IN RE ECOELÉCTRICA, L.P.

PSD Appeal Nos. 96-8 and 96-13

ORDER DENYING REVIEW

Decided April 8, 1997

Syllabus

Two petitioners seek review of a prevention of significant deterioration (PSD) permit issued by U.S. EPA Region II to EcoEléctrica, L.P., pursuant to Clean Air Act § 165, 42 U.S.C. § 7475. The permit authorizes EcoEléctrica to install and operate a 461-megawatt cogeneration plant in Peñuelas, Puerto Rico, and to construct a liqufied natural gas marine terminal to receive deliveries of the plant's primary fuel. In Appeal No. 96-13, the Committee to Save the Environment in Guayanilla (Committee) seeks review of the Region's permit decision on the grounds that: (1) the Region erred by failing to require EcoEléctrica to compile preconstruction ambient air quality monitoring data of the kind described in 40 C.F.R. § 52.21(m); (2) the Region erred by failing to require EcoEléctrica to present a "multi-source modeling" analysis examining emissions from existing facilities in the vicinity of the proposed EcoEléctrica plant; (3) the Region's failure to require additional data-gathering by EcoEléctrica "is an example of environmental injustice"; (4) the Region did not impose restrictions adequate to prevent this facility from burning oil, rather than natural gas, as its primary fuel on a permanent basis; and (5) the Region should refrain from issuing PSD permits for facilities proposed to be constructed in Puerto Rico, because it has not properly enforced applicable regulatory requirements against existing permittees. In Appeal No. 96-8, Mr. Hector Arana seeks review of the Region's permit decision on the grounds that: (1) Puerto Rico's electric power needs can be met through the implementation of energy conservation measures, making the proposed EcoEléctrica facility unnecessary; (2) an Environmental Impact Statement for the EcoEléctrica project, prepared by the Federal Energy Regulatory Commission and the Puerto Rico Planning Board outside the context of the PSD permitting process, contains inaccurate statements concerning Puerto Rico's energy needs; and (3) issuance of this permit decision should be held in abeyance until the conclusion of other litigation filed by Mr. Arana bearing on the proposed EcoEléctrica facility.

Held: The Region did not err by exempting EcoEléctrica from preconstruction ambient air quality monitoring requirements. The PSD regulations provide, at 40 C.F.R. § 52.21(i)(8), two alternative grounds for exempting a permit applicant from the preconstruction ambient monitoring requirements: An exemption may be granted if emissions from the applicant's proposed facility will cause air quality impacts less than certain specified *de minimis* levels or, alternatively, if existing pollutant concentrations in the area of the proposed facility are less than those *de minimis* levels. In this case the Region found, and the Committee has not disputed, that the EcoEléctrica facility's projected air quality impacts are less than the *de minimis* levels for all relevant pollutants. The Region's exemption decision is therefore fully authorized by section 52.21(i)(8)(i) of the PSD regulations, and the Committee has failed to demonstrate that the decision is clearly erroneous.

The Region did not err by failing to require EcoEléctrica to perform multi-source modeling. The Committee has identified no generally applicable regulatory requirement to perform such an analysis. In the absence of any such regulatory requirement, the Region acted permissibly by following PSD program guidance that calls for multi-source modeling only when an applicant's own modeled air quality impacts exceed specified levels of significance. Because the EcoEléctrica facility's modeled air quality impacts do not exceed those significance levels for any pollutant, the Region did not clearly err by choosing not to require multi-source modeling in connection with this permit application.

The Region did not overlook principles of environmental justice generally, or the requirements of Executive Order 12898 in particular, in connection with this PSD permitting process. The Region undertook an environmental justice analysis to consider whether this proposed facility would produce any disproportionately high and adverse human health or environmental effect upon a low-income community. Based on that analysis, the Region concluded that no such effect should occur. The Committee has identified no specific error among the Region's analytical methods or conclusions, nor has it explained how or why an examination of additional data would be expected to reveal an impact of the kind addressed by Executive Order 12898. The Committee's challenge to this permit on environmental justice grounds is therefore rejected.

The Committee's contention that this permit allows the EcoEléctrica facility permanently to combust oil as its primary fuel is rejected. The permit expressly states that oil "will only be fired as a backup fuel," and specifically limits the quantities of oil that the facility is allowed to combust. Region II determined, moreover, that no impermissible air quality impacts would result if EcoEléctrica were to combust oil to the full extent authorized by this permit, and the Committee has suggested no basis for concluding that that determination is clearly erroneous.

Finally, the Committee's allegation that EPA enforcement efforts are generally inadequate provides no basis for review of this permit decision.

Mr. Arana's objections are rejected as grounds for review of this permit decision because: (1) it was not clear error for the Region to defer the question of the need for the facility to the Commonwealth of Puerto Rico's own authorized decisionmakers, rather than reexamine the merits of their decisions; (2) Mr. Arana raised no issue concerning the Environmental Impact Statement for this project during the public comment period applicable to the PSD permit decision, and Mr. Arana, therefore, failed to preserve any such issue for appeal in the manner required by 40 C.F.R. §§ 124.13 & 124.19(a); and (3) the pendency of other litigation challenging the EcoEléctrica facility on non-PSD grounds does not justify holding this Agency's final PSD permit decision in abeyance.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge Stein:

I. *BACKGROUND*

Before us are two petitions seeking review of a final permit decision issued by U.S. EPA Region II under the Clean Air Act program to Prevent Significant Deterioration of Air Quality ("PSD permit"). The PSD permit authorizes EcoEléctrica, L.P. to install and operate a 461-megawatt cogeneration plant at a site on Punta Guayanilla Bay in Peñuelas, Puerto Rico, fifteen kilometers west of the City of Ponce,

and to construct a liquefied natural gas marine terminal to receive deliveries of the plant's primary fuel. The plant will produce electricity from two combustion turbines, each with an extraction-condensing, reheat steam turbine generator, and will also include an auxiliary diesel-cycle generator for emergency purposes. The turbines will employ natural gas as a primary fuel, propane as a secondary fuel, and No. 2 oil as a backup fuel. Permit Attachment I, at 1.

