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

In re:	Energy Answers Arecibo, LLC Arecibo Puerto Rico Renewable Energy Project	PSD Appeal No. 13-05

REPLY TO RESPONSES OF EPA REGION 2 AND ENERGY ANSWERS ARECIBO, LLC

by
The Coalition of Organizations Against Incinerators
(La Coalicion de Organizaciones Anti-Incineracion)
(Petitioners)

August 26, 2013

BY: s/ Christopher D. Ahlers
Christopher D. Ahlers
Environmental and Natural Resources Law Clinic
Vermont Law School
P.O. Box 96, 164 Chelsea Street
South Royalton, VT 05068
Tel: (802) 831-1624
Fax: (802) 831-1630
chrisahlers@vermontlaw.edu
Counsel for Petitioners (the Coalition)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Public Laws

Other Authorities

ARGUMENT

The Coalition of Organizations Against Incinerators (La Coalicion de Organizaciones Anti-Incineracion) ("the Coalition") submits this reply to the responses of EPA Region 2 and Energy Answers Arecibo, LLC (collectively, "Respondents"), which were served by mail on or after August 12, 2013. Respondents attempt to justify the construction of a municipal waste incinerator in a lead nonattainment area, where it would introduce greater lead emissions than are emitted by the industrial facility that has caused the lead nonattainment problem. Their arguments are inconsistent with the plain language of the statute and the structure of the Clean Air Act. They assert that the Facility's lead emissions are not subject to PSD review, at the same time they assert that the Facility's lead emissions are not subject to nonattainment new source review, despite the fact that it is a major stationary source under the plain language of the Clean Air Act. To the extent those arguments are based on EPA policy, the policy is unlawful because it is inconsistent with the statute. To the extent those arguments are based on a regulation, the regulation is unlawful because it is inconsistent with the statute.

1. Preservation of Issues/Consideration of Evidence Not Specifically in the Record.

EPA alleges that the Board should not consider certain documents submitted by the Coalition, under the premise that they were not in the administrative record. *See* EPA Region 2 Response at 2. It cites authority for the proposition that the Board will not consider evidence outside the administrative record. *See id.*, citing *In re Inter-Power of New York, Inc*., 5 E.A.D. 130, 147 n.28 (1994). But that rule is subject to the exception that such evidence may be considered in extraordinary circumstances. *See id.* Given the implication of EPA's twofold effort to avoid a meaningful review of lead emissions in this lead nonattainment area, this case presents extraordinary circumstances compelling the consideration of all documents.

EPA erroneously cites *In re: Sierra Pacific Industries*, PSD Appeal Nos. 13-01, 13-02, 13-03, 13-04 (EAB, July 18, 2013) in support of an argument that the Coalition "fails to explain why the Region's responses to their comments were inadequate." *See* EPA Region 2 Response at 3.[1] In reality, the Petition for Review contains extensive quotations from EPA's responses, with a detailed explanation why EPA's reasoning was incorrect. *See* Coalition's Petition for Review at 11, 14, 17-18, 25, 32-33. EPA erroneously alleges that the Coalition "provides no legal basis to require that EPA regulate nonattainment pollutants or address nonattainment applicability in a PSD permit." *See* EPA Region 2 Response at 4. In reality, the Coalition cited case law in favor of its position on this point. *See* Coalition's Petition for Review at 22.

EPA erroneously suggests that the Board should disregard the Coalition's numerical comparison of the Facility's lead emissions with the battery recycling facility's lead emissions, under the premise that data on emissions rates were not provided during the comment period. *See* EPA Region 2 Response at 14. But there were numerous comments expressing concern about the battery recycling facility's lead emissions during the public comment period. *See* Response to Comments, pages 104-105, 107-108. *See also* Coalition's Petition for Review at 5-9. These comments included objections that the lead air modeling was completely flawed and inadequate because it did not consider existing lead contamination problems, including lead from the battery recycling facility. *See* Transcript of Hearing 5, August 26, 2012, 6 pm – 10 pm, page 21, Comment #20 of Fernando Marquez through Aleyda Centeno, attached as Exhibit 1 to Coalition's Petition for Review. These comments also included comments on whether information on air emissions in the Toxics Release Inventory was considered by EPA, given the concern for cumulative effects of air emissions. *See* Response to Comments, pages 108-109.

[1] That decision was decided just two days before the filing of the Coalition's Petition for Review.

Therefore, the Board should consider the TRI Reports submitted by the Coalition. The comments were sufficient to put EPA and Energy Answers on notice of an issue regarding the relationship between the two facilities. Therefore, the Board should accept the Coalition's evidence and arguments regarding lead issues.

