Hanford and Visalia, it considered the results of the San Joaquin Valley Air Pollution Control District's ("District") assessment of hourly NO_2 emissions from the proposed facility, which indicated a maximum hourly NO_2 impact of 44 ppb, to be the "best available data."[22] Response to Comments at 87; *see also* Supplemental Statement of Basis at 27. The Agency concluded the following in reference to the Hanford/Visalia hourly NO_2 monitoring data and the District's hourly NO_2 emissions assessment:

> This is the best information available to EPA at this time regarding the potential impacts of the facility's NO_2 emissions on short-term NO_2 levels. We do not have an acceptable analysis prepared for PSD purposes that provides a detailed comparison of the facility's emissions, as well as background and nearby sources, with the 1-hour NO_2 NAAQS.
>
> In light of the limited data available, EPA cannot reach any definitive conclusion about the specific human health or environmental impacts of short-term exposure to NO_2 emissions from the facility on minority and low-income populations.

Supplemental Statement of Basis at 27.

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[22] The modeled impact in the District's assessment was calculated using procedures consistent with the Agency's recommended procedures for calculating NO_2 modeled values suitable for comparison to the 1-hour NO_2 NAAQS. *See* Supplemental Statement of Basis at 27 n.24 (referring to procedures for calculating the NO_2 design value for comparison to the 1-hour NO_2 NAAQS set forth in the Agency's *Notice Regarding Modeling for New Hourly NO_2 NAAQS, Updated – 02/25/10*).

2. *The Agency's Environmental Justice Analysis and Resulting Conclusions Regarding Hourly NO_2 Emissions Were Permissible*

El Pueblo's and Sierra Club's central challenges to the Agency's environmental justice analysis focus on the potential for hourly NO_2 emissions to disproportionately impact residents of the communities located nearest to the proposed facility. The two petitioners challenge the Agency's inability to reach a determinative conclusion as to whether hourly NO_2 emissions from the proposed facility will disproportionately affect local residents. They also argue that the Agency erred when it failed to include certain data in its environmental justice analysis that, if included, the two petitioners contend would irrefutably indicate that the proposed facility's hourly NO_2 emissions violate the hourly NO_2 standard.

The plain language of the Executive Order imparts considerable leeway to federal agencies in determining how to comply with the spirit and letter of the Executive Order. Section 1-101 begins "[t]o the greatest extent practicable and permitted by law," and goes on to state that federal agencies shall make environmental justice a part of their missions by identifying and addressing, "as appropriate," disproportionately high and adverse human health or environmental effects. 59 Fed. Reg. at 7629.

Notwithstanding Petitioners' claims to the contrary, the Board's recent decision in *Shell II* does not require the Agency to reach a determinative outcome prior to issuing a permit, particularly when the available valid data is inconclusive. In *Shell II*, the Board remanded an Outer Continental Shelf PSD permit based, in part, on the permit issuer's inadequate environmental justice analysis. *See Shell II*, 15 E.A.D. at 148-61. The context of the challenge to the environmental justice analysis in *Shell II* was unusual in that the permits were finalized in the interim between the Administrator's publication of the final rule establishing the hourly NO_2 NAAQS in the *Federal Register* on February 9, 2010, and the effective date of the new hourly NO_2 standard, April 12, 2010. *See Id.*, 15 E.A.D. at 154. The administrative record did not contain any environmental justice analysis beyond a cursory one-paragraph statement of compliance with the annual NO_2 NAAQS, despite the availability of updated scientific and technical reviews supporting the Administrator's unequivocal determination that an annual NO_2 NAAQS was insufficient by itself to protect the public health with an adequate margin of safety. *See Id.*, 15 E.A.D. at 156-58 & n.83. The Board emphasized that the environmental justice aspect of the remand order turned on the region's scant environmental justice analysis, which provided no examination or analysis of short-term NO_2 impacts whatsoever. *Id.*, 15 E.A.D. at 157.

Contrary to the lack of an environmental justice analysis and the failure to consider short-term impacts of NO_2 emissions in *Shell II*, the Agency in this instance provided a thirty-one page environmental justice analysis coupled with a reasoned explanation for why it concluded that the limited information available

prevented it from making a determination regarding potential disproportionate impacts caused by short-term NO_2 emissions. The Board did not address in *Shell II* whether a permit issuer must make a determinative conclusion after analyzing available, valid data in response to an environmental justice concern. Here, however, the Board finds the Agency's inability to conclude whether short-term NO_2 emissions have a disproportionate impact on the populations surrounding the proposed facility is permissible, particularly in light of the facts of this case and the discretion afforded to federal agencies under the Executive Order. The Executive Order does not mandate that the Agency reach a determinative outcome when it conducts an environmental justice analysis,[23] especially when the available valid data is not sufficient to support a determinative outcome. Thus, El Pueblo's and Sierra Club's attempt to selectively interpret the Executive Order and Board precedent to require more must fail. Where, as here, the Agency conducts a substantive environmental justice analysis that endeavors to include and analyze data that is germane to the environmental justice issue raised during the comment period, *see Shell II*, 15 E.A.D. at 160 n.87, and the permit issuer demonstrates that it exercised its considered judgment when determining that it could not reach a determinative conclusion due to the insufficiency of available valid data, the Board will decline to grant review of the environmental justice analysis. *See, e.g., In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997).

