

**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 Nos. 13-05,
13-06, 13-07, 13-08
and 13-09**

**ENERGY ANSWERS ARECIBO, LLC'S BRIEF IN SUPPORT OF
EPA REGION 2'S MOTION FOR A LIMITED VOLUNTARY REMAND**

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INTRODUCTION

On November 14, 2013, EPA Region 2 ("EPA" or "Region 2") filed a motion requesting that the Environmental Appeals Board ("EAB" or the "Board") grant a limited voluntary remand allowing it to revise the emissions limits for greenhouse gas emissions ("GHG") in the Prevention of Significant Deterioration ("PSD") permit (the "Permit") issued to Energy Answers Arcibo, LLC ("Energy Answers"). EPA's Motion included a copy of a redlined draft of the revised Permit highlighting the proposed changes to the Permit. EPA's Motion requested that it be allowed to exercise its discretion not to reopen the public comment process in connection with the proposed Permit revision. Finally, EPA requested that the Board simultaneously deny review of the other issues raised by the petitioners in their challenges to the Permit.

EPA's request to modify the GHG emissions limits in the Permit is a result of the D.C. Circuit's decision in *Center for Biological Diversity v. EPA*, 732 F.3d 401 (D.C. Cir. 2013), published after Region 2 issued the Permit to Energy Answers. *Center for Biological Diversity* vacated the EPA rule that deferred the regulation of CO₂ emissions from bioenergy and other biogenic sources under the PSD and Title V permit programs (the "Deferral Rule"). As noted in EPA's Motion, the D.C. Circuit has not issued a mandate to implement the judgment in *Center for Biological Diversity* due to the pendency of the appeal in *Utility Air Regulatory Group v. EPA*, Sup. Ct. Nos. 12-1146, *et al.* As a result, the Deferral Rule remains a valid regulation and the Board could deny the petition filed by The Coalition of Organizations Against Incinerators (La Coalicion de Organizaciones Anti-Incineration) ("the Coalition") consistent with applicable law and for the reasons set forth in Energy Answers' Brief in Response to the Petitions for Review ("Brief in Response").

Nonetheless, Energy Answers understands EPA's reluctance to proceed in this manner given the D.C. Circuit's decision in *Center for Biological Diversity*. As set forth in EPA's Motion, a thorough GHG "BACT" (best available control technology) review was undertaken for the Arecibo Renewable Energy Project, which review was done on the basis of *total* GHG emissions, including the project's biogenic CO₂ emissions, although such emissions were deducted for purposes of the emissions limits in the Permit in accordance with the Deferral Rule. The GHG BACT analysis was available for public review and no commenter questioned Region 2's determination that the BACT for GHG emissions was a combination of the combustion of municipal solid waste and high thermal efficiency.

Accordingly, Energy Answers believes that EPA's Motion for a limited remand to include the Arecibo Project's biogenic CO₂ emissions in the Permit's GHG emissions limits is appropriate and reasonable, so long as the limited remand does not pose further delay with respect to the issuance of a truly final Permit. As set forth below, EPA's proposed approach is consistent with EAB precedents providing EPA with discretion to make permit revisions without reopening the public comment process upon the receipt of new information or a change in circumstances that, as in this case, do not raise substantial new questions regarding a permit.

On November 29, 2013, the Coalition filed its response to EPA's Motion for a Limited Voluntary Remand. The Coalition's opposition appears to be premised, not on EPA's proposed revision to add the Arecibo Project's biogenic emissions to the Permit, but to EPA's original GHG BACT determination for the Project. Coalition Response to EPA's Motion for Limited Voluntary Remand at 6 ("Coalition Response") (the EPA's conclusion that BACT for GHG emissions from the Arecibo Project is "'combustion of municipal solid waste and high thermal efficiency' . . . is incorrect."). The Coalition did not raise this objection in the Petition for

Review that it filed on July 22, 2013. The comments identified by the Coalition in its November 29, 2013 filing illustrate that no person objected to Energy Answers' detailed, top-down GHG BACT review or EPA's GHG BACT determination during the public comment period. Accordingly, the Coalition's post-Petition objection to the GHG BACT determination has not been preserved for appeal. *In re City of Palmdale*, PSD Appeal No. 11-07, slip op. at 51 (EAB Sept. 12, 2012) (in order for an issue to be preserved on appeal, it must be raised with "a reasonable degree of specificity and clarity").