The Board should reject EPA's suggestion that the Coalition has not complied with the preservation requirement, for environmental justice issues. *See* EPA Region 2 Response at 16. There is no merit to EPA's suggestion that the Coalition has not shown that the environmental justice issue was raised during the public comment period, or that the petition contains no citations to the comments. *See* Coalition's Petition for Review at 5-9. *See also* Response to Comments, pages 78, 104-108, 124. The comments were sufficient to put EPA and Energy Answers on notice of an issue regarding a failure to address environmental justice considerations.

In response to the Coalition's argument that EPA did not provide a meaningful analysis of the balance of inputs and outputs, EPA erroneously asserts that the Coalition "raises this argument for the first time on appeal." *See* EPA Region 2 Response at 40. In reality, the material balance issue was raised in comments during the public comment period. *See* Coalition's Petition for Review at 8. *See also* Response to Comments, page 49. The comments were sufficient to put EPA and Energy Answers on notice of an issue regarding the material balance between inputs and outputs.

Energy Answers erroneously argues that the Coalition may not assert an argument against the Facility's air emissions modeling for lead, under the premise that this was not preserved for review. *See* Energy Answers Response at 10-11. Again, extensive comments on lead emissions were made during the public comment period. *See* Coalition's Petition for Review at 5-9. The

very fact that the Coalition is challenging statements regarding the amount of lead emissions made by EPA in its Response to Comments demonstrates that issues regarding the amount of lead emissions were raised during the public comment period. *See* Coalition's Petition for Review at 17-18, citing Response to Comments, page 108. The comments were sufficient to put EPA and Energy Answers on notice of an issue that the lead modeling was not sufficient.

2. No Statutory Authority for EPA Regulation or Policy Interpretation.

In an effort to find statutory authority for an unjust result, EPA quotes language from a preamble to an EPA final rule in 1980, which also mischaracterizes the requirements of the statute. *See* EPA Region 2 Response at 10, citing 45 Fed. Reg. 52676, 52711 (August 7, 1980) ("The basic rationale for these restrictions is that section 110(a)(2)(I), which contains the construction moratorium, restricts the construction moratorium to pollutants for which the source is major and for which the area is designated nonattainment."). That quotation is an inaccurate summary of the text of the Clean Air Act Amendments of 1977. The construction moratorium language in former Section 110(a)(2)(I) does not state that a facility is subject to nonattainment new source review only if it is a major source for a particular nonattainment pollutant. The actual text of the relevant amendment reads as follows:

> (b) Section 110(a)(2) of the Clean Air Act is amended by striking out "and" at the end of subparagraph (G), striking out the period at the end of subparagraph (H), and by adding the following new subparagraphs at the end thereof:
>
> > "(I) it provides that after June 30, 1979, **no major stationary source shall be constructed or modified in any nonattainment area** (as defined in section 171(2)) to which such plan applies, **if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area**, unless, as of the time of application for a permit for such construction or

> modification, such plan meets the requirements of part D (relating to non-attainment areas) ….

Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, 694 (August 7, 1977) (emphasis added). Contrary to EPA's suggestion, the language in that amendment did not create a different definition of "major stationary source" for a nonattainment area. Rather, it merely made it unlawful to construct or modify a major stationary source in a nonattainment area, if the emissions would cause or contribute to concentrations of a nonattainment pollutant. *See id.* Therefore, EPA's statement at 45 Fed. Reg. 52711, cited in EPA's Response, merely reflected its own unlawful policy which was inconsistent with the statute. EPA cannot rely on its own unlawful interpretation in a 1980 preamble, to salvage its unlawful policy.

Although EPA also attempted to justify its interpretation under Section 173 in the 1980 preamble, the actual text of Section 173 did not support that interpretation. *See* 45 Fed. Reg. 52676, 52711; *see also* Pub. L. No. 95-95, 91 Stat. 685, 748. None of the amendments to Part D (relating to nonattainment areas) supported that interpretation. *See id.* at 685, 746-751.

3. Challenges to Regulations May be Entertained.

EPA cites *In re: Sierra Pacific Industries* for the proposition that the Board will not entertain challenges to regulations in a PSD permit appeal. *See* EPA Response at 11. But in that decision the Board recognized that it will entertain a challenge to a regulation in exceptional circumstances, where an "extremely compelling argument" is made in support of review. *In re: Sierra Pacific Industries,* PSD Appeal Nos. 13-01, 13-02, 13-03, 13-04, slip op. at 30.

