

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

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

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**PETITION FOR REVIEW**

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

July 22, 2013

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## INTRODUCTION

The Coalition of Organizations Against Incinerators (La Coalicion de Organizaciones Anti-Incineracion) (“Petitioners”) is an unincorporated association of a number of groups and individuals, including Comité Basura Cero Arecibo, Amigos de Rio Guaynabo, Inc., Comité de Salud Pública y Ambiental Colegio de Médicos-Cirujanos de Puerto Rico, Grupo Arecibo 2015, Sierra Club, Ciudadanos en Defensa del Ambiente (CEDDA), Madres de Negro de Arecibo, Elba Diaz, Enrique González, Osvaldo Rosario Lopéz, Bishop Rafael Moreno Rivas, Apolinal Cintrón Pérez, and Cristina Rivera Roman.

Pursuant to 40 C.F.R. § 124.19(a), Petitioners seek review of the conditions of the Clean Air Act Prevention of Significant Deterioration Permit (“the Permit”) which was issued to Energy Answers Arecibo, LLC (“the Company”) on June 11, 2013, by John Filippelli, Director, Clean Air and Sustainability Division, Region II, Environmental Protection Agency. The permit at issue in this proceeding authorizes the Company to construct and operate the Arecibo Puerto Rico Renewable Energy Project in Barrio Cambalache, Arecibo, Puerto Rico (the “Facility”).

Petitioners contend that certain permit conditions (or the lack thereof) are based on clearly erroneous findings of fact and conclusions of law. Specifically, petitioners challenge the following permit conditions, factual findings, and conclusions of law (or the lack thereof): (1) lack of permit conditions relating to lead, (2) EPA’s erroneous finding that the Company sufficiently evaluated lead emissions from the Facility and their potential impacts, which makes the environmental justice analysis insufficient, (3) incorrect conclusions of law in the Response to Comments regarding the applicability of nonattainment new source review (NNSR) to the Facility, (4) lack of sufficient permit conditions for biogenic and non-biogenic carbon dioxide, now that the EPA’s Deferral Rule for biogenic carbon dioxide has been vacated by the United

States Court of Appeals for the District of Columbia, and (5) insufficient analysis of the material balance of inputs and outputs from the municipal waste combustion process. In the alternative, the EAB should review all these issues because they involve important policy considerations meriting review. *See* 40 C.F.R. § 124.19 (a)(4)(B) (“An exercise of discretion or an important policy consideration that the Environmental Appeals Board should, in its discretion, review”). The policy considerations largely relate to the proposed siting of this incinerator in a lead nonattainment area in Arecibo, Puerto Rico, which would introduce greater lead emissions than the existing facility which has caused the lead nonattainment problem.

EAB should remand the Permit to EPA (1) to require a proper analysis of lead emissions and impose meaningful emissions controls for lead, (2) to require a meaningful environmental justice evaluation, considering the fact that Arecibo is a lead nonattainment area, and considering the prevalence of asthma and exposure to lead in the community, (3) to amend its incorrect interpretation of NNSR in its Response to Comments, which may mislead the public and the Puerto Rico EQB when reviewing nonattainment issues in this lead nonattainment area, (4) to require a complete evaluation of requirements applicable to all biogenic and non-biogenic carbon dioxide, including BACT technology, and (5) to require a complete material balance analysis.

## **FACTUAL AND STATUTORY BACKGROUND**

EPA received an application for a PSD permit from the Company on or about February 8, 2011. On May 9, 2012, EPA issued a preliminary determination to approve the PSD permit, subject to public review. The public comment period for the proposed permit was officially closed on August 31, 2012. During the public comment period, EPA received written comments and oral comments given at six public hearings held between June 25, 2012 and August 27, 2012. On June 11, 2013, Director John Filippelli issued the Permit to the Company.

On July 2, 2013, Petitioners filed a Motion for Extension of Time for filing a Petition for Review. Because the Arecibo community consists of a limited English-speaking population, the motion requested that the EAB order EPA to prepare a Spanish translation of the permit, and requested that the deadline to file a petition for review be extended to 60 days after the issuance of a Spanish translation. The Permit was attached to the motion for extension of time. On July 5, 2013, the Company opposed the motion. On July 9, 2013, EPA opposed the motion to the extent it requested that EPA be ordered to translate the permit, but consented to an extension of time for an additional sixty days after July 11, 2013, for the filing of a petition for review. On July 11, 2013, EAB ordered a five day partial extension of time until July 22, 2013, for Petitioners to file a petition for review. Petitioners now are filing this petition for review.

Pursuant to Section 307(b)(1) of the Clean Air Act, Petitioners request a determination from the EAB whether any final action on this petition for review is “locally or regionally applicable,” or whether it has “nationwide scope or effect,” to identify the proper Circuit Court of Appeals for any further judicial review. *See* Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1).

### **THRESHOLD PROCEDURAL REQUIREMENTS**

Petitioners satisfy the threshold requirements for filing a petition for review under 40 C.F.R. pt. 124. Petitioners have standing to petition for review of the permit decision because representative members participated in the public comment period on the permit. *See* 40 C.F.R. § 124.19(a). Petitioners’ written comments are attached as *Exhibit 1*. EPA’s responses to Petitioners’ comments are attached as *Exhibit 2*.



Javier Biaggi, on behalf of the Comité Basura Cero Arecibo spoke at the public hearing at the Lions Club of Puerto Rico. Transcript, Hearing 2, August 25, 2012, 1 pm – 4 pm, pages 31-39; Transcript, Hearing 5, August 26, 2012, 6 pm – 10 pm, pages 19-21. *See Exhibit 1.*

Myrna Conty, on behalf of Amigos de Rio Guaynabo, Inc., spoke at the public hearing at the Lions Club of Puerto Rico. Transcript, Hearing 6, August 27, 2012, 1 pm – 4 pm, pages 15-17, 31-33. She also made a written submission to EPA. *See Exhibit 1.*

In Benigno Caban's testimony at the public hearing at the Lions Club of Puerto Rico, he noted that Elba Diaz, MD had previously spoken at a meeting and presented a paper to the EPA. Transcript, Hearing 4, August 26, 2012, 1 pm – 4 pm, pages 21, 50. *See Exhibit 1.*

Angel A. González, MD, on behalf of the Comité de Salud Pública y Ambiental, Colegio de Médicos-Cirujanos de Puerto Rico spoke at the public hearing at the Lions Club of Puerto Rico. Transcript, Hearing 2, August 25, 2012, 1 pm – 4 pm, pages 40-46, 94-98; Transcript, Hearing 3, August 25, 2012, 6 pm – 10 pm, pages 47-52; Transcript, Hearing 5, August 26, 2012, 6 pm – 10 pm, pages 27-28. He also made a written submission to EPA. *See Exhibit 1.*

Enrique González made a written submission to EPA. *See Exhibit 1.*

Oswaldo Rosario Lopéz, Professor of Environmental Chemistry at the University of Puerto Rico spoke at the public hearing at the Lions Club of Puerto Rico. Transcript, Hearing 2, August 25, 2012, 1 pm – 4 pm, pages 13-19, 89-94. *See Exhibit 1.*

Fernando Márquez, on behalf of Grupo Arecibo 2015, made a written submission read by Attorney Aleyda Centeno at the public hearing at the Lions Club of Puerto Rico. Transcript, Hearing 5, August 26, 2012, 6 pm – 10 pm, pages 15-17, 21-24. *See Exhibit 1.*

Rafael Moreno Rivas, the Bishop of the Methodist Church of Puerto Rico, spoke at the public hearing at the Lions Club of Puerto Rico. Transcript, Hearing 5, August 26, 2012, 6 pm – 10 pm, pages 5-8. *See Exhibit 1.*

Orlando Negrón, CPA, as President of the Sierra Club de Puerto Rico spoke at the public hearing at the Lions Club of Puerto Rico. Transcript, Hearing 4, August 26, 2012, 1 pm – 4 pm, pages 15-19, 58-61. *See Exhibit 1.*

Apolinal Cintrón Pérez spoke at the public hearing at the Lions Club of Puerto Rico. Transcript, Hearing 5, August 26, 2012, 6 pm – 10 pm, pages 11-12. *See Exhibit 1.*

