

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

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In re:)
Energy Answers Arcibo, LLC)
Arcibo Puerto Rico Renewable)
Energy Project)
)
)

PSD Appeal Nos. 13-05, 13-06, 13-07,
13-08, and 13-09

EPA REGION 2's MOTION FOR A LIMITED VOLUNTARY REMAND

INTRODUCTION

The D.C. Circuit recently issued a decision, *Center for CO₂ Biological Diversity v. EPA*, 722 F.3d 401 (D.C. Cir. July 12, 2013), vacating EPA's *Deferral for Emissions from Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs* ("Deferral Rule"), 76 Fed. Reg. 43,490 (July 20, 2011). Due to Region 2's application of the now-vacated Deferral Rule to support the permit at issue in this matter, Region 2 moves for a limited voluntary remand to enable Region 2 to revise the emissions limitations for greenhouse gases ("GHGs") in the PSD permit issued to Energy Answers Arcibo, LLC ("Energy Answers" or "EA") so that the permit conditions addressing this pollutant are consistent with the court decision. Furthermore, in consideration of the statutory requirement for timely action on PSD permit applications, the narrow scope of the proposed permit revision, and the previous opportunity provided for public comment on the Best Available Control Technology ("BACT") for GHGs, Region 2 requests that the Board issue a narrow remand order that directs Region 2 to issue the revised permit attached to this motion expeditiously as part of its final permit decision under 40 C.F.R. § 124.19(l)(2) without requiring an additional opportunity for public notice and comment.

Region 2 respectfully requests that, upon granting this motion, the Board simultaneously deny review of all other issues raised in the petitions for the reasons set forth in Region 2's Response to Petitions for Review.

In accordance with 40 C.F.R. § 124.19(f)(2), Region 2 attempted to ascertain whether the other parties concur or object to this Motion. Energy Answers informed EPA that it does not oppose the Motion, although it reserves the right to file a response based on its review of the Motion. The Coalition informed EPA that it will reserve its position on the Motion until counsel

for the Coalition has an opportunity to review it. Region 2 has not received a response from the other Petitioners, who were provided notice about the Motion via e-mail on November 8, 2013.

BACKGROUND AND SUMMARY OF ISSUES

After Region 2 issued a final PSD permit to Energy Answers on June 11, 2013 under 40 C.F.R. 124.15(b), the United States Court of Appeals for the District of Columbia Circuit issued its opinion in *Center for Biological Diversity*. The opinion held that EPA had failed to provide a valid basis for its regulation temporarily exempting from the PSD and Title V permitting programs emissions of carbon dioxide from biogenic sources. 722 F.3d at 412. By way of remedy, the court ordered that this regulation be vacated, but in accordance with court rules, deferred issuance of the mandate necessary to make the vacatur final and effective. *In re Sierra Pacific Industries*, PSD Appeal Nos. 13-01, 13-02, 13-03, & 13-04 , slip op. at 65-66 (EAB July 18, 2013) 15 E.A.D. ____.

Because it was in effect at the time of its final permit decision under 40 C.F.R. 124.15(b), Region 2 applied the Deferral Rule to determine the form of the emissions limitations for greenhouse gases included in the PSD permit issued to Energy Answers. RTC at 36. Energy Answers' permit application provided information on emissions and control strategies for all forms of greenhouse gases emitted by the facility, including the biogenic CO₂ emissions exempted from regulation under the Deferral Rule. Based on this information, Region 2 examined available pollution control strategies for all GHGs and prepared a draft permit containing limits based on the judgment that BACT for GHG was combustion of municipal solid waste and high thermal efficiency. No public commenters questioned Region 2's determination that this control technique was BACT for GHGs. However, Region 2 received one comment

from Osvaldo Rosario regarding the exclusion of biogenic CO₂ emissions from the GHG emissions limit in the draft permit. Mr. Rosario stated that EPA should have included the biogenic CO₂ emissions in EA's annual GHG emissions limit, arguing that the effect on climate change is the same whether or not the CO₂ emissions are biogenic or non-biogenic. RTC at 36. EPA responded in the RTC by explaining that EA's biogenic CO₂ emissions were not included in the GHG emissions limit due to the Deferral Rule but that EA's non-biogenic CO₂ emissions were included and subject to regulation under the PSD program because EA's non-biogenic CO₂ emissions exceeded the applicability levels set forth in EPA regulations. *Id.*

Five parties filed Petitions for Review under 40 C.F.R. § 124.19 at various times through July 23, 2013. Under section 124.19(l), final agency action on the PSD permit does not occur until agency review procedures under this section are exhausted and Region 2 issues a final permit decision. Region 2 submitted its Response to Petitions for Review on August 12, 2013, responding to all issues raised in the Petitions except the issue raised by The Coalition of Organizations Against Incinerators (La Coalicion de Organizaciones Anti-Incineracion) concerning whether the permit must be remanded to address the biogenic CO₂ emissions following the D.C.Circuit's decision in *Center for Biological Diversity*. The only individual who commented on this issue, Mr. Rosario, is one of the parties in the Coalition. Attachment #1. Region 2 stated in the Response to Petitions for Review that it was premature to respond to the biogenic CO₂ issue because proceedings before the D.C. Circuit were not complete and it was unknown whether EPA or other parties to the *Center for Biological Diversity* matter would seek rehearing or relief from the remedy ordered by the court.

