

**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 IN SUPPORT OF MOTION FOR SUBMISSION OF A REPLY

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

September 20, 2013

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ARGUMENT

1. The Coalition Satisfies the Standard of Review for Granting a Motion for Submission of a Reply.

In addressing the legal standard for granting a motion for submission of a reply brief, Energy Answers implies that the only grounds for granting a reply brief are where the permit issuer “offers a new rationale, cites new authority, or relies on new information to support its decision making for the first time in its response brief.” See Opposition Papers at 1, citing *In Re Pio Pico Energy Ctr.*, PSD Appeal No. 12-04, 2013 WL 4038622, at 19 (Envtl. App. Bd. Aug. 2, 2013). The Coalition does not agree that those are the only instances where the granting of a reply brief is appropriate. Rather, the Board should exercise its discretion to allow parties objecting to a permit to challenge a preservation argument raised by a permit applicant for the first time in its response papers, in certain circumstances.

To make out a case for the submission of a reply, a petitioner must merely “state[] with particularity the arguments to which the Petitioner seeks to respond and the reasons the Petitioner believes it is both necessary to file a reply to those arguments and how those reasons overcome the presumption in the Standing Order.” *Id.* at *10. In *Pio Pico Energy*, the Board granted the Petitioners leave to submit a reply brief because EPA “for the first time in its response brief relied on additional information contained in the administrative record.” *See id.*

Similarly, in the present case, Energy Answers did two things for the first time in its response, which compel the opportunity for a reply. First, it relied on additional information in the administrative record (the alleged absence of comments that the air emissions modeling was inadequate, where the proposed incinerator would generate more lead emissions than the battery recycling facility). The Board should reject Energy Answers’ argument to the contrary. *See*

Opposition Papers at 2. Second, it cited a decision of the Board decided just two days before the Coalition filed its petition for review. Accordingly, the Board should grant the motion.

The Board should reject Energy Answers' suggestion that the issue of whether "the modeling of the air quality impact of lead emissions from the Project must be wrong because these emissions would be allegedly greater than the lead emissions from the Battery Recycling Company facility" cannot be raised in this proceeding. *See* Opposition Papers at 3. Energy Answers erroneously mischaracterizes the issues presented in this petition for review, in support of this strained argument.

The reality is that Energy Answers confuses the concept of issue preservation with the idea of offering evidence in support of a preserved issue. The offering of evidence that the lead emissions from the incinerator would be greater than the lead emissions from the battery recycling facility (which is responsible for the lead nonattainment problem) does not present an unpreserved issue. Rather, such evidence supports issues already preserved for appeal—that the air emissions modeling was inadequate and that the air emissions modeling did not address the cumulative impacts from the proposed incinerator and the battery recycling facility.

2. The Coalition should be allowed to file its proposed reply brief to respond to the erroneous assertion that it did not object to the adequacy of lead emissions modeling during the administrative proceeding.

The Coalition has preserved the issue of the adequacy of lead modeling because there were comments challenging the modeling of air emissions. *See* 40 C.F.R. § 124.19(a)(4)(ii) (2013). The Coalition provided comments that Energy Answers did not address the cumulative impacts from air emissions from the proposed incinerator and the battery recycling facility, which releases lead emissions. Petition for Review at 8 (citing extensively from the

administrative record). It also provided comments that Energy Answers did not adequately address lead emissions. *Id.* at 7 (citing extensively from the administrative record). These comments were sufficient to put the company on notice of the issue of the adequacy of air emissions modeling, in light of lead emissions.

Three sample comments are illustrative. First, one commenter made technical objections to the modeling under the AERMOD program:

Technically consider three aspects of the Aeromon¹ [sic] simulator. First there is no evidence of calibration and standardization program and subroutine regarding Puerto Rico in general. We know that has been evaluated and normalized to some states and countries, but there is no evidence that those standards hold true or work for Puerto Rico. You and I know that the plant passed Arecibo Cambalache modeling Aeromon twice, when he missed the first thermoelectric time to comply with the emission parameters, then everyone swore they had the best technology, and they met all applicable local, state and federal EPA guidelines. And the second time when they brought the new catalyst and returned to swear the same and also failed.

Petition for Review, Exhibit 1, Transcript of Hearing 2, August 25, 2012, 1 pm – 4 pm, at 31-32 (testimony of Javier Biaggi) (emphasis added). Therefore, the company was on notice of technical objections to the air emissions modeling.