ARGUMENT

I. If *Center For Biological Diversity* Had Been Decided Prior to the Issuance of the Permit, EPA Could Have Revised the Permit Without Reopening the Permit for Additional Public Comment

We have not found a Board decision that precisely fits the current situation, in which during the pendency of petitions before the EAB to review a permit, EPA is proposing to revise the permit to address the consequences of a rule that was vacated by a judicial decision after the permit was issued. However, the process that EPA is proposing is comparable to what EPA is authorized to do in responding to information or data that is provided or comes to light during the public comment period. In either case, if the change to a permit is a logical outgrowth of the public comment process, such that parties had a reasonable and fair opportunity to comment on the substantive issue that is reflected by the change to the permit, EPA has discretion to implement the change without reopening the public comment period.

A permitting authority's decision whether to reopen the public comment period will be afforded substantial deference. *In re City of Palmdale*, slip op. at 21 (EAB Sept. 17, 2012). The Board reviews a permitting authority's decision not to reopen the comment period "under an abuse of discretion standard." *Id.* With respect to changes made to a permit as a result of the

public comment process, a permitting authority is not required to reopen the public comment period "as long as the changes are the 'logical outgrowth' of the public comment process." Id.

Factors that may be taken into account by a permitting authority in exercising its discretion whether to reopen a public comment period include "whether permit conditions have changed, whether new information or new permit conditions were developed in response to comments received during prior proceedings for the permit, whether the record adequately explains the agency's reasoning so that a dissatisfied party can develop a permit appeal, and the significance of adding delay to the particular permit proceedings." Id. at 22 (quoting *In re Dominion Energy Brayton Point, L.L.C.*, 13 E.A.D. 407, 416 n. 10 (EAB 2007)).

EPA's regulations provide that a public comment period may be reopened "if any data[,] information or arguments submitted during the public comment period . . . appear to raise substantial new questions concerning a permit." 40 C.F.R. §124.14(b). Conversely, if such information does not raise substantial new questions, as is the case here, it is not an abuse of discretion for the permitting authority to decide not to reopen a permit for additional public comments. *Dominion Energy*, 13 E.A.D. at 416.

If *Center for Biological Diversity* had been decided two months prior to the issuance of the Permit rather than one month after the issuance of the Permit, there is no question that EPA could have revised the GHG emission limits in the draft permit to include the Arecibo Project's biogenic CO₂ emissions without reopening the Permit to additional public comment. The non-biogenic emissions from the Arecibo Project were sufficient to subject the Arecibo Project's GHG emissions to a BACT review. As a result, Energy Answers' permit application included a BACT analysis with respect to the Arecibo Project's GHG emissions. As explained by EPA in its Motion and by Energy Answers in its Brief in Response, the techniques to control or limit

GHG emissions that were evaluated as part of the BACT review apply to both biogenic and non-biogenic CO₂ emissions.¹ This analysis, including data on total GHG emissions from the Arecibo Project, was included in the administrative record that was available for review and public comment. As EPA noted in its Motion, no person commented on EPA's selection of the control techniques that were BACT for the Arecibo Project's GHG emissions, although one commenter argued that biogenic CO₂ emissions should not be excluded from the Permit's GHG emission limits.

The administrative record available to the public clearly explained EPA's basis for its selection of BACT to control GHG emissions from the Arecibo Project and the Arecibo Project's GHG emissions. The technical change in the Permit's GHG emission limits necessary to include the excluded biogenic CO₂ emissions would have been a logical outgrowth of (1) the information available to the public prior to the public comment period, (2) EPA's GHG BACT determination for the Arecibo Project and (3) the change in law resulting from *Center for Biological Diversity*. No purpose would have been served by reopening the public comment process other than to unnecessarily delay the issuance of the Permit. Accordingly, had EPA changed the final permit to add back the Arecibo Project's biogenic CO₂ emissions to the limits in the Permit, it could have done so without reopening the public comment period.