The EcoEléctrica facility is subject to PSD permitting requirements for the following pollutants: nitrogen oxides (NO_x), sulfur dioxide (SO_2), carbon monoxide (CO), particulate matter less than ten microns in diameter (PM_{10}), and volatile organic compounds (VOCs). *See* Permit Attachment I, at 1-2; 40 C.F.R. § 52.21(b)(23).

The PSD permit requires EcoEléctrica to control NO_x emissions by using a steam or water injection process into the combustion system and employing a selective catalytic reduction system. Permit Attachment I, at 2. EcoEléctrica will be required to control SO_2 emissions by using clean fuels (pipeline quality natural gas or commercial grade propane, with use of low sulfur No. 2 fuel oil [sulfur content not to exceed 0.04 percent by weight] allowed as a backup fuel only). *Id*. EcoEléctrica must employ good combustion practices to control emissions of CO, PM_{10}, and VOCs. *Id*.

The petitioner in Appeal No. 96-8 is Mr. Hector Arana, a resident of Puerto Rico and President of Wind Energy Development Corporation. Mr. Arana's principal contention is that the electric power to be generated by the EcoEléctrica facility is not needed. Specifically, Mr. Arana maintains that Puerto Rico's existing sources of electric power would be adequate if Puerto Rican consumers of electricity were to adopt energy conservation measures such as those EPA itself has recommended in the context of its "Green Lights" program.

The petitioner in Appeal No. 96-13 is an organization identifying itself as the Comité Pro Rescate del Buen Ambiente de Guayanilla, or Committee to Save the Environment in Guayanilla (hereinafter "Committee"). The Committee principally argues that Region II should, as a discretionary matter, have insisted that EcoEléctrica compile additional, more extensive air quality data before acting on EcoEléctrica's PSD permit application, despite the Region's determination that EcoEléctrica met the conditions for a regulatory exemption from any legal requirement to gather such additional data. The Committee also suggests, albeit in very general terms, that the Region's failure to demand such additional data raises issues of environmental justice.

At the request of the Environmental Appeals Board, Region II submitted responses to both petitions for review.[1] The Region urges that both petitions be denied for failure to identify, pursuant to 40 C.F.R. § 124.19, any clear error of fact or law, or any important policy matter or exercise of discretion that warrants review.[2] For the reasons that follow, we agree with the Region's assessment and we deny both petitions for review.

II. *DISCUSSION*

A. *Statutory Background*

The Clean Air Act's PSD program serves to regulate air pollution in "attainment" areas, in which the air quality meets or is cleaner than the national ambient air quality standards (NAAQS), as well as in areas that cannot be classified as "attainment" or "nonattainment" ("unclassifiable" areas). *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 766-67 (EAB 1997) (citing Clean Air Act §§ 160 *et seq.*). The NAAQS are "maximum concentration 'ceilings' measured in terms of the total concentration of a pollutant in the atmosphere." New Source Review Workshop Manual (hereinafter "Draft Manual"), at C.3.[3] The primary NAAQS "define levels of air quality which the Administrator judges are necessary, with an adequate margin of safety, to protect the public health," and the secondary NAAQS "define levels of air quality which the Administrator judges necessary to protect the public welfare from any known or anticipated adverse effects of a pollutant." 40 C.F.R. § 50.2(b).

> The goals of the PSD program are:
>
> (1) to ensure that economic growth will occur in harmony with the preservation of existing clean air

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[1] The response to Petition No. 96-8 was submitted jointly by Region II (through its Office of Regional Counsel) and by EPA's Office of General Counsel, and is signed by representatives of both offices. The response to Petition No. 96-13 was submitted in the Region's name alone, but indicates that it was prepared "in coordination with" the Office of General Counsel.

[2] In addition, with leave of the Board, EcoEléctrica itself submitted a brief urging that both petitions be denied.

[3] The New Source Review Workshop Manual is a draft document issued by EPA's Office of Air Quality Planning and Standards in October 1990. It was developed for use in conjunction with new source review workshops and training, and to guide permitting officials. Although it is not accorded the same weight as a binding Agency regulation, it has been looked to by this Board as a statement of the Agency's thinking on certain PSD issues. *See In re Masonite Corp.*, 5 E.A.D. 551, 558 n.8 (EAB 1994).

> resources; (2) to protect the public health and welfare from any adverse effect which might occur even at air pollution levels better than the [NAAQS]; and (3) to preserve, protect, and enhance the air quality in areas of special natural recreational, scenic, or historic value, such as national parks and wilderness areas.

Draft Manual at 5. To that end, the PSD regulations at 40 C.F.R. § 52.21 require, among other things, that new major stationary sources of air pollution and major modifications of such sources be carefully reviewed prior to construction to ensure that emissions from such facilities will not cause exceedance of the NAAQS or applicable PSD ambient air quality "increments." A PSD "increment" refers to "the maximum allowable increase in concentration that is allowed to occur above a baseline concentration for a pollutant." Draft Manual at C.3; *see also* 40 C.F.R. § 52.21(c) (setting forth increments for regulated pollutants).

The PSD regulations further require that new major stationary sources and major modifications of such sources employ the "best available control technology" (BACT) to minimize emissions of regulated pollutants. Clean Air Act § 165(a)(4); 40 C.F.R. § 52.21(j)(2). BACT is defined in part as follows:

> [BACT] means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under [the] Act which would be emitted from any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant.

40 C.F.R. § 52.21(b)(12).

B. *Standard of Review*

Under the regulations that govern the Board's review of PSD permit decisions, a PSD permit decision will ordinarily not be reviewed unless the decision is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exer-

cise of discretion that warrants review. 40 C.F.R. § 124.19(a). The preamble to section 124.19 states that the Board's power of review "should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level." 45 Fed. Reg. 33,412 (1980). The petitioners bear the burden of demonstrating that review is warranted. *E.g.*, *Commonwealth Chesapeake Corp.*, 6 E.A.D. at 769. Moreover, the Board has repeatedly emphasized that petitioners' burden under section 124.19 requires both that they clearly identify their objections and that they specifically explain why the Region's previous response to those objections is clearly erroneous or otherwise worthy of review. *Id.*; *see also, e.g.*, *In re Puerto Rico Electric Power Authority*, 6 E.A.D. 253, 255 (EAB 1995).