Iván Federico Elías Rodríguez, on behalf of Ciudadanos en Defensa del Ambiente (CEDDA) spoke at the public hearing at the Lions Club of Puerto Rico. Transcript, Hearing 3, August 25, 2012, 6 pm – 10 pm, pages 40-47, 63-65; Transcript, Hearing 4, August 26, 2012, 1 pm – 4 pm, pages 9-12, 47-51. He also made a written submission to EPA. *See Exhibit 1.*

Teresa Sánchez Rodríguez, on behalf of Madres de Negro de Arecibo spoke at the public hearing at the Lions Club of Puerto Rico. Transcript, Hearing 4, August 26, 2012, 1 pm – 4 pm, pages 41-45, 54-58. Transcript, Hearing 5, August 26, 2012, 6 pm – 10 pm, pages 25-26. She also made a written submission to EPA. *See Exhibit 1.*

Cristina Rivera Roman spoke at the public hearing at the Lions Club of Puerto Rico. Transcript, Hearing 3, August 25, 2012, 6 pm – 10 pm, pages 27-31; Transcript, Hearing 5, August 26, 2012, 6 pm – 10 pm, pages 13-14. *See Exhibit 1.*

Jessica Seiglie on behalf of the Comité Basura Cero spoke at the public hearing at the Lions Club of Puerto Rico. Transcript, Hearing 2, August 25, 2012, 1 pm – 4 pm, pages 46-50. *See Exhibit 1.*

The issues raised in this petition were raised during the public comment period, and therefore were preserved for review. Issues regarding lead emissions were raised at the public hearings. *See Exhibit 1*, Transcript, Hearing 2, August 25, 2012, 1 pm – 4 pm, Pages 21, 23-27, 36-38, 44, 50, 96-97; Transcript, Hearing 3, August 25, 2012, 6 pm – 10 pm, Pages 13, 19, 24, 25, 32-33, 44, 66; Transcript, Hearing 4, August 26, 2012, 1 pm – 4 pm, Pages 22, 26, 30, 33-34; Transcript, Hearing 5, August 26, 2012, 6 pm – 10 pm, Pages 7, 11, 13, 15, 18, 21; Transcript, Hearing 6, August 27, 2012, 1 pm – 4 pm, Pages 9, 18-19, 29. Issues regarding lead pollution were also raised in written comments. *See Exhibit 1*, Written Submission to EPA by Jahaira Serrano, Pages 1 and 2; Written Submission to EPA by Angel A. González, Pages 2 and 4 and Slide 8; Written Submission to EPA by Myrna Conty, Page 6; Written Submission to EPA by Iván Federico Elías Rodríguez, Page 2. In this petition, Petitioners also challenge EPA's responses to comments relating to lead pollution. *See Response to Comments*, Pages 50, 56, 58, 62, 74, 99, 100, 105, 107, 108, 110, 117.

Comments regarding the material balance issue were made by Osvaldo Rosario López during the second public hearing. *See Transcript*, Hearing 2, August 25, 2012, 1 pm – 4 pm, Pages 13-19. Petitioners challenge EPA's responses on the material balance issue. *See Response to Comments*, Page 49.

Issues regarding cumulative effects of air toxics in the Arecibo area, including the air emissions from the battery recycling facility, were also raised during public hearings. *See Transcript*, Hearing 2, August 25, 2012, 1 pm – 4 pm, Pages 22, 23, 96; Transcript, Hearing 3, August 25, 2012, 6 pm – 10 pm, Page 29; Transcript, Hearing 4, August 26, 2012, 1 pm – 4 pm, Pages 13, 30, 33, 34; Transcript, Hearing 5, August 26, 2012, 6 pm – 10 pm, Pages 10, 11, 14, 18, 19, 21; Transcript, Hearing 6, August 27, 2012, 1 pm – 4 pm, Pages 18 and 19. These issues

were also raised in written comments. *See* Written Submission to EPA by Enrique González, Pages 1-3; Written Submission to EPA by Orlando Negrón of Sierra Club de Puerto Rico, Page 4. Petitioners challenge EPA's responses to comments relating to the cumulative effects of air toxics and the air emissions from the battery recycling facility. *See* Response to Comments, Pages 100, 105, 108, 109, 119.

Issues regarding environmental justice were also raised at the public hearings. *See* Transcript, Hearing 2, August 25, 2012, 1 pm – 4 pm, Pages 20, 49, 51, 52, 63, 101; Transcript, Hearing 3, August 25, 2012, 6 pm – 10 pm, Pages 15, 64, 69; Transcript, Hearing 4, August 26, 2012, 1 pm – 4 pm, Pages 17, 22, 23, 28, 53; Transcript, Hearing 5, August 26, 2012, 6 pm – 10 pm, Pages 7 and 22; Transcript, Hearing 6, August 27, 2012, 1 pm – 4 pm, Pages 9, 12, 24-28. These issues were also raised in written comments. *See* Written Submission to EPA by Iván Federico Elías Rodríguez, Pages 1, 10, 31; Written Submission to EPA by Bishop Rafael Moreno Rivas, Pages 1-4; Written Submission to EPA by Orlando Negrón of Sierra Club de Puerto Rico, Page 4. Petitioners challenge EPA's responses to comments relating to environmental justice. *See* Response to Comments, Pages 104-124.

All reasonably ascertainable issues and all reasonably available arguments supporting Petitioners' positions were submitted by the close of the public comment period, consistent with the requirements of 40 CFR § 124.13 and § 124.19.

## ARGUMENT

### **I. EAB Should Order EPA to Regulate Lead Emissions in the Permit, Because Lead is Subject to Regulation Under the PSD Program.**

The Clean Air Act mandates that no “major emitting facility” may be constructed in an area subject to the PSD program, unless “the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter [the Clean Air Act] emitted from, or which results from, such facility.” Section 165(a)(4), 42 U.S.C. § 7475(a)(4). EPA has promulgated national ambient air quality standards for lead. 40 C.F.R. §§ 50.12, 50.16. Therefore, lead is a regulated NSR pollutant under the PSD regulations. 40 C.F.R. § 52.21(b)(50) (definition of “regulated NSR pollutant” includes “Any pollutant for which a national ambient air quality standard has been promulgated”).

In addition, lead is “subject to regulation” under the Clean Air Act. 40 C.F.R. § 52.21(b)(49) (defining “subject to regulation” to mean “that the pollutant is subject to either a provision in the Clean Air Act, or a nationally-applicable regulation codified by the Administrator in subchapter C of this chapter, that requires actual control of the quantity of emissions of that pollutant ....”). As an example, lead is subject to NESHAP regulations for secondary lead smelting facilities, including numerical emissions limitations. *See* 40 C.F.R. pt. 63, Subpart X – National Emission Standards for Hazardous Air Pollutants for Secondary Smelting, 40 C.F.R. § 63.543 (standards for process vents include a numerical emissions standard of 0.20 mg/dscm). Because lead is “subject to regulation,” Section 165(a)(4), 42 U.S.C. § 7475(a)(4) requires that the Facility be subject to BACT for lead.

In its Response to Comments, EPA repeatedly made the incorrect assertion that it does not have the authority to regulate lead in this PSD permit:

However, Arecibo is in a nonattainment area for lead, **so EPA does not have authority to regulate it under the PSD program.**

Response to Comments, page 58.

As explained above in this response, based on PSD regulations, **Pb cannot be included in the PSD permit**, but Pb will be included in the Commonwealth permit issued by PR EQB.

Response to Comments, page 75.

The PSD program does not apply in nonattainment areas. Therefore, **lead is not a pollutant regulated in EA's PSD permit** .... [i]f lead were a PSD regulated air pollutant, EA's lead emissions rate of 0.31 TPY would fall below this threshold.

Response to Comments, page 99.

EPA did not cite any legal authority for this assertion, and the assertion directly contradicts the statutory language quoted above. EPA may be relying on language in its regulations that provides that certain paragraphs of the Section 52.21 PSD regulations do not apply with respect to a particular pollutant, for a major stationary source located in an area that is designated as a nonattainment area as to that pollutant. 40 C.F.R. § 52.21(i)(2) (providing that the “requirements of paragraphs (j) through (r) of this section shall not apply to a major stationary source or major modification with respect to a particular pollutant if the owner or operator demonstrates that, as to that pollutant, the source or modification is located in an area designated as nonattainment under section 107 of the Act”). But this regulatory language only creates an exemption from paragraphs (j) through (r) of the Section 52.21 regulations. It does not create a complete exemption from regulation under the PSD program, nor could it, in contravention of Section 165(a)(4) of the Act.