There was a second comment regarding the failure of the air emissions modeling to consider impacts from the battery recycling facility, which releases lead emissions:

20. Lead emissions from the incinerator pose a major health concern since we already have too much lead in area homes and **the lead baseline used in the air modeling did not consider existing lead contamination problems in the community, such as the one created by Battery Recycling, Inc,** and Cambalache Thermoelectric Power Plant, as known by EPA. **The lead air modeling is completely flawed and inadequate for protecting the community.**

¹ Likely a misspelling or a mistranslation. This apparently refers to AERMOD, EPA's air emissions modeling program.

21. We require a continuous lead ambient air monitoring program to track the incinerator lead emissions in the community.

22. We need more blood lead monitoring and testing in our children immediately, due to Battery Recycling Inc.'s non compliance in Arecibo.

Petition for Review, Exhibit 1, Transcript of Hearing 5, August 26, 2012, 6 pm – 10 pm, at 14-17, 21 (Comment of Fernando Marquez read by Aleyda Centeno) (emphasis added). Based on this comment, the company was on notice of the issue that the modeling was inadequate because it failed to address the cumulative impacts of lead emissions from the proposed incinerator and the battery recycling facility.

Finally, there is a third comment regarding the fact that the proposed incinerator would worsen the lead air emissions problem created by the existing battery recycling plant:

I am also concerned that there are already two factories or plants or work areas near the plant. I'm talking about the battery recycling plant and the power plant in Cambalache. I understand that when tie[d] with the high incidence of cancer in Arecibo, putting a third plant that will produce toxic wastes and dioxins into the environment would be like saying in English "adding insult to injury." We are throwing salt into the wounds, we are adding more to this town, and this area is already receiving the disadvantages of these plants.

Petition for Review, Exhibit 1, Transcript of Hearing 4, August 26, 2012, 1 pm – 4 pm, at 30 (Comment by Jose Candelaria) (emphasis added). The commenter stated that putting the incinerator near the battery recycling facility would be "adding insult to injury" and "throwing salt into the wounds" of the community. When the Coalition's petition for review provides a quantitative comparison of the lead emissions from the proposed incinerator and the battery recycling facility, it offers quantitative evidence in support of issues that were already preserved.

Given these comments, Energy Answers' suggestion that "EPA did not address comments regarding deficiencies in the lead emissions modeling" is misleading. The Coalition raised objections to air modeling, both for technical reasons and for failure to include cumulative impacts from the proposed incinerator and the battery recycling facility, which releases lead emissions. EPA responded to those objections. *See* Response to Comments, 83-85, 100-101, 105, 108. In their brief, the Coalition challenges the adequacy of the model, in light of lead emissions. Petition for Review at 12-18.

The Coalition is entitled to seek review on the merits of these arguments. *See In re EcoEléctrica, L.P.*, PSD Appeal Nos. 96-8 and 96-13, 7 E.A.D. 56, 63 n.9 (Envtl. App. Bd. 1997) (rejecting Region II's argument that issues raised by an environmental group in Puerto Rico in a petition for review had not been preserved for review). In the petition for review in *In re EcoEléctrica*, the environmental organization asserted that the existing ambient air quality data "did not satisfy certain standards of data quality, data currentness, and monitor location . . ." *Id.* at 63. In response, Region II argued that there had not been comments on "when the data were originally collected," which would relate to the issue of currentness. *Id.* at 63 n.9. The Board rejected EPA's argument because "the issue of data currentness is so closely related to other challenges to the existing air quality data that were properly preserved for review . . . and that the Region has had an opportunity to address." *Id.* As a result, the Board proceeded to the merits of the issue.

The Board should reach the same result here. EPA and Energy Answers had an opportunity to address objections to the air emissions modeling in light of lead emissions from the battery recycling facility. During the permit application process, EPA required the company to investigate the cumulative effects of emissions of air toxics in Arecibo. *See* Petition for

Review at 19, citing EPA Letter to Arcadis, dated October 11, 2011, at 2. In response, Energy Answers identified five Toxic Release Inventory (TRI) reporting facilities in Arecibo. *See* Petition for Review at 19, citing Arcadis Letter to EPA dated October 26, 2011, at 5. In its petition for review, the Coalition pointed out that there are not five, but at least twelve TRI reporting facilities in Arecibo, and that one of them—the battery recycling facility—reported lead emissions. Petition for Review, Exhibit 9. It also provided copies of their TRI reports to describe the situation of lead emissions in the community. *Id.* Energy Answers cannot claim that it did not have an opportunity to address evidence regarding the quantitative amount of lead emissions from the proposed incinerator, as compared to those from the battery recycling facility. Moreover, EPA and Energy Answers had an opportunity to address these issues again in opposition to this motion.