C. *The Committee's Petition*

1. *Air Quality Analysis*

a. *Failure to Require Preconstruction Ambient Monitoring*

The PSD permitting regulations require, pursuant to 40 C.F.R. § 52.21(m), that a permit application for a major stationary source (such as the EcoEléctrica facility) include "an analysis of ambient air quality in the area that [the source] would affect for * * * each pollutant that [the source] would have the potential to [e]mit in a significant amount." 40 C.F.R. § 52.21(m)(1)(i)(*a*).[4] For any Clean Air Act "criteria" pollutant (*i.e.*, pollutant for which there exists an applicable NAAQS) that is to be emitted in a significant amount, the ambient air quality analysis must generally include "continuous air quality monitoring data gathered for purposes of determining" whether the applicable NAAQS or PSD increment will be exceeded. *Id.* § 52.21(m)(1)(iii).

The regulations specifically allow, however, for an exemption from the requirement to gather such air quality monitoring data for any particular pollutant as to which either of two conditions is satisfied: The exemption is potentially available if "the emissions increase of the pollutant from the new source * * * would cause, in any area, air quality impacts less than" certain specified concentrations (40 C.F.R. § 52.21(i)(8)(i)) or, alternatively, if existing "concentrations of the pollutant in the area that the source * * * would affect are less than" those same specified values (40 C.F.R. § 52.21(i)(8)(ii)). The specified concentrations that are compared, in this analysis, either

[4] The terms "major stationary source," "potential to emit," and "significant" are defined at 40 C.F.R. § 52.21(b).

with the predicted impacts from a proposed source or with existing pollutant concentrations in the area of a proposed source, are sometimes referred to as "*de minimis* levels." *See* 40 C.F.R. § 52.21(i), footnote 1. The Region's briefs refer to them as "monitoring *de minimis* levels" — highlighting their role in assessing the need for preconstruction ambient air quality monitoring — and we employ that terminology in the discussion that follows.[5]

In applying for its PSD permit, EcoEléctrica requested an exemption from preconstruction ambient monitoring and demonstrated, in making that request, that emissions of all relevant pollutants from its proposed facility would produce air quality impacts below the monitoring *de minimis* levels set forth at 40 C.F.R. § 52.21(i)(8)(i). Specifically, EcoEléctrica submitted technical analyses demonstrating that the maximum air quality impacts from its proposed facility would not exceed: 375 $\mu g/m^3$ (eight-hour average) for CO, below the monitoring *de minimis* level of 575 $\mu g/m^3$; 0.73 $\mu g/m^3$ (annual average) for nitrogen dioxide (NO_2), below the monitoring *de minimis* level of 14 $\mu g/m^3$; 4.52 $\mu g/m^3$ (24- hour average) for SO_2, below the monitoring *de minimis* level of 13 $\mu g/m^3$; and 4.97 $\mu g/m^3$ (24-hour average) for PM_{10}, below the monitoring *de minimis* level of 10 $\mu g/m^3$.[6] EcoEléctrica further established that the proposed facility's potential to emit VOCs would be limited to a rate of 96 tons per year (tpy), thereby demonstrating its eligibility for exemption from the requirement to conduct preconstruction ambient air quality monitoring for ozone.[7] The Region concluded, based on these modeled air quality impacts, that EcoEléctrica would not be required to perform the ambient monitoring described in 40 C.F.R. § 52.21(m).

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[5] The New Source Review Workshop Manual refers to this set of pollutant concentrations as "significant monitoring concentrations." *See* Draft Manual at C.17. Like the terminology we employ in the text, that designation serves to distinguish the significance levels used in evaluating the need for preconstruction ambient monitoring (set forth in 40 C.F.R. § 52.21(i)(8) and in Table C-3 of the Draft Manual) from the "significant ambient impact levels" (Draft Manual Table C-4) discussed in the following section of our opinion. The latter are consulted to determine whether a particular permit applicant should be required to perform a "full impact analysis" — including multi-source modeling — in order to demonstrate its compliance with PSD regulatory requirements, or whether a "preliminary analysis" alone will suffice to make that demonstration.

[6] To provide context for these figures we would point out that the existing primary NAAQS, expressed in terms of the same units ($\mu g/m^3$) and the same averaging times as the monitoring *de minimis* levels cited in the text, are 10,000 $\mu g/m^3$ for CO, 100 for NO_2, 365 for SO_2, and 150 for PM_{10}. *See* 40 C.F.R. §§ 50.4, 50.6, 50.8, and 50.11.

[7] A new source may be exempted from the ambient air quality monitoring requirement for ozone if the source would emit less than 100 tpy of VOCs. *See* footnote 1 to 40 C.F.R. § 52.21(i)(8)(i); *Masonite Corp.*, 5 E.A.D. at 576-77.

EcoEléctrica's air quality impact analyses for CO, NO_2, SO_2, and PM_{10} emissions from its proposed facility have not been challenged, nor is there any dispute concerning the figure (96 tpy) cited by EcoEléctrica as representing the facility's potential to emit VOCs. It is therefore undisputed that this facility was eligible for exemption from the requirement to conduct preconstruction ambient air quality monitoring for all pollutants for which such monitoring would otherwise have been required. Such an exemption is, however, not mandatory. Even if emissions from a proposed new source would produce air quality impacts below the *de minimis* levels set forth in section 52.21(i), the Region nonetheless "has discretion to order a full ambient air quality analysis" for any pollutant for which the source is subject to PSD review. *In re Masonite Corp.*, 5 E.A.D. 551, 579 (EAB 1994). Indeed, section 52.21(i)(8) itself says only that EPA "may exempt" a source from preconstruction ambient air quality monitoring requirements if the *de minimis* levels are not exceeded; the regulation nowhere suggests that EPA *must* do so.

In its petition for review, the Committee argues that Region II abused its discretion by failing to require (that is, by granting an exemption from) preconstruction ambient air quality monitoring in connection with the EcoEléctrica permit application. Such an abuse of discretion is, the Committee contends, evident from certain statements in the Responsiveness Summary that accompanied the Region's final permit decision, in which the Region indicated that it had evaluated certain existing ambient air quality data from "other areas * * * similar in industrialization [to] Guayanilla"[8] during its review of the EcoEléctrica permit application.