Moreover, the exemption is based on the premise that more stringent requirements of NNSR apply. Given EPA's unlawful interpretation of the applicability of NNSR to the Facility,

EPA's position on the applicability of PSD to the Facility's lead emissions would strip away any regulation of lead for this Facility. *See* Discussion in Point IV, *infra*.

Nowhere does the permit contain an emissions limitation for lead, or refer to lead by name. While the Company purported to include lead in its air emission modeling, it appears to have assumed that lead emissions would be no more than 75mg/dscm, the level it alleges to constitute best available control technology (BACT). *See Exhibit 3*, Environmental Justice Study dated October 11, 2011, *Exhibit 4*, PSD Application dated February 2011, page 5-37. But mere assertions that the Company will comply with BACT in a PSD application are not legally enforceable permit conditions.

Because elemental lead is a criteria pollutant and not a hazardous air pollutant, it is "subject to regulation" and a "regulated NSR pollutant" under the Clean Air Act. *See* Section 112(b)(7), 42 U.S.C. § 7412(b)(7). Therefore, the Permit should be remanded to EPA to require a proper analysis of lead emissions, and to impose meaningful emissions controls for lead.

## **II. EAB Should Reject EPA's Conclusion that the Facility's Lead Emissions Would be Essentially Zero.**

Lead emissions present a particularly dangerous threat to the Arecibo community. Arecibo has been in nonattainment for the lead NAAQS since 2011. *Exhibit 5*, Nonattainment Status for Each County by Year for Puerto Rico Including Previous 1-Hour Ozone Counties, [http://www.epa.gov/oaqps001/greenbk/anayo\\_pr.html](http://www.epa.gov/oaqps001/greenbk/anayo_pr.html) (last visited July 7, 2013). EPA has designated Arecibo as a nonattainment area for lead. *Exhibit 6*, Letter from Judith A. Enck, Regional Administrator, EPA Region 2, to Luis Fortuno Buset, Governor of Puerto Rico, dated June 14, 2011. This designation was based on data collected from an ambient lead monitor which began monitoring in Arecibo on January 1, 2010. *Id.* A Technical Support Document

(TSD) attached to the letter provided a detailed analysis supporting this designation. *Id.* The lead design value for Arecibo was 0.245 micrograms per cubic meter ( $\mu\text{g}/\text{m}^3$ ). *Id.*, TSD. This value exceeded the NAAQS for lead ( $0.15 \mu\text{g}/\text{m}^3$ ) warranting the designation of the area as nonattainment for lead. *Id.*

EPA identified only two sources in Arecibo with emissions allegedly greater than 0.1 tons per year (tpy): the Battery Recycling Company with 1.22 tpy of lead, and Puerto Rico Electric Power Authority's (PREPA) Cambalache Combustion Turbine Plant with emissions of 0.165 tpy of lead. *Id.*, TSD at 4. It concluded that the battery recycling facility "is the largest emissions source located upwind of the violating monitor, and EPA believes this facility caused and/or contributed to the violating monitor during the period." *Id.* at 7.

But these figures appear to be potential or allowable emissions, rather than actual emissions. *Exhibit 7*, The Battery Recycling Company, Inc. Draft Title V Operating Permit, page 15 of 35 (listing allowable emission rate for lead of 1.24 tpy). Moreover, actual air emissions of lead from the battery recycling facility were 255 lb. in 2011, according to its 2011 TRI report. *Exhibit 8*, EPA TRI Form R for Battery Recycling Co., Inc., [http://oaspub.epa.gov/enviro/tri\\_formr\\_partone\\_v2.get\\_thisone?rpt\\_year=2011&dcn\\_num=1311209763135&ban\\_flag=Y](http://oaspub.epa.gov/enviro/tri_formr_partone_v2.get_thisone?rpt_year=2011&dcn_num=1311209763135&ban_flag=Y) (last visited July 21, 2013). In actuality, the battery recycling facility appears to be the only TRI reporting facility in Arecibo that released air emissions of lead in 2011, the latest year of available reported data. *Exhibit 9*, EPA Historical TRI Data for other reporting facilities in Arecibo.<sup>1</sup> PREPA did not report any air emissions of lead for 2011. *See id.* EPA's Green Book Nonattainment Areas for Criteria Pollutants provides a map of the lead

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<sup>1</sup> The TRI Database indicates that PREPA last reported air emissions of lead for the year 2008, over four years ago.



nonattainment area within Arecibo. *Exhibit 10*, EPA Arecibo Nonattainment Area Description and Map, <http://www.epa.gov/airquality/greenbook/mnp.html#72013>, <http://www.epa.gov/airquality/greenbook/map/prpb2008.pdf> (last visited July 20, 2013). EPA describes the lead nonattainment area as an area bounded by 4 kilometers from the boundary of the Battery Recycling Company's facility – essentially a circle. *Id.*

In its Response to Comments, EPA attributes Arecibo's lead nonattainment to the battery recycling facility, which is located in Cambalache, the same barrio where the Facility would be located:

First EPA would like to clarify that there was no federal air permit issued to the Battery Recycling facility. **EPA is aware that the facility has caused high lead levels.** The issue is currently being addressed by Puerto Rico EQB and Region 2 independent of this PSD permit action. **To resolve the high lead concentrations, EPA designated the area to nonattainment with respect to lead.** This means that the Commonwealth must take action to lower the ambient lead concentrations and show attainment of the lead NAAQS.

Response to Comments, page 108 (emphasis added).

Because lead is so dangerous and harmful to human health, relatively low amounts of this toxic metal have caused this nonattainment problem. In 2011, the battery recycling facility emitted only 255.66 pounds of lead. According to EPA's TRI database, the following have been the air emissions of lead from the battery recycling facility, from 2004 through 2011 (the latest year for which TRI reports are available):<sup>2</sup>

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<sup>2</sup> Form Rs for 2012 were due on July 1, 2013, and do not appear to be available on EPA's website yet.

<b>Unit/ Contaminant</b>	<b>2011 (lbs./yr)</b>	<b>2010 (lbs./yr)</b>	<b>2009 (lbs./yr)</b>	<b>2008 (lbs./yr)</b>	<b>2007 (lbs./yr)</b>	<b>2006 (lbs./yr)</b>	<b>2005 (lbs./yr)</b>	<b>2004 (lbs./yr)</b>
Air Fug/ Lead	Nothing reported	7.44	4.59	4.59	3.93	3.07	2.63	2.14
Air Stack/ Lead	Nothing reported	98.61	61.2	88.84	160.8	872.36	746.49	608.15
Air Fug/ Lead Compounds	123.86	Nothing reported	Nothing reported	Nothing reported	Nothing reported	Nothing reported	Nothing reported	Nothing reported
Air Stack/ Lead Compounds	131.6	Nothing reported	Nothing reported	Nothing reported	Nothing reported	Nothing reported	Nothing reported	Nothing reported
<b>Totals</b>	<b>255.46</b>	<b>106.05</b>	<b>65.79</b>	<b>93.43</b>	<b>164.73</b>	<b>875.43</b>	<b>749.12</b>	<b>610.29</b>

*Exhibit 9*, EPA Historical TRI Data for Battery Recycling Co., Inc.,

[http://oaspub.epa.gov/enviro/tris\\_control\\_v2.tris\\_print?tris\\_id=00612BTTRYRD2KM](http://oaspub.epa.gov/enviro/tris_control_v2.tris_print?tris_id=00612BTTRYRD2KM) (last visited July 4, 2013).

By comparison, the Facility's Final Permit does not quantify lead emissions, nor does it refer to lead by name at all. But the PSD Application states that potential lead emissions from the facility would be 0.31 tpy, from the two boilers (0.153 tpy from one boiler, 0.153 tpy from the other boiler, or a total of 0.306 tpy from both boilers). *Exhibit 4*, Energy Answers PSD Application dated February 2011, Table 3-1, page 3-4. This would be equivalent to 612 pounds of lead per year, more than twice the amount of emissions from the battery recycling facility in 2011. (0.306 tpy x 2,000 lb/ton = 612 lb/yr).