The Board should reject Energy Answers' cited authorities. One case actually supports the Coalition's position on this motion. *See* Opposition Papers at 3-5, citing *In re ConocoPhillips Co.*, 13 E.A.D. 768, 787 (Env'tl. App. Bd. 2008). In that case, the Board actually rejected a preservation challenge to an argument that the EPA's BACT analysis was not adequate. *See id.* In that case, petitioners had commented on the inadequacy of the BACT analysis. EPA and the company attempted to mischaracterize the issue in the petition for review as a "failure to conduct any BACT analysis whatsoever." *Id.* The Board rejected that effort to mischaracterize the nature of the comments. Just as petitioners in that case preserved the issue of the adequacy of BACT, the Coalition here has preserved the issue of the adequacy of the air emissions modeling.

Moreover, legal authorities finding that issues were not preserved are distinguishable. *See id.* at 800 (comments expressing a general concern over greenhouse gas emissions were not

specific enough to preserve a challenge over a BACT limit for greenhouse gases); *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 395-96 (Envtl. App. Bd. 2007) (generalized concern over monitoring is not particularized enough to preserve issue of federal enforceability of Owner Requested Limit). In the present case, the Coalition did not just merely comment on a general concern regarding lead emissions, but presented specific concerns over the model's assessment of ambient impacts. *See* Petition for Review, Exhibit 1, Transcript of Hearing 2, at 31-32 (testimony of Javier Biaggi). They also commented on the failure to include cumulative impacts from the proposed incinerator and the battery recycling facility, which releases lead emissions. Therefore, the evidence of comparatively greater lead emissions from the proposed incinerator relates to issues already preserved.

Nor is the Coalition attempting to present a new specific issue in its petition for review. *See* Opposition Papers at 3, citing *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 235 (Envtl. App. Bd. 2000) (comments regarding averaging times and sample durations are not sufficient to preserve a challenge to stack test methods or conditions); *In re Russell City Energy Center, LLC.*, No. 10-73870, 2010 EPA app. LEXIS 45, 69-71 (Envtl. App. Bd. Nov. 18, 2010), *aff'd on other grounds Chabot-Las Positas Community College District v. EPA*, 482 Fed. Appx. 219, 220-21 (9th Cir. 2012) (petitioner could not preserve a challenge to emissions calculations based on one model, when petitioner had raised a challenge in a comment based on another model). Again, the Coalition is offering evidence in favor of issues already raised and preserved.

3. In the interests of fundamental fairness, the Board should allow the Coalition the opportunity to address the decision in *In re Sierra Pacific Industries* cited by Energy Answers, decided two days before the petition for review was filed.

The very case cited by Energy Answers for the applicable standard of review compels the granting of this motion:

The Board has held that when a permit issuer offers a new rationale, **cites new authority** or relies on new information to support its decision making for the first time in its response brief, such circumstances meet the high threshold required to overcome the presumption against filing a reply brief.

See Opposition Papers at 1, citing *In Re Pio Pico Energy Ctr.*, 2013 WL 4038622, at *10 (emphasis added). The Board's decision in *In re Sierra Pacific Industries* was rendered just two business days prior to the Coalition filing its petition for review. *In re Sierra Pacific Industries*, PSD Appeal Nos. 13-01, 13-02, 13-03, 13-04 (Envtl. App. Bd. July 18, 2013). Reliance on this new authority is a compelling reason for overcoming the presumption against filing a reply.

The Board should reject other authorities cited by Energy Answers, which arguably relate to the merits of the petition for review, rather than to the motion for submission of a reply brief. Opposition Papers at 5-6, citing *In re Woodkin, Inc.*, 7 E.A.D. 254, 269 (Envtl. App. Bd. 1997); *In re USGen New England, Inc. Brayton Point Station*, 11 E.A.D. 525, 557 (Envtl. App. Bd. 2004); *In re Peabody Western Coal Co.*, CAA Appeal No. 12-01, slip op. at 17 (Envtl. App. Bd. Jan. 25, 2013); *In re TVA v. Whitman*, 336 F.3d 1236 (11th Cir. 2003). The fact that Energy Answers disagrees with the Coalition's petition on the merits is not a reason to deny the Coalition the opportunity to address a very recent decision in a reply brief. Whether the *In re Sierra Pacific Industries* decision cites earlier decisions is beside the point. See Opposition Papers at 5-6. That is the nature of all case law. The Coalition should be allowed to respond to Energy Answers' argument about the decision.

For the reasons set forth above, the Coalition respectfully requests that this motion be granted.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

This brief contains a total of 2,555 words, according to the word-processing system.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Reply in Support of Motion for Submission of A Reply, on this 20th day of September, 2013, via USPS First-class Mail to the following:

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