II. EPA Has Discretion To Not Reopen the Public Comment Period on Remand

EPA's discretion to reopen or not reopen the public comment period applies not only to data, information or arguments raised during the public comment period, but also to new

¹ The initial GHG BACT analysis submitted to EPA was prepared prior to the promulgation of the Deferral Rule. The control techniques recommended in that submittal included combustion of municipal solid waste, maximizing energy efficiency and a robust recycling program. See Energy Answers Brief in Response at 20 (citing to A.R. I.B.2.a, June 2, 2011 Response to EPA Comments at 68). EPA determined that recycling was not BACT for GHG emissions because recycled materials would be replaced in the combustor. A.R. I.B.3.a, Additional Information on the PSD Permit Application (September 2011) at 19.

information raised in a remand proceeding. *Dominion Energy*, 13 E.A.D. at 416; *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 584-586 (EAB 1998), *aff'd*, *Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3rd Cir. 1999). The Board has "consistently described the procedural posture of remanded permit conditions as returned to pre-final decision status" and therefore 40 C.F.R. § 124.14 governs a permitting authority's discretion with respect to reopening the public comment period even on remand. *In re Upper Blackstone Water Pollution Abatement District*, NPDES Appeal Nos. 10-09, 10-10, 10-11, and 10-12, slip op. at 20 (EAB March 3, 2011). The facts that lead to the conclusion that EPA could have revised the GHG emissions limits in the Permit prior to the original issuance of the Permit, without reopening the public comment period, also support the conclusion that EPA has discretion to revise the Permit without reopening the public comment period pursuant to a limited voluntary remand.

As noted by EPA, the proposed revision to the GHG emission limits in the Permit not only responds to the vacatur of the Deferral Rule, but also to the one comment that was made by Dr. Osvaldo Rosario Lopez, one of the parties in the Coalition. This is similar to the situation in *Upper Blackstone*, where the Board held that

where the Region's decision to issue the Permit without the co-permittee condition is precisely what the District requested in its public comments, there is no reason for the Region to be required to follow different or more extensive procedural steps in making its decision on remand after appeal than had the Region made the same decision in the first instance after its initial review of the public comments.

Id. at 21. Here, EPA's proposed revision to add back in the Arecibo Project's biogenic CO₂ emissions is precisely what Dr. Lopez has requested and no purpose would be served by requiring Region 2 to follow more extensive procedural steps to make this change upon remand than would have been required prior to the original issuance of the Permit.

III. The Coalition's Response to EPA's Motion Does Not Provide a Basis to Deny the Motion

On November 29, 2013, the Coalition filed its response to EPA's Motion. The Coalition argues that *contra* EPA, the Coalition and others had concerns about greenhouse gas emissions from the Arecibo Project, as expressed in comments by Dr. Lopez (Coalition Response to EPA's Motion for Limited Voluntary Remand at 5) ("Coalition Response") and Dr. Obed Garcia (Coalition Response at 7). The Coalition further asserts that because GHG BACT for the Arecibo Project was determined, after extensive review, to be the Arecibo Project's design -- combustion of municipal waste coupled with high thermal efficiency -- its expressions of concern regarding greenhouse gas emissions from the facility meant that it had "expressed concern" with this "control technique." Coalition Response at 6.

The comments of Dr. Lopez and Dr. Garcia highlighted in the Coalition Response did not allege error with respect to either (i) the top-down BACT review conducted by Energy Answers, which review identified the potential control techniques for the Arecibo Project and evaluated the technical feasibility, control effectiveness, economic feasibility and energy impacts of said techniques or (ii) EPA's GHG BACT determination. See A.R. I.B.3.a, Additional Information on the PSD Permit Application (September 2011), Appendix B ("Revised GHG BACT Analysis"); A.R. IV.4, Fact Sheet For A Clean Air Act Prevention of Significant Deterioration Air Quality Draft Permit ("Fact Sheet") at 10-11.² As noted above, Dr. Lopez's specific comment regarding GHGs concerned EPA's exclusion of biogenic CO₂ emissions from the Permit pursuant to the Deferral Rule.³ EPA's proposed revision to the Permit addresses this

² Energy Answers included select pages from the September 2011 submission to EPA, including Appendix B, as Attachment 5 to its Brief in Response to the Petitions for Review.

³ The quote from Dr. Lopez on page 5 of the Coalition Response is edited to suggest that Dr. Lopez was objecting to the exclusion of CO₂ from the Permit. However, it is clear from the full text of Dr. Lopez's

(cont'd)

concern. The remainder of Dr. Lopez's comments refer to his contention that EPA should have prepared a mass balance relating to the inputs and outputs of combustion. See Coalition Response at 7. This contention has been previously addressed by EPA and Energy Answers in their responses to the Coalition's Petition for Review. The comment by Dr. Garcia highlighted in the Coalition's Response appears to be related to an environmental impact statement prepared by Energy Answers and not to the GHG BACT determination for the Arecibo Project. Id.