To be precise, this is not the Facility's potential to emit (PTE) for lead. Rather, this would be the potential emissions of lead over the course of 8,760 hours, assuming an average

emissions rate of lead of 0.035 lb./hr from each boiler. In actuality, the Facility would be operating within a range of emissions rates, between a maximum emissions rate of 0.038 lb./hr. and a minimum emissions rate of lead of 0.028 lb./hr. *See id.*, Appendix A, Table 2 of PSD Application. Therefore, the following chart summarizes the Facility’s potential emissions of lead, under different emission rates of lead:

<b>Emission Rate</b>	<b>1 boiler (lbs./hr)</b>	<b>1 boiler over 8,760 hours (lbs./yr)</b>	<b>2 boilers over 8,760 hours (lbs./yr)</b>
<b>Maximum</b>	0.038	332.88	665.76 <b>(Potential to Emit)</b>
<b>Average</b>	0.035	306.6	613.2
<b>Minimum</b>	0.028	245.28	490.56

The highest figure -- 665.76 lbs./yr – is the Facility’s PTE for lead.

To forecast future actual emissions, it is important to consider availability (capacity). In the PSD application, the facility noted that it would operate at 95% capacity:

For annual potential-to-emit (PTE) calculations, the two boilers were assumed to operate continuously for 8,760 hours per year at 100% design capacity. **In reality, the Facility is expected to operate at 95 percent availability, or 8,322 hours per year.**

*Id.*, page 3-1 (emphasis added). Therefore, one can calculate future actual emissions from the boilers, assuming a maximum rate, an average rate, or a minimum rate of lead emissions:

<b>Emission Rate</b>	<b>Potential Emissions: 2 boilers over 8,760 hours (lbs./yr)</b>	<b>Actual Emissions: 2 boilers at 95% capacity over 8,322 hours (lbs./yr)</b>
<b>Maximum</b>	665.76 (Potential to Emit)	632.472
<b>Average</b>	613.2	582.54
<b>Minimum</b>	490.56	466.032

Consequently, the facility has represented that future actual emissions of lead would range from 466 pounds per year to 632 pounds per year. Based on the TRI data, this range would still be 2-7 times greater than the annual lead emissions from the battery recycling facility that already is causing the nonattainment problem in Arecibo, dating back to 2007.<sup>3</sup>

Because the battery recycling facility appears to be the only reason Arecibo is a nonattainment area for lead, and because lead emissions from the Facility would be far greater than those of the battery recycling facility, EPA cannot justify its conclusion that lead emissions from the Facility would be essentially zero (i.e., less than 0.00 micrograms per cubic meter).

Therefore, EAB should reject EPA's approval of the facility's modeling for lead:

**The modeled impact of the maximum allowed emissions of lead impacts** was so small it did not show up in two decimal places of the model results, that is, it **was less than 0.00 micrograms per cubic meter where the health standard is 0.15 ug/m<sup>3</sup>**. Emissions of lead would have to be 1000 times greater than projected in order to show a number in two decimal places.

Response to Comments, page 108.

Because the Facility would generate more lead emissions than the battery recycling facility, EAB should also reject EPA's attempt to draw a contrast between the battery recycling facility's lead emissions (which it says caused high lead concentrations) and the Facility's lead emissions (which it says could not pose a disproportionate or adverse impact):

**Therefore, while the battery recycling facility caused high lead concentrations, Energy Answers could not be said to pose a**

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<sup>3</sup> Dating back to 2007, air emissions of lead from the battery recycling facility ranged from a low of 65.79 lb. in 2009 to a high of 255.46 lb. in 2011. 466 lb. (the Facility's minimum future actual emissions of lead) is more than seven times the battery recycling facility's low of 65.79 lb. in 2009. 632 lb. (the Facility's maximum future actual emissions of lead) is more than two times the battery recycling facility's high of 255.46 lb. in 2011.

**disproportionate or adverse impact** even if EPA had authority to regulate it under the PSD permit.

Response to Comments, page 108.

The Facility's position (and EPA's conclusion) that ambient levels of lead will be less than 0.00 micrograms per cubic meter is clearly erroneous, given what is going on here. The Facility would be introducing more lead emissions into the air than the battery recycling facility that has caused Arecibo's nonattainment problem. Additionally, the Facility is close to the battery recycling facility. *See* Exhibit 3, Environmental Justice Evaluation, Figure 2. EAB should remand the Permit to EPA for a proper lead analysis.

### **III. EPA Failed to Consider the Environmental Justice Implications Associated with Siting a Lead-Emitting Facility in a Lead Nonattainment Area.**

The purpose of Executive Order 12898 is to provide minority and low-income communities access to information and opportunity for public participation:

*1-103. Development of Agency Strategies...*

The environmental justice strategy shall list programs, policies, planning and public participation processes, enforcement, and/or rulemakings related to human health or the environment that should be revised to, at a minimum; (1) promote enforcement of all health and environmental statutes in areas with minority populations; (2) ensure greater public participation; (3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and (4) identify differential patterns of consumption of natural resources among minority populations and low-income populations.

E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (February 11, 1994). Consistent with this Executive Order, EPA Region 2 has developed a policy relating to environmental justice. United States Environmental Protection Agency Region 2, Interim Environmental Justice Policy

(December 2000), <http://www.epa.gov/region2/ej/ejpolicy.pdf> (last visited July 18, 2013). EPA Region 2 defines minority “for EJ purposes to include Hispanics” and low-income to be interchangeable with poverty. *Id.* Therefore, it applies to Petitioners, who are Hispanic residents of Puerto Rico.

During the course of its review of the PSD permit application, EPA recommended that the Facility conduct a qualitative assessment of toxic air emissions in the surrounding areas. *Exhibit 11*, EPA Letter to Arcadis, dated October 11, 2011, page 2 (“We also recommend doing a qualitative assessment of the air toxic emissions in the surrounding areas”). In response, the Company merely prepared a map showing the physical location of five TRI reporting facilities in the area of Arecibo, and asserted in a conclusory manner that there was not a disproportionate distribution of TRI facilities in the area. *Exhibit 12*, Arcadis Letter to EPA dated October 26, 2011, page 5. *Exhibit 3*, Energy Answers Environmental Justice Study dated October 11, 2011, page 7, Figure 2. By granting the Permit, EPA apparently accepted this as a sufficient response. EAB should reject this because it was not sufficient to address environmental justice concerns.

Neither EPA nor the Company has addressed the cumulative impacts from the proposed facility, the battery recycling facility, and other TRI reporting facilities in the area. Any meaningful qualitative assessment would necessarily involve some effort to review the underlying health status of the population of the Arecibo community, including its history of exposure to lead, and a high incidence of asthma. This was not done.

Because of the problem of lead nonattainment caused by the battery recycling facility, EPA has been trying for several years to address lead emissions from that plant. *Exhibit 13*, *EPA Takes Action on Lead Problems at Arecibo, Puerto Rico Battery Recycling Facility* (June 9, 2011), *EPA Finds Area in Arecibo, Puerto Rico Does Not Meet Stricter Air Standards for Lead*

(June 15, 2011), *EPA Orders Battery Recycling Company to Reduce Air and Water Pollution At Arecibo, Puerto Rico Lead Smelting Facility* (August 10, 2011), *EPA Reaches Agreement with Battery Recycling Company, Inc. of Arecibo, Puerto Rico to Reduce Lead Pollution* (February 23, 2012).

Moreover, public health studies at voluntary blood screening clinics in Puerto Rico have confirmed that workers at the battery recycling plant and their families have high blood lead levels (BLLs). *Exhibit 14, Take-Home Lead Exposure Among Children with Relatives Employed at a Battery Recycling Facility -- Puerto Rico, 2011*, Morbidity and Mortality Weekly Report (MMWR), Vol. 61, No. 47 (November 30, 2012),

<http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6147a4.htm> (last visited July 7, 2013). The screening revealed alarming BLLs in children of workers at the battery recycling facility.