According to the Committee, the existing ambient air quality data that the Region claims to have evaluated is, for various reasons, either inherently unreliable or unrepresentative of conditions in the specific area that would be affected by emissions from the EcoEléctrica facility. Committee's Petition at 1-3. To support that contention, the Committee specifically asserts that the ambient air quality data examined by the Region did not satisfy certain standards of data quality, data currentness,[9] and monitor location that are described in the May 1987 EPA publication titled *Ambient Monitoring Guidelines for*

[8] Responsiveness Summary at 9.

[9] In its response to the Committee's petition, Region II argues that during the public comment period and public hearing for this permit, neither the Committee nor any other commenter raised any challenge to the existing air quality data on grounds specifically related to *when* the

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Prevention of Significant Deterioration (PSD). The Committee concludes that by referring to existing air quality data of such limited value, the Region committed an error that invalidates the Region's decision exempting EcoEléctrica from the requirement to conduct preconstruction ambient air quality monitoring.

The Committee's argument reflects an apparent misunderstanding of the regulatory provision underlying the Region's exemption decision. As noted above, that regulatory provision, 40 C.F.R. § 52.21(i)(8), describes two alternative grounds for exempting a proposed source from the preconstruction ambient air quality monitoring requirements of section 52.21(m): An exemption may be granted based on the source's own projected *de minimis* air quality impacts (section 52.21(i)(8)(i)) or, in the alternative, an exemption may be granted on the basis of existing *de minimis* pollutant concentrations in the area of the proposed source (section 52.21(i)(8)(ii)) without regard to the source's own projected impacts.[10] In this case, EcoEléctrica was determined to have qualified for the exemption based on EcoEléctrica's own projected air quality impacts — which the Region found to be below the monitoring *de minimis* level for each pollutant at issue — and not based on estimates of currently existing ambient concentra-

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data were originally collected. Response to Committee's Petition at 5. The Region argues that, for that reason, the Committee lacks "standing" to raise such an objection on appeal. *Id*. (citing *In re Patowmack Power Partners, L.P.*, PSD Appeal No. 93-13, at 3 n.2 (EAB, Feb. 24, 1994) (unpublished Order Denying Review)).

Strictly speaking, the problem identified by the Region is not one of standing. The Committee has standing to seek review of this permit decision by virtue of its acknowledged participation in the public hearing on the permit. *See* 40 C.F.R. § 124.19(a); *In re Envotech, L.P.*, 6 E.A.D. 260, 266 (EAB 1996) (petitioner has standing to seek review "if the petitioner filed timely comments on the draft permit or participated in the public hearing on the draft permit"). Instead, it appears that the essence of the Region's concern is that the Committee should not be permitted to raise issues, like the data-currentness issue, that were reasonably ascertainable during the public comment period but were not raised during that period. In other words, the argument is that this particular issue was not preserved for review in the manner required by 40 C.F.R. §§ 124.13 and 124.19(a). However, because the issue of data currentness is so closely related to other challenges to the existing air quality data that were properly preserved for review (by commenters other than the Committee) and that the Region has had an opportunity to address, we decline to deny review based on the Committee's alleged failure to preserve a specific data-currentness objection. *See Puerto Rico Electric Power Authority*, 6 E.A.D. at 257 n.5.

[10] These alternative grounds for an exemption from preconstruction monitoring are also described in the May 1987 *Guidelines*, as follows: "[N]o preconstruction monitoring data will generally be required if the ambient air quality before construction is less than the significant monitoring concentrations. * * * Cases where the projected impact of the source or modification is less than the significant monitoring concentrations would also generally be exempt from [the requirement to compile] preconstruction monitoring data, consistent with the *de minimis* concept." *Ambient Monitoring Guidelines for PSD* at 4.

tions of the relevant pollutants in the affected area. *See* Responsiveness Summary at 3 ("EcoElectrica was exempt from installing ambient monitors since the *modeled air impacts* were below the monitoring de minimis levels defined in 40 CFR 52.21.") (emphasis added); *id*. at 10 ("EcoElectrica was not required to install monitoring data [sic] since *their impacts* are below the monitoring de minimis levels.") (emphasis added).

Thus, nothing in the Committee's challenge to the available air quality data for the Guayanilla-Peñuelas region affects the validity of the exemption granted to EcoElectríca. Region II was not required to examine *any* existing air quality data before granting the exemption, given that EcoEléctrica's own projected *de minimis* air quality impacts, without more, provided sufficient grounds for the exemption under section 52.21(i)(8)(i). We therefore conclude that the Region did not abuse its discretion by exempting EcoEléctrica from the preconstruction ambient air quality monitoring requirements set forth in 40 C.F.R. § 52.21(m).

b. *Failure to Require Multi-Source Modeling*

In an argument closely related to the one we have just addressed, the Committee faults Region II for failing to demand from EcoEléctrica "an analysis of the combined impacts from the existing facilities" in the vicinity of the proposed cogeneration plant. Committee's Petition at 4. The Committee suggests that Region II "exempted" EcoEléctrica from an otherwise applicable regulatory requirement to perform such multi-source modeling, and the Committee challenges that "exemption" decision as having been based on unreliable and unrepresentative air quality data.

The Committee, however, seems to have mischaracterized the Region's decision not to require multi-source modeling in this case. The Committee identifies no regulatory provision stating that PSD permit applicants are generally required to perform multi-source modeling unless declared to be "exempt" from doing so, and we have located no such provision in our own review of the PSD regulations. It appears that the regulations do not expressly require all applicants to perform multi-source modeling but do require applicants, in more general terms, to demonstrate that the proposed source will not cause or contribute to a violation of any NAAQS or any PSD increment. 40 C.F.R. § 52.21(k). Clearly, however, when acting on a PSD permit application EPA may, in its discretion, insist that the applicant perform multi-source modeling as part of its demonstration of PSD compliance. *See* Draft Manual at C.24-C.25; 40 C.F.R. § 52.21(n)(2) ("*Upon request of the*

Administrator, the owner or operator shall also provide information on * * * [t]he air quality impacts * * * of any or all general commercial, residential, industrial, and other growth which has occurred since August 7, 1977, in the area the source or modification would affect.") (emphasis added). Therefore, the question before the Region was not whether to "exempt" EcoEléctrica from an otherwise applicable regulatory requirement to perform multi-source modeling; the question, instead, was simply how much information to demand about existing sources of air pollution as part of EcoEléctrica's demonstration of PSD compliance.