In order for an issue to be preserved on appeal, it must be raised with a "reasonable degree of specificity and clarity." *In re City of Palmdale*, slip op at 51. A general expression of concern regarding CO₂ emissions, such as the comment by Dr. Garcia that "incineration does not reduce greenhouse gas emissions" (Coalition Response at 7) is not a clear, specific criticism of the GHG BACT analysis that was conducted for the Arecibo Project.⁴ See, e.g., *In re ConocoPhillips Co.*, 13 E.A.D. 768, 801 ("[t]he fact that Petitioners' comments expressed 'extensive concern' regarding greenhouse gas emissions . . . does not by itself reflect the requisite level of specificity required to properly preserve the issue of whether BACT for CO₂ and methane was required"). Similarly, general expressions of concern regarding the emission of CO₂ from the Arecibo Project, including the statement that "incineration does not reduce

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comment on page 14 of the Public Hearing Transcript 2, August 25, 2012, that he is talking about EPA's exclusion of biogenic CO₂ emissions from the draft Permit:

. . . I will simply summarize – and that amount regulated matter we take into account the so-called biogenic CO₂ – that -- the very fact that the EPA allows a company like Energy Answers to not count as a contaminant CO₂ is flabbergasting into and of itself – as if the argument that the fact that his material is organic or natural somehow makes it less toxic . . . (underline added).

⁴ Although not relevant for purposes of BACT applicability, the Arecibo Project in fact will reduce net GHG emissions in Puerto Rico by eliminating methane emissions that would otherwise occur if combusted municipal solid waste were landfilled and by displacing the combustion of fossil fuels. See A.R. I.B.1.a, Prevention of Significant Deterioration Permit Application, February 8, 2011, at 3-3 and Appendix A; A.R.I.B.3.a, Additional Information on the PSD Permit Application (September 2011), Appendix B at 3 and 22 (table identifying net impact on biogenic CO₂e emissions due to the Arecibo Project's displacement of landfill disposal).

greenhouse gas emissions," is not a specific critique identifying error in the determination of BACT for GHG emissions from the Arecibo Project that would preserve this challenge for review.

Moreover, in its Petition for Review, the Coalition's only objection to the EPA's GHG BACT determination was that as a result of the decision in *Center for Biological Diversity*, the Permit should be remanded to address the "changes in rules for greenhouse gas emissions from biogenic sources." Coalition Petition for Review at 34.⁵ This is what EPA has proposed to do. Even if one assumes that the issue had been preserved for review, the Coalition did not challenge the GHG BACT determination in its Petition for Review and has therefore waived this objection to the Permit.

CONCLUSION

Given the uncertainties resulting from the judgment in *Center for Biological Diversity*, Energy Answers does not object to EPA's decision to revise the Permit to include the Arecibo Project's biogenic CO₂ emissions in the Permit's emissions limits. The Coalition's response to EPA's Motion does not argue that EPA's proposal to revise the Permit through a limited voluntary remand is inconsistent with applicable law or inappropriate in this instance, but simply that EPA's GHG BACT determination for the Arecibo Project -- combustion of municipal waste and high thermal efficiency -- is incorrect. As discussed above, this challenge has not been preserved for appeal and was not raised by the Coalition in its Petition for Review.

⁵ The Coalition's Petition included a statement that the analysis on remand should "include the applicability of BACT and other PSD requirements for biogenic and non-biogenic carbon dioxide" (Coalition Petition at 34), without acknowledging that the Permit had already included BACT emissions limits for non-biogenic carbon dioxide and other GHG emissions from the Arecibo Project. However, it is clear from the text of the Coalition's Petition that the only basis for remand that it asserted with respect to GHGs related to the exclusion of biogenic CO₂ emissions from the emission limits in the Permit.

Consistent with EPA's regulations and applicable Board precedent, EPA has demonstrated that upon voluntary limited remand, no further public review of the Arcibo Project is required to make the proposed changes to the Permit.

Dated: December 2, 2013

Respectfully Submitted

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMITATION

Pursuant to 40 C.F.R. § 124.19(d)(3), I hereby certify that Energy Answers Arcibo, LLC's Brief in Support of EPA Region 2's Motion for a Limited Voluntary Remand contains 3,120 words, as calculated using Microsoft Word software.

/s/ Henry C. Eisenberg
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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2013, a true and correct copy of the foregoing ENERGY ANSWERS ARECIBO, LLC'S BRIEF IN SUPPORT OF EPA REGION 2'S MOTION FOR A LIMITED VOLUNTARY REMAND was served, by first class mail, on:

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