Similarly, the two Petitioners' remaining challenges regarding the Agency's decision to consider some, but not all, of the available hourly NO_2 emissions data in its environmental justice analysis, and the Agency's conclusions based on that data, must fail. The Board has frequently stated that, when a petitioner seeks review of decisions that are fundamentally technical in nature, the Board assigns a particularly heavy burden to the petitioner. *E.g., In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005). Moreover, the Board has often relied on such expertise in evaluating the adequacy of an environmental justice analysis. *See, e.g., In re Chem. Waste Mgmt.*, 6 E.A.D. 66, 80 (EAB 1995) (stating that the proper scope of a demographic study conducted to fulfill the Agency's obligations under the Executive Order is "precisely the kind of issue that the Region, with its technical expertise and experience, is best suited to decide").

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[23] In recently issued internal guidance the Agency concluded that, "E.O. 12898 and the Agency's [environmental justice] policies do not mandate particular outcomes for an action, but they demand that decisions involving the action be informed by a consideration of [environmental justice] issues. Where feasible, actions should prevent or address and mitigate [environmental justice] concerns." Office of Policy, Economics and Innovation, U.S. EPA, *EPA's Action Development Process: Interim Guidance on Considering Environmental Justice During the Development of an Action* 5 (July 2010). Although this interim guidance is not binding on the Board and does not explicitly apply to Agency permitting procedures, the Board nonetheless finds this statement supportive of its interpretation of the Executive Order.

The Agency explained its reasons for rejecting both data and modeling demonstrations that Avenal submitted to the Agency during its efforts to demonstrate compliance with the hourly NO_2 NAAQS, and the District's 1-hour NO_2 analysis prepared in the context of Avenal's minor source permit application. *See* Response to Comments at 89-90. In addition, the Agency explained that it had insufficient information to determine whether, as El Pueblo and Sierra Club allege, near-roadway hourly NO_2 emissions would necessarily be 30% – 100% higher in Kettleman City, located directly adjacent to Interstate 5, than emissions measured in Hanford or Visalia. *Id.* at 92. For both the Hanford and Visalia monitoring data and the District's assessment of 1-hour NO_2 emissions that the Agency deemed the available valid data, the Agency clarified that these data complied with or were consistent with Agency-approved methods for gathering and analyzing data. *See id.* at 91; Supplemental Statement of Basis at 26-27. The Agency appropriately utilized its technical expertise to determine which data should be included in the environmental justice analysis, and to conclude based on the results of its analysis that the available valid data was insufficient to determine whether short-term exposure to NO_2 emissions would disproportionately impact local minority communities and low-income communities.[24] *See In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567-68 (EAB 1998) (explaining that the Board typically defers to the permit issuer's expertise in matters that are fundamentally technical or scientific in nature, if the permit issuer's rationale is supported in the record), *review denied sub nom. Penn Fuel Gas, Inc. v. EPA,* 185 F.3d 862 (3rd Cir. 1999); *accord Ash Grove Cement*, 7 E.A.D. at 403.

El Pueblo and Sierra Club have not met their particularly heavy burden of demonstrating that the Agency clearly erred in making its technical judgments regarding the short-term NO_2 emissions data available for the environmental justice analysis. *See NE Hub*, 7 E.A.D. at 567.

3. *The Agency Adequately Considered the Cumulative Impacts in the Area of the Proposed Facility*

El Pueblo and Sierra Club also argue that the Agency's cumulative impacts analysis within the environmental justice analysis was inadequate. The Board disagrees. The Agency provided an extensive discussion of the various projects and mitigation strategies underway in the area surrounding the proposed facility that are intended to mitigate the impacts of multiple existing sources on the communities located in close proximity to the proposed facility. *See* Response to Comments at 83-85. Specifically, the Agency determined that based on the types of environmental conditions already present in the area surrounding the proposed

[24] The Board notes that the Agency intends to place an ambient NO_2 monitor in the vicinity of the proposed facility to gather more information about local NO_2 concentrations. Supplemental Statement of Basis at 29; Response to Comments at 96-97.

facility, the Agency believed these conditions would be more effectively addressed through actions that the Agency can take in conjunction with state and local governments. *See id.* (discussing mitigation strategies including, but not limited to, enforcement actions against a local hazardous waste facility, addressing nonattainment pollutants through the ongoing state and local air quality planning process, and issuing administrative compliance orders to address local violations of the Safe Drinking Water Act).