With the issue properly framed, it becomes readily apparent that the Region's decision not to require multi-source modeling does not represent an abuse of discretion. In making its decision concerning the scope of the analysis that EcoEléctrica would be required to perform, the Region followed an approach outlined in the New Source Review Workshop Manual. The Draft Manual indicates that an applicant will generally be required to perform a *full impact analysis* — that is, an analysis "involving the estimation of background pollutant concentrations resulting from existing sources and growth associated with the proposed source" — only if the applicant's own modeled impacts (as shown by the applicant's *preliminary analysis*) exceed a specified level of significance. Draft Manual at C.24-C.25.[11] If the preliminary analysis shows that impacts from the applicant's own facility are expected to be insignificant, then a full impact analysis will generally not be required. *Id*.[12] It is undisputed that the modeled impacts from the EcoEléctrica facility, for all relevant pollutants, were below the "significant ambient impact levels" set forth in the Draft Manual. *Id*. at C.28 (Table C-4).[13] The Region therefore did not clearly err by failing to require the performance of a full impact analysis including multi-source modeling.

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[11] As noted in footnote 5, *supra*, these significance levels (referred to in the New Source Review Workshop Manual as "significant ambient impact levels") are distinct from the "significant monitoring levels" used in deciding whether to exempt a permit applicant from ambient monitoring requirements.

[12] "The EPA does not require a full impact analysis for a particular pollutant when emissions of that pollutant from a proposed source or modification would not increase ambient concentrations by more than prescribed significant ambient impact levels * * * ." Draft Manual at C.24.

[13] In $\mu g/m^3$, the facility's modeled impacts and the corresponding "significant ambient impact levels" listed in the Draft Manual are as follows: For NO_2, 0.71 (annual average) with a

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c. *Environmental Justice Analysis*

Near the conclusion of its challenge to the adequacy of EcoEléctrica's air quality impact analysis, the Committee states: "The exemption of this industry from additional modeling is an example of environmental injustice." Committee's Petition at 4. It would appear that this may be intended as a reference to Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations), issued February 11, 1994. But because the Committee's reference to environmental justice is entirely unexplained, we do not know the specific basis for the Committee's contention that additional modeling — or, perhaps more generally, additional information-gathering in the context of the permit applicant's air quality impact analysis for this proposed source — should have been required for reasons of environmental justice.[14] We have, however, examined the Region's application of Executive Order 12898 in this case, and we are satisfied that the Executive Order was not violated in any respect.

The Executive Order directs each Federal agency to incorporate environmental justice as part of the agency's mission "by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." Executive Order § 1-101.[15] Thus, in response to a commenter's observation that "Guayanilla and Peñuelas are poor towns," the Region explained that it had performed an analysis specifically designed to

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significant impact level of 1; for SO_2, 0.40 (annual average), 4.33 (24-hour average), and 20.32 (3-hour average) with significant impact levels of 1, 5, and 25 for those averaging times; for PM_{10}, 0.83 (annual average) and 4.94 (24- hour average) with significant impact levels of 1 and 5 for those averaging times; and for CO, 187 (8-hour average) and 131 (1-hour average) with significant impact levels of 500 and 2000 for those averaging times. *See* Responsiveness Summary at 15.

[14] We recognize that Mr. Efraín Emmanuelli, who signed the Committee's petition for review and appeared on the Committee's behalf at the public hearing, is not an attorney (*see* Public Hearing Transcript at 29), and we therefore take a broad view of the reference to environmental justice that appears in the Committee's petition. *See In re Beckman Production Services*, 5 E.A.D. 10, 19 (EAB 1994) ("The Board generally tries to construe petitions filed by persons unrepresented by counsel in a light most favorable to the petitioners.").

[15] Although EPA has not issued formal rules or detailed written guidance on environmental justice with respect to PSD permitting, *see* Response to Committee's Petition at 19, the absence of such guidance does not prevent the Agency from addressing environmental justice issues. *See In re Chemical Waste Management of Indiana*, 6 E.A.D. 66, 78 (EAB 1995); *In re Envotech, L.P.*, 6 E.A.D. 260, 283 n.27 (EAB 1996).

identify any disproportionate impact of the EcoEléctrica PSD permitting decision upon a low-income community.[16] The Region explained that in the course of that analysis it had assembled per capita income data derived from the 1990 Census, and source location data derived from the 1990 Toxics Release Inventory and from the Region's own Permit Compliance System database.

> These data were subsequently geographically plotted for the Ponce, Guayanilla and Penuelas Municipalities and for the Commonwealth of Puerto Rico as a whole. The location of the proposed facility, maximum emission impact data and monitored meteorological data were then plotted on maps to determine: (1) if the proposed facility was located in a lower income area; and (2) if the maximum emission impacts occurred in areas that were either lower than the Island's or the Guayanilla/Peñuelas's per capita income average.

Responsiveness Summary at 4.

Based on that analysis, the Region determined that the location of the proposed facility was characterized by a median household income lower than the Commonwealth average but higher than the median household income elsewhere in Peñuelas or in nearby Guyanilla and Ponce. *Id*. Likewise, the Region determined that the maximum emission impacts from the proposed facility would occur primarily in areas of higher median household income than the surrounding areas. *Id*. at 4-5. The Region emphasized, moreover, that "the modeled maximum emission impacts from this project are insignificant and well below NAAQS, and [the] project therefore should have insignificant impacts on the surrounding communities." *Id*. at 5; *see also supra* note 6 (comparing modeled air impacts of the EcoEléctrica facility with the NAAQS). For those reasons, the Region concluded that "the proposed EcoElectrica facility does not have any disproportionately high impact to lower income communities." Responsiveness Summary at 5.