Among 68 children under 6 years, 16% had confirmed BLLs greater than or equal to 10  $\mu\text{g}/\text{dL}$ , the concentration at which the CDC recommended individual intervention to reduce BLLs in 2010. *Id.* In addition, 57% of these children had venous or capillary BLLs greater than or equal to 5  $\mu\text{g}/\text{dL}$ , the reference value for elevated BLLs in children established by CDC in 2012. *Id.* Additionally, 7% of children over 6 years and 42% of adults aged 18–68 years also had confirmed BLLs greater than or equal to 10  $\mu\text{g}/\text{dL}$ . *Id.*

In addition to their history of lead exposure, residents of Puerto Rico suffer disproportionately from asthma in comparison with individuals in the mainland United States. An estimated 143,080 children in Puerto Rico had asthma in 2008. *Exhibit 15, Asthma in Puerto Rico*, Department of Health and Human Services, Center for Disease Control and Prevention, CDC's National Asthma Control Program (BRFSS 2008 data), [http://www.cdc.gov/asthma/stateprofiles/Asthma\\_in\\_PR.pdf](http://www.cdc.gov/asthma/stateprofiles/Asthma_in_PR.pdf) (last visited July 7, 2013). Child

lifetime asthma prevalence in Puerto Rico was 28.9% compared with the 38 participating states' rate of 13.3%. *Id.* Child current asthma prevalence was 13.8% compared with the 38 participating states' rate of 9.0%. *Id.* Asthma was the underlying cause of death for 94 adults and less than 10 children in Puerto Rico. *Id.*, n.5 (citing 2007 data from the National Vital Statistics System, and noting that the data on children are suppressed, due to confidentiality). The age-adjusted mortality rate in Puerto Rico was 24.4/million, greater than the U.S. rate of 11.0/million. *Id.*

Residents of Arecibo also suffer disproportionately from asthma in comparison with most of Puerto Rico. In 2007, current childhood asthma prevalence was 15.8% in the Arecibo health care region. *Exhibit 16*, Puerto Rico Department of Health, Puerto Rico Asthma Prevalence & Mortality Fact Sheet (April 2010), page 2, Figure 2, [http://proyectoasmapr.org/uploads/GeoInfo\\_Mayo\\_6\\_2010.pdf](http://proyectoasmapr.org/uploads/GeoInfo_Mayo_6_2010.pdf) (last visited July 8, 2013). For adults, current asthma prevalence was 8.6% in the Arecibo health care region. *Id.* at 2, Figure 4. For both children and adults, this was the second highest of the health care regions on the island. *Id.*

Consequently, EAB should remand the permit to EPA to require a meaningful environmental justice evaluation, considering the fact that Arecibo is a lead nonattainment area, and considering the prevalence of asthma and exposure to lead in the community.

**IV. EAB Should Order EPA to Amend its Response to Comments to Correct Incorrect and Misleading Conclusions of Law Regarding the Applicability of Nonattainment New Source Review, Which is Under the Jurisdiction of the Puerto Rico Environmental Quality Board (EQB).**

Although EPA has authority over PSD permitting, the Puerto Rico Environmental Quality Board (EQB) has authority over nonattainment new source review (NNSR). 40 C.F.R.



§§ 52.2722 (approval of authority for Part D, nonattainment), 52.2729 (no approval of authority for Part C, PSD). Because state permitting agencies (and the Commonwealth permitting agency in Puerto Rico) naturally look to EPA for guidance, it is important to properly understand the applicability of NNSR to the Facility, in evaluating the conclusions of law drawn by EPA in its Response to Comments.

In the context of review of PSD permits, the EAB has considered the applicability of NNSR to individual facilities. *See In Re: Russell City Energy Center, LLC*, 2010 WL 5573720 (Nov. 18, 2010) (considering the College District petitioner’s challenge to the Bay Area Air Quality Management District’s determination on the applicability of NNSR, but concluding that the petitioner had not made the case for the non-applicability of NNSR). *See also In re: Indeck-Elwood, LLC*, 13 E.A.D. 126, fn18 (September 27, 2006) (“The facility, however, will be located in an area that is in nonattainment for ozone.... Therefore, it is subject to the nonattainment area new source review (“Nonattainment NSR”) requirements for VOCs, and not the PSD requirements”). In addition, the EAB has addressed the applicability of NNSR in the context of enforcement cases. *See e.g., In Re: Tennessee Valley Authority*, 9 E.A.D. 357 (September 15, 2000) (finding company in violation of NNSR requirements).

Petitioners are not asking the EAB to review substantive requirements under NNSR regulations. Petitioners are only asking for EAB to reject EPA’s interpretation regarding the applicability of NNSR, as a matter of federal law and policy. Because the public and the Commonwealth agency would likely give weight to EPA’s comments, it is important to correct EPA’s misleading conclusions of law regarding the applicability of NNSR, which violate the statutory language of the Clean Air Act.

1. The Facility is subject to NNSR under Section 172 and 173 of the Clean Air Act, because it is a major stationary source under Section 302 of the Clean Air Act.

For nonattainment areas, the Clean Air Act defines a “major stationary source” as one that “directly emits, or has the potential to emit, one hundred tons per year or more of *any air pollutant* ...” Section 302(j), 42 U.S.C. § 7602(j) (emphasis added). The regulations repeat this definition. 40 C.F.R. § 51.165(a)(1)(iv)(A)(1) (“Any stationary source of air pollutants that emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant ...”). Although the regulations make the threshold more stringent for certain air pollutants in nonattainment areas, they do not make the threshold less stringent. *See id.* (50 tpy for VOC in any serious ozone nonattainment area, 50 tpy for CO in any serious nonattainment area, etc.). As a matter of law, they cannot do so, because this would violate the statute.

Under Section 172 of the Clean Air Act, nonattainment plan provisions must comply with the requirement that “[s]uch plan provisions *shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area*, in accordance with section 7503 of this title.” Section 172(c)(5), 42 U.S.C. § 7502(c)(5) (emphasis added). Section 7503 of this title does not authorize such a narrowing of the nonattainment new source review permitting program. *See* Section 173, 42 U.S.C. § 7502. The fact that offsets apply to a “new or modified major stationary source” underscores this rule. *See* Section 173(c)(1), 42 U.S.C. § 7503(c)(1).

The statute does not require that a facility emit 100 tons per year of the pollutant for which the area is in nonattainment, in order to be subject to NNSR. Rather, it is sufficient that a facility emits 100 tpy of “any air pollutant.” Here, this means that the Facility need not have a potential to emit 100 tpy of lead, in order to trigger NNSR.

Looking at it another way, the statutory definitions of sources that are subject to PSD review and NNSR are essentially the same. Because the Facility is a major emitting facility for PSD review, it is also a major stationary source for NNSR. *See* Section 169(1), 42 U.S.C. § 7479(1) (definition of “major emitting facility” includes “municipal waste incinerators capable of charging more than fifty tons of refuse per day” which “emit, or have the potential to emit, one hundred tons per year or more of any air pollutant”). Section 302(j), 42 U.S.C. § 7602(j) (definition of “major stationary source” and “major emitting facility” includes any stationary source which “directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant”).

This is important because a major stationary source in a lead nonattainment area in Puerto Rico is subject to requirements for offsetting emissions of lead. 40 C.F.R. § 51.165(a)(3),(9) (rules for offsets in nonattainment areas). *See* Regulation for the Control of Atmospheric Pollution of the Commonwealth of Puerto Rico, Rule 102 (Paragraph A(8) and (B)(2)(8) of the definition of “major stationary source” includes municipal incinerators with a potential to emit more than 100 tpy of any air pollutant); Rule 201(B)(3), Rule 201(C) (requiring emissions offsets for new major stationary sources in nonattainment areas), Rule 201(B)(6) (requiring LAER technology); Rule 203(B)(3) (rules for emissions offsets for permits to construct), Rule 204(B)(1)(b) (rules for emissions offsets for permits to operate). Petitioners only ask for review of the applicability of NNSR as a threshold matter, rather than whether certain substantive requirements under NNSR must be met.

2. In its Response to Comments, EPA makes the erroneous conclusion of law that the Facility is not subject to NNSR because it does not have potential emissions of 100 tpy of lead.

In violation of the plain language of the statute, in its Response to Comments, EPA repeatedly makes the erroneous conclusion of law that to be regulated as a “major stationary source” under NNSR, the Facility must have actual emissions or a potential to emit of 100 tpy of the particular pollutant for which the area is in nonattainment (in this case, 100 tpy of lead emissions):

In addition, **Energy Answers is not subject to the nonattainment permit regulations since it would have to emit 100 tons per year of lead.** Since the EA Facility will emit less than this major source threshold it is also not subject to nonattainment permit requirements.