The present case presents an extremely compelling argument in favor of review of any regulation cited by EPA as a basis for asserting that the Facility's lead emissions are not subject to nonattainment new source review, at the same time it asserts they are not subject to PSD

review. Through illogical and unreasonable interpretations, EPA and Energy Answers ask the Board to endorse the introduction of a municipal waste combustion facility into a lead nonattainment area, where it would release greater lead emissions than the existing facility causing the lead nonattainment problem. This unjust result should not be allowed.

In the *Sierra Pacific* decision, the Board directed EPA to consider the challenge to the PSD permit based on biogenic CO_2 in light of the decisions EPA makes regarding the Court's ruling in the *Center for Biological Diversity* case, following a remand on other grounds (EPA's failure to provide a public hearing). *In re: Sierra Pacific Industries,* PSD Appeal Nos. 13-01, 13-02, 13-03, 13-04, slip op. at 66-67. The Coalition requests that the Board do the same in this case, when remanding on other issues.

CONCLUSION

The Coalition respectfully submits that the PSD Permit should be remanded to EPA, with appropriate instructions.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

This brief contains a total of 1,755 words, according to the word-processing system.

Respectfully submitted,

The Coalition of Organizations Against Incinerators (La Coalicion de Organizaciones Anti-Incineracion)

Javier Biaggi Caballero
Comité Basura Cero Arecibo
Urb Las Brisas
C-72 Calle 6
Arecibo, PR 00612

Myrna Conty, President

Amigos del Rio Guaynabo, Inc.
Valle Escondido # 9
Guaynabo, Puerto Rico, 00971-8000

Elba Diaz
Calle 9 C 24
Urb. Parques de Torrimar

Bayamon, PR 00959

Angel A. González, MD
Comité de Salud Pública y Ambiental
Colegio de Médicos-Cirujanos de Puerto Rico

Enrique González
Valle Escondido #9
Guaynabo, PR 00971

Osvaldo Rosario Lopéz
Professor of Environmental Chemistry
University of Puerto Rico
Apartado 22079
San Juan, PR 00931

Fernando Márquez
Grupo Arecibo 2015
P.O. Box 140878
Arecibo, PR 00614

Bishop Rafael Moreno Rivas
Methodist Church of Puerto Rico
P.O. Box 23339
San Juan PR 00931

Orlando Negrón, CPA, President
Sierra Club de Puerto Rico
P.O. Box 21552
San Juan, PR 00931-1552

Apolinal Cintrón Pérez
Barrio Santana #626
Sector Cambalache
Arecibo, PR 00612

Iván Federico Elías Rodríguez
Ciudadanos en Defensa del Ambiente (CEDDA)
Apartado 8054
Arecibo, PR 00613

Teresa Sánchez Rodríguez
Madres de Negro de Arecibo
Victor Rojas 1
Calle Amadeus #290
Arecibo, PR 00612

Cristina Rivera Roman
HC-01 Box 11043
Arecibo, PR 00612

Jessica Seiglie
Comité Basura Cero
Calle Solandra #34
Urbanización Villas del Capitàn
Arecibo, PR 00612

Date: August 26, 2013

BY: s/ Christopher D. Ahlers
Christopher D. Ahlers
Environmental and Natural Resources Law Clinic
Vermont Law School
P.O. Box 96, 164 Chelsea Street
South Royalton, VT 05068
Tel: (802) 831-1624
Fax: (802) 831-1630
chrisahlers@vermontlaw.edu
Counsel for Petitioners (the Coalition)

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

In re: Energy Answers Arecibo, LLC Arecibo Puerto Rico Renewable Energy Project	)	PSD Appeal No. 13-05

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Reply to Responses of EPA Region 2 and Energy Answers Arecibo, LLC, on this 26th day of August, 2013, via USPS First-class Mail to the following:

Judith A. Enck, Regional Administrator
U.S. EPA Region 2
290 Broadway
New York, New York 10007

Joseph A. Siegel
Assistant Regional Counsel
U.S. EPA Region 2
290 Broadway
New York, New York 10007

Henry C. Eisenberg
Skadden, Arps, Slate, Meagher & Flom, LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111

Dated at South Royalton, Vermont on August 26, 2013.

BY: s/ Christopher D. Ahlers

Christopher D. Ahlers
Environmental and Natural Resources Law Clinic
Vermont Law School
P.O. Box 96, 164 Chelsea Street
South Royalton, VT 05068
Tel: (802) 831-1624
Fax: (802) 831-1630
chrisahlers@vermontlaw.edu
Counsel for Petitioners (the Coalition)