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[16] The Region also points out that notice of the preliminary determination on this permit, of the opportunity to comment, and of the public hearing to be held were all published in a Spanish-language newspaper as well as in English, and that the public hearing itself was conducted primarily in Spanish. Response to Committee's Petition at 17. These are among the kinds of actions specifically encouraged by the environmental justice Executive Order, which states: "Each Federal agency may, whenever practicable and appropriate, translate crucial public documents, notices, and hearings relating to human health and the environment for limited English speaking populations." Executive Order § 5-5.

The Committee does not take issue with the procedures employed by the Region in its environmental justice analysis, nor does the Committee express disagreement with the results of that analysis. It makes no specific showing, for instance, that (contrary to the Region's conclusion) the facility would have a disproportionately high and adverse human health or environmental impact on a low-income population, nor does it even explain how or why an examination of additional data would be expected to reveal such an impact.[17] The Committee therefore has made no showing of clear error in connection with the Region's analysis of any environmental justice issues associated with this permit. *See Puerto Rico Electric Power Authority*, 6 E.A.D. at 257. Accordingly, we decline to review the Region's permit decision on grounds of environmental justice.

2. *Use of Distillate Oil*

The Committee argues that the PSD permit does not impose sufficient restrictions to prevent EcoEléctrica from permanently using oil as the primary fuel for this facility — which, according to the Committee, is precisely what EcoEléctrica secretly intends to do. Committee's Petition at 4-5.[18] The permit specifically states, however,

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[17] In connection with other types of permit proceedings, this Board has previously encouraged EPA Regional offices to examine any "superficially plausible" claim that a minority or low-income population may be disproportionately affected by a particular facility. *See Chemical Waste Management*, 6 E.A.D. at 75 (RCRA permit proceeding); *Envotech*, 6 E.A.D. at 280 (injection well permit proceeding under the Safe Drinking Water Act). In this case, the Committee suggests no plausible basis for concluding that further examination of air quality data, beyond the examination that the Region has already conducted, would disclose the kind of disproportionate impact that the environmental justice Executive Order seeks to address.

[18] Much like it did in connection with the Committee's data-currentness argument, *see supra* note 9, Region II suggests that no issue relating to this facility's combustion of distillate oil was preserved for review in the manner required by 40 C.F.R. §§ 124.13 and 124.19(a). The Region acknowledges that before issuance of a final permit decision, the Committee (or a commenter working in collaboration with the Committee) raised a concern about this facility's possible combustion of distillate oil "on a prolonged basis" (*see* Responsiveness Summary at 12), but the Region points out — and the Committee does not dispute — that the issue was raised only after the close of the public comment period.

The Region's argument against entertaining this objection on appeal is certainly not without merit. *See, e.g., Beckman Production Services*, 5 E.A.D. at 17 (the obligation to file comments in a timely manner should be "given its full meaning"). Nonetheless, because the Committee's objection is so clearly refuted by the permit conditions governing this facility's use of distillate oil and because, in addition, the Committee has failed to suggest how the Region's response to the original (untimely) comment on this issue was erroneous, it is unnecessary for us to decide whether review should also be denied based on the Committee's failure to comment in a timely manner. We therefore do not address the effect of the Committee's untimely submission of its comments.

that each combustion turbine "shall be primarily firing natural gas or LPG [propane]," and that "No. 2 fuel oil (distillate oil) will only be fired as a backup fuel." Permit § VI.1. The permit further provides that each turbine may consume distillate oil at a rate no higher than 12,500 gallons per hour, and that the combined consumption of distillate oil by both turbines may not exceed 54 million gallons per year. At the other end of the combustion-rate spectrum, the permit provides in substance that neither turbine may (except during startup, shutdown, or fuel switching operations) be operated at less than 50% of the maximum allowable rate.[19] Given these restrictions, if EcoEléctrica were to fuel the plant exclusively with distillate oil, it would be limited to roughly six hours of operation per day (over a 365-day period) with the plant firing oil at the maximum allowable rate, or to roughly twelve hours of operation per day (over a 365-day period) with the plant firing oil at the minimum allowable rate. Response to Committee's Petition at 21-22. It is difficult to see why, in the Committee's view, EcoEléctrica might routinely choose to curtail the operation of its plant to the extent necessary to burn distillate oil in compliance with those restrictions.[20] In any event the Region, in reaching its permit decision, concluded that firing distillate oil to the fullest extent allowed by those restrictions would not produce any impermissible air quality impacts. The Committee has not challenged that conclusion, nor has it cited any basis for its assertion that EcoEléctrica does not intend primarily to fire natural gas or propane. Review of this issue is, accordingly, denied.

3. *Violations by Other Permittees*

Finally, the Committee argues that other permittees have violated EPA-issued permits, and that EPA should refrain from issuing new permits such as this one so long as "EPA is unable to carry out enforcement." Committee's Petition at 5. This Board's role, however, is to examine specific permit conditions that are claimed to be erroneous, not to address generalized concerns broadly directed toward the enforcement capabilities of this or any other regulatory agency. *See*,

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[19] To be more precise, it appears that minimum allowable fuel-consumption rates for each fuel will be set during performance testing, and will be determined with reference to VOC emissions measured at that time. In no event, however (other than during startup, shutdown, or fuel switching), would this permit allow the EcoEléctrica facility's turbines to combust any fuel at a rate less than 50% of their design capacity for that fuel. Permit § VI.4.

[20] Region II points out that a worst-case operating scenario — involving combustion of distillate oil twelve hours a day, 365 days a year — is unlikely to occur, "since it is impractical and economically disadvantageous to run a power plant 12 hours on, 12 hours off." Response to Committee's Petition at 22 n.13.

e.g., In re Brine Disposal Well, Montmorency County, Michigan, 4 E.A.D. 736, 746 (EAB 1993) (review denied where petitioner merely alleged a generalized concern over EPA's ability to enforce compliance with regulatory requirements). "The Board has the authority to examine specific provisions of a permit that might tend to make subsequent enforcement of the permit more or less effective," *In re Federated Oil & Gas*, 6 E.A.D. 722, 730 (EAB 1997), but no such provisions have been challenged in this case. The Committee's request for review based on this objection must, accordingly, be denied.[21]