Response to Comments, Page 99 (emphasis added).

**A new major source is considered to be one that emits 100 tons per year. Energy Answers is projected to emit 0.31 tons per year** which is even lower than a Significant Emission Rate of 0.6 tons per year. Therefore, **Energy Answers is not subject to the lead nonattainment permit requirements.**

Response to Comments, Page 108 (emphasis added).

EPA’s policy interpretation is not justified by the language of the regulations, either. The policy appears to be based on language in the regulations that states that the NNSR program “shall apply to any new major stationary source or major modification that is *major for the pollutant for which the area is designated nonattainment ....*” See 40 C.F.R. § 51.165(a)(2)(i) (emphasis added). But this language merely reflects the lower alternative emissions thresholds in the definition of “major stationary source,” which apply for particular pollutants in particular nonattainment areas, none of which include lead nonattainment areas. See 40 C.F.R. §

51.165(a)(1)(iv) (“except that *lower emissions thresholds shall apply in areas subject to subpart 2, subpart 3, or subpart 4 of part D, title I of the Act*, according to paragraphs (a)(1)(iv)(A)(1)(i) through (vi) of this section”) (emphasis added). Under paragraphs (a)(1)(iv)(A)(1)(i) through (vi) of this section, there are lower thresholds for emissions of VOCs in ozone nonattainment areas, emissions of carbon monoxide in carbon monoxide nonattainment areas, and emissions of PM-10 in PM-10 nonattainment areas. Again, the purpose of these lower regulatory thresholds is to make the requirements for qualifying as a “major stationary source” *more stringent*, rather than *less stringent*. Therefore, 40 C.F.R. § 51.165(a)(2)(i) does not support EPA’s conclusions of law.

3. The EAB should strike any policy or regulation of EPA limiting the applicability of NNSR to a facility with a potential to emit only one nonattainment pollutant in the amount of 100 tpy, as a violation of the statute.

The roots of EPA’s unlawful policy lie in its revised interpretation of the Emissions Offset Interpretive Ruling for nonattainment areas, issued in 1979 and 1980. In the original ruling in 1979, EPA set forth the correct interpretation that the statute requires offsetting rules to apply to all “major stationary sources” as defined in Section 302, 42 U.S.C. § 7602 of the Act:

Section 129(a) of the 1977 Amendments **requires that the offset requirements be applicable to all major stationary sources** (including Federal facilities) **as defined in Section 302 of the Act** (i.e., sources with potential emissions of 100 tons or more per year).

Emissions Offset Interpretive Ruling, Final Rule, 44 Fed. Reg. 3274, 3276 (January 16, 1979) (emphasis added). But EPA made an error in a subsequent interpretative ruling. Without any statutory justification, it proceeded to exclude a large group of major stationary sources from NNSR, by asserting that a major stationary source had to be “major” for the “pollutant,” for NNSR to apply:

A major new source or major modification which would locate in an area designated in 40 CFR 81.300 *et. [sic] seq.* as nonattainment for a pollutant **for which the source or modification would be major** may be allowed to construct only if the stringent conditions set forth below are met.

Requirements for Preparation, Adoption, and Submittal of SIPS; Approval and Promulgation of State Implementation Plans; Final Rule, 45 Fed. Reg. 31,307, 31,311(May 13, 1980) (emphasis added) (revising Emissions Offset Interpretive Ruling, Section I (Introduction)). In 2013, current regulations contain similar language. 40 C.F.R. pt. 51, Appendix S, Section I (Introduction), II(C), IV(A). This unlawful policy also underlies EPA's draft 1990 policy on new source review. *See* New Source Review Workshop Manual (Draft), October 1990 at F.7 ("A new source will be subject to nonattainment area preconstruction review requirements only if it will emit, or will have the potential to emit, in major amounts any criteria pollutant for which the area has been designated nonattainment"). Because this policy is inconsistent with the statutory language, it should be stricken.

4. Precedent supports the striking of EPA's unlawful policy that purports to narrow the applicability of NNSR.

Then and now, EPA's policy violates the plain language of the statute. For this reason, EAB should reject EPA's interpretation regarding the applicability of NNSR. *See City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 335 (1994) (rejecting Solicitor General's plea for deference to EPA interpretation that would have exempted municipal waste combustion ash from regulation under RCRA simply because it included household waste, because "we cannot interpret the statute to permit MWC ash sufficiently toxic to qualify as hazardous to be disposed of in ordinary landfills").

Long ago, the D.C. Circuit rejected EPA’s attempt to create a partial exemption from the PSD requirements of Section 165 for major emitting facilities that emit less than 50 tons per year of any pollutant. *Alabama Power Company v. Costle*, 606 F.2d 1068, 1076 (1979) (“EPA does not have broad authority in this statute to create exemptions on the basis of an analysis of cost-effectiveness”). The same result should apply here, in the context of NNSR. Although the Court recognized that EPA has authority to generally make regulatory exemptions based on the *de minimis* and administrative necessity doctrines, those doctrines would not apply here. No *de minimis* theory could justify the exemption of emissions of up to 99.9 tons per year of lead. No administrative necessity theory could justify a blanket exclusion of more than 100 tpy of one or more criteria pollutants from the threshold determination, when it was the intention of Congress to subject such a facility to NNSR as a “major stationary source.”

Ordering EPA to correct its erroneous conclusions of law regarding the applicability of NNSR is consistent with the D.C. Circuit’s decision vacating EPA’s final rule deferring the regulation of carbon dioxide under the PSD program (the “Deferral Rule”). *See Center for Biological Diversity v. Environmental Protection Agency*, No. 11-1101 (D.C. Cir., July 12, 2013), available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/F523FF1F29C06ECA85257BA6005397B5/\\$file/11-1101-1446222.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/F523FF1F29C06ECA85257BA6005397B5/$file/11-1101-1446222.pdf). In that case, petitioning environmental organizations alleged that the Deferral Rule contradicted the plain language of the Clean Air Act, which requires PSD review for a “major emitting facility,” defined to mean a “stationary source[.]” that “emit[s], or ha[s] the potential to emit” certain specified amounts of “any air pollutant.” *Id.* at 12, citing Section 169(1), 42 U.S.C. § 7479(1). The petitioners successfully argued that EPA did not have the authority to exempt any sources of carbon dioxide, including biogenic sources, from the PSD

permitting program. *Id.* In short, the phrase “any air pollutant” means any air pollutant, including biogenic carbon dioxide.

Similarly, EPA has no authority to exempt a “major stationary source” from the applicability of NNSR, by allowing it to consider only its potential to emit the particular criteria pollutant for which the area is in nonattainment. EPA’s interpretation contradicts the plain language of the Clean Air Act, which requires NNSR for a “major stationary source,” defined to mean one that “directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant.” *See* Section 302(j), 42 U.S.C. § 7602(j).

The term “major stationary source” for NNSR is synonymous with the term “major emitting facility” for PSD, at issue in *Center for Biological Diversity*. Section 302(j), 42 U.S.C. § 7602(j). In both cases, the relevant statutory language is “any air pollutant.” *Id.* If a new facility in an attainment area is a “major emitting facility” based on its potential to emit “any air pollutant,” it is subject to PSD review. If a new facility in a nonattainment area is a “major stationary source” based on its potential to emit “any air pollutant,” it is subject to NNSR.

5. EPA’s unlawful interpretation of the applicability of the NNSR program is inconsistent with the structure of the Clean Air Act.

With respect to the structure of the Clean Air Act, EPA’s interpretation makes no sense because NNSR under Part D is supposed to be more stringent than PSD under Part C. In recent litigation, the D.C. Circuit set forth this very premise:

The PSD program applies to those areas of the United States designated as in “attainment” or “unclassifiable” for any NAAQS pollutant, *see id.* § 7471, and requires permits for major emitting facilities embarking on construction or modification projects in those regions. *Id.* § 7475(a). A separate part of Title I of the CAA, Part D, governs the construction and modification of sources in nonattainment regions. *See id.* §§ 7501, 7502. It bears emphasis



that attainment classifications are pollutant-specific: depending on the levels of each NAAQS pollutant in an area, **a region can be designated as in attainment for NAAQS pollutant A, but in nonattainment for NAAQS pollutant B. If a major emitting facility in such a region wishes to undertake a construction or modification project, both Part C and Part D's substantive requirements apply—that is, the source must obtain a general PSD permit and must also abide by Part D's more stringent, pollutant-specific requirements for any NAAQS pollutants for which the area is in nonattainment.....**

*Coalition for Responsible Regulation, Inc. v. E.P.A.*, 684 F.3d 102, 133 (D.C. Cir. 2012). It would defy common sense to suggest that a facility could avoid a more stringent regulation (NNSR) through a loophole in a policy that narrows the scope of that more stringent regulation.