The Board is unpersuaded by El Pueblo's arguments that the Agency "may not address disproportionate impacts by relying on wholly unrelated actions that may or may not decrease pollution from sources outside the PSD permitting process." El Pueblo Pet. at 36. El Pueblo cites no authority to support its contention that the Agency's ability to address cumulative impacts is confined to the PSD program, and provides no further explanation of how cumulative impacts from multiple existing sources can be effectively addressed solely through the PSD permitting process. Nor does El Pueblo present any authority supporting its contention that the Agency must include in the record information to justify its use of activities outside the PSD process to address cumulative impacts. *See id.* at 37. El Pueblo has failed to demonstrate that the Agency clearly erred in its choice of methods to address the cumulative impacts in the area of the proposed facility.

In addition, EPA is in the midst of an agency-wide strategic planning process for addressing environmental justice, entitled Plan EJ 2014, which will serve as "a roadmap that will help EPA integrate environmental justice into the Agency's programs, policies, and activities." Plan EJ 2014, *available at* http://www.epa.gov/compliance/ ej/plan-ej/. Significantly, Plan EJ 2014 will focus on addressing "the complex issue of cumulative impacts from exposure to multiple sources and existing conditions that are critical to the effective consideration of environmental justice in permitting." Plan EJ 2014 Draft for Public Comment, U.S. EPA 4 (July 27, 2010), *available at* http://www.epa.gov/compliance/ej/resources/policy/plan-ej-2014.pdf.

The Agency has provided a thorough accounting of its efforts to address cumulative impacts in the area of the proposed facility. The Agency's strategy for addressing cumulative impacts from multiple sources and existing conditions in the permitting process is still evolving, and the Board declines to second-guess the Agency's well-explained cumulative impacts analysis in this case. Based on the foregoing, the Board concludes that the Agency's environmental justice analysis and related conclusion complies with the Executive Order.[25]

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[25] In connection with its objections to the Agency's environmental justice analysis, El Pueblo also alleges Agency discrimination in the course of this PSD permit proceeding. Specifically, El Pueblo baldly asserts discrimination against Latino residents living near the proposed facility. El Pueblo cannot demonstrate that this issue was previously raised in this PSD permit proceeding, a
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VII. *CONCLUSION AND ORDER*

For all of the reasons provided, the Board denies review of the issues addressed above. The Board also summarily denies all issues not addressed above. *See* Order Governing Petitions for Review of CAA New Source Review Permits (EAB Apr. 19, 2011) (explaining that in order to facilitate the expeditious resolution of NSR appeals, the Board may summarily deny review as appropriate).

So ordered.

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requirement for raising the issue on appeal, *see Russell City*, 15 E.A.D. at 10-11, or that the Agency provided any response to comment on this issue. Further, the record demonstrates that in the course of this PSD proceeding the Agency conducted a distinct environmental justice analysis in response to commenters' concerns. While El Pueblo may not agree with the result of the Agency's environmental justice analysis, it cannot prevail here where it fails to meet the basic threshold procedural requirements for obtaining Board review, namely, raising the issue during the public comment period. Accordingly, the Board concludes that El Pueblo's claim of discrimination is without merit.

El Pueblo further asserts that the Agency erred by proceeding to issue the Permit while there is a pending complaint in the Agency's Office of Civil Rights alleging discriminatory actions under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7 (Title VI"). The Title VI claim currently pending before the Agency's Office of Civil Rights cannot operate to stay the PSD permit the Agency issued to Avenal. Agency guidance issued to clarify how EPA will investigate and resolve Title VI claims explicitly states that "[n]either the filing of a Title VI complaint nor the acceptance of one for investigation by OCR stays the permit at issue." Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits, 65 Fed. Reg. 39,650, 39,676 (June 27, 2000). The Permit at issue in the Title VI claim is the District's Permit issued to Avenal in November 2008 as a result of the nonattainment new source review ("NNSR") permit process. As the Agency points out in its response to El Pueblo, the guidance makes clear that the NNSR permit issued by the District that is the subject of the pending Title VI claim is not stayed due to the Title VI investigation. OAR Response Br. at 37. El Pueblo cites no authority to support its contention that despite clear Agency guidance stating that the NNSR permit is not stayed, the Agency should nonetheless stay the entirely separate PSD permit process underway for the same facility.