D. *Mr. Arana's Petition*

1. *Need for the Facility*

Petitioner Hector Arana, in Appeal No. 96-8, argues that Region II should have denied EcoEléctrica's PSD permit application because there is no real need for the power that the proposed facility would generate. He argues, specifically, that if residential customers of the local electric utility were to replace eight million of their incandescent light bulbs with fluorescent lighting, the utility would find itself with surplus power equal to the entire generating capacity of the EcoEléctrica cogeneration plant. More generally, he advocates "the implementation of Demand Side Management and energy conservation" as preferred methods for alleviating any existing or anticipated shortage of power-generating capacity in Puerto Rico, and he notes that EPA itself advocates such conservation measures in the context of its voluntary "Green Lights" program.[22] Petition at 3. Mr. Arana does not argue that this permit should include additional or more-stringent

[21] The Committee has also attempted to argue — though there is some dispute as to whether the attempt was timely — that EPA must determine, before acting on this PSD permit application, the extent to which the EcoEléctrica facility would be subject to future NAAQS revisions such as those proposed by EPA on December 13, 1996. *See* 61 Fed. Reg. 65,637 (1996) (proposing for public comment new air quality standards for ozone and for particulate matter less than 2.5 microns in size). Whether or not it was raised in a timely fashion, the Committee's argument is plainly wrong. As the Region explains in its response to the Committee's petition, the revisions to which the Committee refers are still only proposals, not final rules. Response to Committee's Petition at 23. EPA's publication of those proposals for public comment provides no basis for review of the permit decision currently before us.

[22] As described by the Region in response to Mr. Arana's petition, the Green Lights program is an "important EPA voluntary initiative to encourage businesses, public schools, and government agencies to reduce the amount of electricity used" by installing energy-efficient lighting systems. "EPA does not mandate implementation of this voluntary program nor is the program designed for residential implementation. The Green Lights program is implemented through education and outreach, and has not been imposed on entities. EPA asks willing

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emissions limitations for any particular pollutants. He argues that no permit should be issued at all, thus precluding the building of the facility.[23]

In response, Region II and EPA's Office of General Counsel (hereinafter jointly referred to as the "Region") strongly endorse the general proposition that "[e]nergy conservation is central to meaningful air pollution prevention initiatives." Response to Arana's Petition at 17. The Region also asserts that energy conservation falls comfortably within the range of considerations that a PSD permitting agency might reasonably choose to examine in the context of, for example, determining how much (if any) of a PSD increment should be devoted to a particular proposed facility. *Id*. at 9-10 (citing S. Rep. No. 127, 95th Cong., 1st Sess. 31 (1977), *reprinted in* Senate Comm. on Environment and Public Works, 95th Cong., 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1977*, vol. 3 at 1405 (1978)). The Region further notes that one of the express statutory prerequisites for construction of a major emitting facility subject to PSD review is that interested persons must be provided an opportunity to submit comments concerning "alternatives" to the facility and concerning "other appropriate considerations." *See* Clean Air Act § 165(a)(2); *see also* Clean Air Act § 160(5) (purposes of the statutory PSD provisions include "assur[ing] that any decision to permit increased air pollution in [an attainment area] is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process").

We agree that energy conservation can produce significant environmental benefits, and we recognize the importance of promoting conservation through initiatives such as the voluntary Green Lights program. However, the very nature of the Green Lights program is

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participants to sign a Memorandum of Understanding (MOU) with EPA. Participants agree to survey 100 percent of their facilities, and within five years of signing the MOU, to upgrade 90 percent of the square footage that can be upgraded profitably without compromising lighting quality." Response to Arana's Petition at 19.

[23] Although Mr. Arana's petition includes a very general reference to "BACT," it offers no explanation of how Mr. Arana's principal argument — that the EcoEléctrica facility is not really necessary — is meant to relate to the specific concept of "Best Available Control Technology" as defined and employed in Clean Air Act §§ 165(a)(4) & 169(3) and in 40 C.F.R. §§ 52.21(j)(2) & 52.21(b)(12). In the absence of any such explanation by Mr. Arana, we will not undertake an abstract reconsideration of the BACT determinations that are reflected in the Region's permit decision. *Cf. In re Ross Incineration Services*, 5 E.A.D. 813, 819 (EAB 1995) (where petitioner fails to explain an objection presented to the Board as grounds for review under 40 C.F.R. § 124.19(a), the Board "will not speculate as to what the explanation might be").

such that EPA does not mandate the program's implementation. Moreover, neither the Clean Air Act nor the PSD regulations specifically require a PSD permitting agency to demand that conservation alternatives to the building of a proposed power-generating facility be fully implemented before the permitting agency may authorize construction of such a facility. Mr. Arana has cited no authority suggesting that this is a requirement, nor has he shown that the Region committed clear error in exercising its discretion not to deny the permit.

In determining whether to review a final permit decision, the Board's role is not to substitute its own judgment for that of the permit issuer; rather, it is to ensure that the permit issuer's decision has been adequately explained and does not represent clear error. *See* 40 C.F.R. § 124.19(a); 45 Fed. Reg. 33,412 (1980). We find that the Region's decision not to deny this particular permit, notwithstanding Mr. Arana's allegations, has been more than adequately explained. In response to Mr. Arana's comments on the draft permit, the Region described at some length its reasons for not engaging in an energy planning analysis of the kind urged upon it by Mr. Arana. Specifically, the Region explained that unlike many PSD situations in which a single State government is responsible both for the PSD permitting process and for any related energy planning decisions, in this case those responsibilities are divided between two different governments: Responsibility for the PSD permitting process lies with an agency of the Federal government, whereas the responsibility to plan for the Commonwealth of Puerto Rico's current and future energy needs lies principally with the Commonwealth's own government. Given that division of responsibility, the Region concluded that Mr. Arana's arguments concerning the need for this proposed facility would more appropriately be addressed by the Commonwealth of Puerto Rico itself, in the context of the Commonwealth's own deliberations regarding the facility:

> In [response to Mr. Arana's comments], the Region explained that it was not well-positioned to engage in regional or Commonwealth-wide energy planning in Puerto Rico during its review of the EcoElectrica PSD permit. This is distinguishable from the circumstances governing most PSD permits, where the State is the PSD permit issuer and the State can more readily coordinate its energy planning with permitting. By contrast, Region II was not well-situated in the context of the EcoElectrica PSD permit review to determine what Puerto Rico's short- and long-term energy needs are, to decide the importance of diversifying energy supply

> through the use of natural gas, or to make a permit decision based on the conclusion that demand side management and other energy conservation measures in Puerto Rico render the proposed facility unnecessary.