6. EPA's unlawful interpretation of the applicability of the NNSR program would lead to absurd and unjust results.

EPA's interpretation would lead to absurd and unjust results. On the one hand, EPA takes the position that lead cannot be subject to this PSD permit, because the Facility is located in a nonattainment area, and is therefore subject to NNSR. On the other hand, EPA asserts that the Facility is not subject to NNSR for lead because it does not have a PTE of 100 tpy of lead. This interpretation is being used to justify the insensible: locating an incinerator emitting up to 662 pounds per year of lead in a lead nonattainment area without undergoing NNSR, when actual lead emissions of the incinerator would be several times higher than the battery recycling plant that has caused the area to be a lead nonattainment area.

7. This challenge to EPA's unlawful policy or regulation is timely.

Despite the fact that Petitioners are challenging a policy (or regulation) of EPA dating back to the late 1970s, their claims are timely. *See Coalition for Responsible Regulation, Inc. v. E.P.A.*, 684 F.3d 102, 129-132 (D.C. Cir. 2012) (rejecting claim that industry petitioners' challenge to the applicability of PSD review to their emission of greenhouse gases was untimely, despite the fact that EPA's implementation of PSD review was based on a policy or regulation dating back to the 1970s and 1980s). In that case, the D.C. Circuit allowed industry petitioners to challenge the Timing Rule and Tailoring Rule, despite the fact that these rules were premised on EPA's 1978 regulatory definition of the term "major stationary source" to include "any air pollutant regulated under the [CAA]." *See id.* at 129, citing 43 Fed. Reg. 26,380, 26,382 (June 19, 1978). The Timing Rule and Tailoring Rule were also based on EPA statements in a 1980 final rule that a "source need only emit *any* pollutant in major amounts (i.e., the amounts specified in [CAA Section 168(1)] and be located in an area designated attainment or unclassifiable for that or any other pollutant," and that "any air pollutant" included both criteria pollutants and non-criteria pollutants. *Id.*, citing 45 Fed. Reg. 52,711 (emphasis in original). The Court held that the claims of the industry petitioners were not time-barred, because any claims were not ripe in the late 1970s. *Id.* at 131.

Similarly, Petitioners are allowed to make their challenge to EPA's policy or regulation, because their claims were not ripe until the Permit was issued. The EAB should order EPA to amend its erroneous conclusions of law in its Response to Comments, which may mislead the public and the Puerto Rico EQB.

8. EPA Should Amend its Erroneous Conclusions of Law Regarding the Applicability of the “Significant Net Emission” Threshold for Nonattainment New Source Review, in its Response to Comments.

For an existing facility that undergoes a modification which may trigger NNSR, the issue is whether the modification rises to the level of a “major modification,” which requires that a project generate a “significant emissions increase,” as well as a “significant net emissions increase.” *See* 40 C.F.R. § 51.165(a)(1)(v)(A) (definition of “major modification”). In turn, the regulations define the term “significant” by providing different numerical thresholds for different pollutants. *See* 40 C.F.R. § 51.165(a)(1)(x) (definition of “significant”), (xxvii) (definition of “significant emissions increase”). Under that analysis, a modification that causes an increase of 0.6 tpy in lead emissions would subject a facility to permitting for a “major modification.” *See* 40 C.F.R. § 51.165(a)(1)(x). But we are not dealing with a modification here.

Rather, EPA states that the Facility is a new facility, rather than a modified facility. In rejecting a comment urging that a requirement for modifications of existing stationary sources apply to the Facility, EPA stated that

As explained in the Fact Sheet, under the PSD regulations, the **EA’s proposed project is a new major stationary source** [footnote citing 40 CFR 52.21(b)(1)], and therefore, contrary to the commenter’s claim, **these requirements do not have to be included in the PSD permitting review.**

Response to Comments, page 51 (emphasis added). Because EPA states that the Facility is a new facility, the “significant” levels that are relevant to “major modifications” do not apply.

Nevertheless, in its Response to Comments EPA repeatedly made the incorrect assertion that the Facility does not trigger NNSR because the emissions of lead are not greater than the level of significance set forth in the regulations (0.6 tpy):

Lead would normally be regulated via Puerto Rico’s nonattainment permit program; **however, our understanding is that the**

**emissions of lead fall below the de minimis thresholds for nonattainment regulation.**

Response to Comments, page 58 (emphasis added).

However, **we note that the lead emission rate of the Energy Answers facility is 0.31 tons per year which is below the significant emission rate that would trigger review if lead were a PSD pollutant.** A “significant emission rate” at a major source of lead is defined as 0.6 tons per year. If lead were a PSD regulated pollutant, EA’s lead emissions rate of 0.31 TPY would fall below this threshold.

Response to Comments, page 99 (emphasis added).

A new major source is considered to be one that emits 100 tons per year. **Energy Answers is projected to emit 0.31 tons per year which is even lower than a Significant Emission Rate of 0.6 tons per year.** Therefore, Energy Answers is not subject to the lead nonattainment permit requirements.

Response to Comments, page 108 (emphasis added).

The EAB should order EPA to amend its erroneous conclusions of law in its Response to Comments, which may mislead the public and the Puerto Rico EQB. The Facility is subject to NNSR because it is a “major stationary source.” It is particularly important in this case, because EPA’s interpretation in all likelihood will be granted particular weight and influence in Puerto Rico, all in the context of a harmful contaminant such as lead.

**V. EAB Should Remand the PSD Permit to EPA for a Proper Consideration of Greenhouse Gas Emissions of a Biogenic Nature.**

The Permit does not fully take into consideration greenhouse gases of a biogenic source, as a “regulated NSR pollutant.” *See* Permit at 7, 35, and 47. During the application process, EPA stated it would not consider greenhouse gas emissions of a biogenic nature in the PSD review, because of its Deferral Rule, which deferred regulation of biogenic greenhouse gases for a period of three years. Response to Comments at 36-38, and 49. Deferral for CO2 Emissions

From Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs, 76 Fed. Reg. 43,490 (July 20, 2011) (codifying Deferral Rule at 40 C.F.R. § 51.166(b)(48)(ii)(a) and 40 C.F.R. § 52.21(b)(49)(ii)(a)).

But this final rule has now been vacated by the D.C. Circuit. *Center for Biological Diversity v. Environmental Protection Agency*, No. 11-1101 (July 12, 2013), available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/F523FF1F29C06ECA85257BA6005397B5/\\$file/11-1101-1446222.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/F523FF1F29C06ECA85257BA6005397B5/$file/11-1101-1446222.pdf) (last visited July 16, 2013). In the event of an administrative appeal, a PSD permit decision does not become effective until the permit appeal has been resolved. EAB, Revised Order Governing Petitions for Review of Clean Air Act New Source Review Permits, dated March 27, 2013, page 2, citing 40 C.F.R. §§ 124.15(b), 124.19(l)(2). Therefore, the Permit is not really final yet.

EAB has the discretion to remand the Permit to EPA for reconsideration to reflect the changes in rules for greenhouse gases from biogenic sources. *In the Matter of: J&L Specialty Products Corp.*, 5 E.A.D. 31 (1994) (“On administrative review, the Agency has the discretion to remand permit conditions for reconsideration in light of legal requirements that change before the permit becomes final agency action”). In *J&L Specialty Products Corp.*, the EAB remanded a NPDES permit condition for nitrite/nitrate to EPA, for reconsideration following a change in an “Agricultural Water Supply” designation, following the grant of the permit. *Id.* Here, the EAB should also remand the Permit to EPA to address biogenic greenhouse gas emissions, which were excluded from consideration in the PSD review. Analysis should include the applicability of BACT and other PSD requirements for biogenic and non-biogenic carbon dioxide, as well as any other applicable requirements.

## **VI. EAB Should Order EPA to Require A Meaningful Material Balance Analysis of Municipal Waste Combustion.**

In its Response to Comments, EPA confirms that that not all the products of combustion of refuse-derived fuel (RDF) MSW are included in the PSD permit. Response to Comments, page 49. In a conclusory fashion, EPA asserts that “water vapors resulting from hydrogen, and from moisture, and the non-biogenic CO<sub>2</sub>, which are not included in the EA’s PSD permit, represent around 42% of the total products of combustion resulting from the combustion of 768,690 TPY of MSW.” *Id.* But neither EPA nor the PSD permit provides any meaningful analysis of a balance of inputs and outputs.

As provided in the Permit, a maximum of 2,106 tpd of refuse-derived fuel (RDF) would be allowed for incineration. Permit, page 22. While the majority of the RDF is expected to consist of municipal solid waste (MSW), the plant would be allowed to combine supplemental fuels with MSW. *Id.* at 22-26. One type of supplemental fuel would be permitted to be burned in combination with MSW on any given operating day. Supplemental fuels would include tire-derived fuel (TDF), auto-shredder residue (ASR), and processed urban wood waste (PUWW). *Id.* at 22. The Permit allows combustion as follows: 330 tpd of TDF, 286 tpd of ASR and 898 tpd of PUWW. *Id.* at 22-24. In total, at a rate of 2,106 tpd, approximately 768,690 tpy of fuel would be used ( $2,106 \times 365 = 768,690$ ). But this does not include supplemental fuels.

While 768,690 tpy of fuel would be subject to combustion, EPA has only accounted for 665,060 tpy as an output of combustion. (According to the facility, approximately 25% of RDF, or 192,172 tpy would turn to ash, and total annual emission of pollutants would be 468,388 tpy,

adding up to an output of 665,060 tpy). *Id.* at 7.<sup>4</sup> EPA suggests that the remaining 103,630 tpy of RDF<sup>5</sup> would consist of “water vapors resulting from hydrogen, and from moisture, and the non-biogenic CO<sub>2</sub>, which are not included in the EA’s PSD Permit.” *Id.* at 49. But neither EPA nor the Company offers compelling technical authority for these assertions. The addition of the supplemental fuels magnifies the uncertainty regarding the relationship between inputs and outputs. Moreover, EPA’s apparent failure to consider oxygen flow as an additional input in the combustion process further enlarges the discrepancy of the material balance.

Without a full material balance analysis of the inputs and outputs of combustion, EPA cannot fully determine future air emissions and confirm the accuracy of the company’s calculations. Petitioners request that EAB remand the Permit to EPA, to provide a complete material balance analysis.

## **CONCLUSION**

Petitioners respectfully submit that the PSD Permit should be remanded to EPA, with appropriate instructions.

## **STATEMENT OF COMPLIANCE WITH WORD LIMITATION**

This brief contains a total of 11,785 words.

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<sup>4</sup> Total annual emissions of pollutants were calculated by adding the individual values of annual emissions for each pollutant provided in the Final Permit (Page 7).

<sup>5</sup> 768,690 tpy - 665,060 tpy = 103,630 tpy.

## LIST OF EXHIBITS

Exhibit 1: Written Comments

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Enrique González  
Osvaldo Rosario López  
Bishop Rafael Moreno Rivas  
Orlando Negrón, CPA, President  
Iván Federico Elías Rodríguez  
Teresa Sánchez Rodríguez  
Dra. Jahaira Serrano

Public Hearings

Hearing 2 Transcript – August 25, 2012 1-4pm  
Hearing 3 Transcript – August 25, 2012 6-10pm  
Hearing 4 Transcript – August 26, 2012 1-4pm  
Hearing 5 Transcript – August 26, 2012 6-10pm  
Hearing 6 Transcript – August 27, 2012 1-4pm

Exhibit 2: EPA's Response to Comments

Exhibit 3: Energy Answers Environmental Justice Study dated October 11, 2011, page 7, Figure 2.

Exhibit 4: Energy Answers PSD Application dated February 2011, pages 3-1 through 3-4, 5-37, Appendix A-Table 2.

Exhibit 5: Nonattainment Status for Each County by Year for Puerto Rico Including Previous 1-Hour Ozone Counties,  
[http://www.epa.gov/oaqps001/greenbk/anayo\\_pr.html](http://www.epa.gov/oaqps001/greenbk/anayo_pr.html) (last visited July 7, 2013).

Exhibit 6: Letter from Judith A. Enck, Regional Administrator, EPA Region 2, to Luis Fortuno Burset, Governor of Puerto Rico, dated June 14, 2011, attaching Technical Support Document.

Exhibit 7: Battery Recycling Company Draft Title V Operating Permit, pages 1-3, 14-15.

Exhibit 8: *Exhibit 8*, EPA TRI Form R for Battery Recycling Co., Inc.,  
[http://oaspub.epa.gov/enviro/tri\\_formr\\_partone\\_v2.get\\_thisone?rpt\\_year=2011&dcn\\_num=1311209763135&ban\\_flag=Y](http://oaspub.epa.gov/enviro/tri_formr_partone_v2.get_thisone?rpt_year=2011&dcn_num=1311209763135&ban_flag=Y) (last visited July 21, 2013).



- Exhibit 9: EPA List of EPA-Regulated Facilities in TRI in Arecibo, Puerto Rico
- EPA Historical TRI Data for companies in Arecibo:  
Battery Recycling Company, Inc.  
Continental Flavors & Fragrances (dba R&D Services)  
Cutler Hammer Electrical Co.  
GE Industrial of Puerto Rico LLC Arecibo Plant  
Hudson Lock de Puerto Rico Inc.  
Kayser-Roth Corp. Inc.  
Maycom Amp Puerto Rico Inc.  
MSD International GMBH (PR Branch) LLC  
Pfizer Pharmaceuticals LLC – Arecibo  
PRASA – North Coast Superaqueduct Project  
PREPA -- Cambalache Combustion Turbine Plant  
Thermo King Manufactura Puerto Rico Inc.
- Exhibit 10: EPA Arecibo Nonattainment Area Description and Map,  
<http://www.epa.gov/airquality/greenbook/mnp.html#72013>,  
<http://www.epa.gov/airquality/greenbook/map/prpb2008.pdf>  
(last visited July 20, 2013).
- Exhibit 11: EPA Letter to Arcadis, dated October 11, 2011.
- Exhibit 12: Arcadis Letter to EPA dated October 26, 2011.
- Exhibit 13: *EPA Takes Action on Lead Problems at Arecibo, Puerto Rico Battery Recycling Facility* (June 9, 2011)
- EPA Finds Area in Arecibo, Puerto Rico Does Not Meet Stricter Air Standards for Lead* (June 15, 2011)
- EPA Orders Battery Recycling Company to Reduce Air and Water Pollution At Arecibo, Puerto Rico Lead Smelting Facility* (August 10, 2011)
- EPA Reaches Agreement with Battery Recycling Company, Inc. of Arecibo, Puerto Rico to Reduce Lead Pollution* (February 23, 2012)
- Exhibit 14: *Take-Home Lead Exposure Among Children with Relatives Employed at a Battery Recycling Facility -- Puerto Rico, 2011*, Morbidity and Mortality Weekly Report (MMWR), Vol. 61, No. 47,  
<http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6147a4.htm> (last visited July 7, 2013).
- Exhibit 15: Asthma in Puerto Rico, Department of Health and Human Services, Center for Disease Control and Prevention (BRFSS 2008 data),

[http://www.cdc.gov/asthma/stateprofiles/Asthma\\_in\\_PR.pdf](http://www.cdc.gov/asthma/stateprofiles/Asthma_in_PR.pdf) (last visited July 7, 2013).

Exhibit 16: Puerto Rico Department of Health, Puerto Rico Asthma Prevalence & Mortality Fact Sheet (April 2010), [http://proyectoasmapr.org/uploads/GeoInfo\\_Mayo\\_6\\_2010.pdf](http://proyectoasmapr.org/uploads/GeoInfo_Mayo_6_2010.pdf) (last visited July 8, 2013).

Respectfully submitted,

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

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

I hereby certify that I served a copy of the foregoing Petition for Review, on this 22nd day of July, 2013, via USPS First-class Mail to the following:

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