Response to Arana's Petition at 18-19 (citing Responsiveness Summary at 2).

Mr. Arana does not express any specific disagreement with the premise that the energy planning authorities of the government of Puerto Rico are deserving of deference under these circumstances. He disagrees, instead, with the decisions that those government authorities have reached.[24] But it would not be appropriate for the Board, in this proceeding, to undertake a detailed reexamination of the merits of the Commonwealth's energy planning decisions. As explained above, the Board's role in this proceeding is to determine whether the Region committed clear error. We conclude that, in the circumstances of this case, far from committing clear error, the Region acted reasonably and appropriately by deferring questions concerning the need for the facility to the Puerto Rican government. *See In re Kentucky Utilities Co.*, PSD Appeal No. 82-5, at 2, 1982 PSD LEXIS 32 at 2-3 (Adm'r, Dec. 21, 1982) ("the need for the proposed power plant will be more appropriately addressed by the state agency charged with making that determination").[25] Review of Mr. Arana's contentions regarding the need for the proposed EcoEléctrica facility is therefore denied.

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[24] In particular, Mr. Arana expressly criticizes the Commonwealth's Energy Affairs Administration (Petition at 2-4), for its favorable comments on the EcoEléctrica project during the PSD permitting process and for its alleged inattention to promoting energy conservation, and impliedly criticizes the Puerto Rico Planning Board (Petition at 4-5 and Attachment 7 — Mr. Arana's complaint seeking judicial review of the Planning Board's siting decision), for its role in approving the project (*see infra* section II.D.3) and in preparing the project's Environmental Impact Statement (*see infra* section II.D.2).

[25] In *In re SEI Birchwood, Inc.*, 5 E.A.D. 25 (EAB 1994), we stated that a challenge to whether the power from a proposed facility was needed was "outside the scope of the Board's jurisdiction and does not, therefore, warrant review." *Id.* at 27 n.1 (citing *In re Kentucky Utilities Co.*, PSD Appeal No. 82-5, at 2 (Adm'r, Dec. 21, 1982)); *see also id.* at 28. By that statement, the Board did not mean to address the issue of whether, and under what circumstances, the Board could consider a challenge based on alternative means of meeting energy needs. Rather, as in *Kentucky Utilities* and as in this case, the Board merely meant to suggest that review under 40 C.F.R. § 124.19(a) was not warranted because the need for power from a proposed facility would "more appropriately" be addressed by the responsible State agency.

2. *The Environmental Impact Statement*

Mr. Arana's petition challenges certain statements regarding Puerto Rico's energy needs that appear in the Environmental Impact Statement jointly prepared for this project, pursuant to the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (NEPA), by the Federal Energy Regulatory Commission and the Puerto Rico Planning Board. He asserts that "[t]he decisions of EPA can not be separated from verification of the correctness of the statements presented in [the] Environmental Impact Statement ('EIS')." Petition at 1. The Region points out, however, that Mr. Arana made no reference to the contents of the EIS in his comments on the draft PSD permit, although any alleged deficiencies associated with the EIS would have been "reasonably ascertainable" during the comment period applicable to the PSD permit.[26] Having examined Mr. Arana's comments, we conclude that the Region is correct. Mr. Arana therefore failed to preserve any objection concerning the contents of the EIS in the manner required by 40 C.F.R. §§ 124.13 and 124.19(a), and review of any such objection must be summarily denied.[27]

3. *Other Pending Litigation*

Mr. Arana, finally, requests that we hold the PSD permit decision for this facility in abeyance pending final resolution of certain litigation that he has commenced in the Commonwealth of Puerto Rico's Circuit Court of Appeals. In that litigation, Mr. Arana seeks judicial review of the Puerto Rico Planning Board's May 29, 1996 approval of the siting of the EcoEléctrica facility. Mr. Arana's action, alleging that the challenged administrative decision was in error because the facility is unnecessary, has already been dismissed by the Court of Appeals by order dated November 6, 1996, but Mr. Arana, in his petition to this Board, states that "the case will * * * be elevated to the Puerto Rico Supreme Court" and will ultimately be brought before the

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[26] The EIS was issued during April 1996. *See* Attachment 5 to Mr. Arana's Petition for Review. The public comment period applicable to Region II's PSD permit decision did not begin until July 20, 1996, and did not end until August 29, 1996 (when the Region held its public hearing).

[27] We note, moreover, that the PSD permitting process itself does not require the preparation of an EIS, because "[n]o action taken under the Clean Air Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA]." *See* Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. § 793(c)(1). Thus, a PSD permit decision would not ordinarily be rendered clearly erroneous merely because inaccuracies are alleged to appear in an EIS prepared for the same proposed facility.

Federal courts as well. Petition at 5. In addition, Mr. Arana has verbally advised EPA's Office of General Counsel "that legal action is still pending against the Puerto Rico Electric Power Authority for a matter related to the EcoEléctrica project and that [he] is pursuing administrative relief with FERC." Response to Arana's Petition at 25-26.

The matters referred to by Mr. Arana do not, individually or collectively, constitute grounds for holding this PSD permitting process in abeyance. *See In re West Suburban Recycling & Energy Center*, 6 E.A.D. 692, 705-06 (EAB 1996) (declining to allow PSD permitting process to be held in abeyance by State agency, notwithstanding the pendency of other administrative litigation challenging the same facility on State-law grounds). EPA's issuance of a final PSD permit is independent of, and should not affect the resolution of, any non-PSD issues that are currently awaiting determination and that may have some relevance to the construction or operation of the proposed EcoEléctrica facility. As Region II explains in its brief, "a decision to grant a PSD permit under the Clean Air Act does not mean that a proposed source has satisfied applicable local, state, or federal requirements" other than the PSD requirements themselves. Response to Arana's Petition at 26. We therefore decline to stay the issuance of the final PSD permit in any manner.

III. *CONCLUSION*

For the reasons set forth herein, the petitions for review are denied in all respects.

So ordered.