On August 26, 2013, the D.C. Circuit granted a request from intervenors in *Center for Biological Diversity* to extend the deadline to petition for rehearing until 30 days after the

Supreme Court's decision on pending petitions for a writ of certiorari in *Utility Air Regulatory Group v. EPA*, Sup. Ct. Nos. 12-1146, *et al.* These petitions sought review of a number of issues raised by the D.C. Circuit's opinion upholding EPA's regulation of greenhouse gas emissions, including the treatment of GHG emissions under the PSD program. On October 15, 2013, the Supreme Court granted six of the petitions for certiorari, all as they related to the treatment of GHG emissions under the PSD program. Supreme Court Order List at 2-3 (October 15, 2013). On October 22, 2013, the intervenors in *Center for Biological Diversity* filed an additional request to extend the deadline for petitions for rehearing until 30 days after the Supreme Court's disposition of Case No. 12-1146 (and consolidated cases). On November 4, the Petitioners in *Center for Biological Diversity* filed a cross-motion for immediate issuance of the mandate. On November 14, 2013, the D.C. Circuit granted the motion for an extension but denied the motion for issuance of the mandate. Attachment #5. As a result, notwithstanding Region 2's expectation noted in its Response that it would soon have more information regarding when the mandate might issue or the nature of the requested relief, it now appears that Region 2 might not have certainty around the *Center for Biological Diversity* proceedings for some time.

ARGUMENT

In the interest of administrative efficiency and closure, Region 2 is seeking a limited voluntary remand to expedite issuance of a final permit decision that is consistent with the D.C. Circuit's opinion in *Center for Biological Diversity*. Although proceedings in the latter case are not necessarily complete at this time, awaiting resolution of any rehearing process in the D.C. Circuit could prolong this proceeding before the EAB and otherwise delay final agency action on a permit application that has been pending for an extended period of time. The revisions to the

PSD permit for Energy Answers discussed herein facilitate resolution of this permit appeal by providing the relief requested in public comments and eliminating the issue raised by Petitioners based on the *Center for Biological Diversity* case. Further delay to the proposed construction project can be avoided if Region 2 is permitted to revise the permit as part of the Region's final permit decision without providing an additional opportunity for public notice and comment. Under the circumstances present here, a narrow remand directing Region 2 to revise the permit without requiring an additional public comment opportunity balances Congressional direction that EPA issue PSD permits expeditiously after providing an adequate opportunity for public participation and shows respect for the opinion and judgment of the District of Columbia Circuit, as it presently stands, pending any rehearing proceedings and issuance of the mandate.

As noted by the Board in this matter in its *Order Granting In Part Extension of Time to File Petition for Review*, at 3 (July 11, 2013), "PSD permit appeals are time-sensitive" in light of the one year deadline in Section 165(c) of the Clean Air Act, 42 U.S.C. § 7475(c). At the same time, EPA's regulations at 40 C.F.R. Part 124 provide significant public participation requirements for PSD permits including, among others, the opportunity for public comments and public hearings, and a response to public comments. *Id.* at §§ 124.10, 124.11, and 124.17.

Region 2 recognizes the importance and value of a robust public process. That is why, in this permit action, the Region's public participation process surpassed all of its prior efforts to involve the public and translate documents. *See Region 2 Response to Petitions for Review* at 24-25. However, this robust public participation process required significant amounts of time to adequately engage the public and translate documents. This contributed to Region 2's review of this permit extending beyond the statutory one-year deadline in Section 165(c) of the Clean Air Act for EPA to grant or deny the permit application. 42 U.S.C. § 7475(c). This matter is now at

the two-year mark following Region 2's completeness determination.¹ Given the Region's experience with prior permit actions, it is reasonable to assume an additional public comment process could delay the final permit decision an additional 6 months.²

The revisions that Region 2 proposes to the CO₂ limits in the permit are directly responsive to a public comment received in the robust public participation process already conducted. Furthermore, when the opportunity was earlier provided, no commenters expressed concern with the control technique for either non-biogenic or biogenic CO₂. The record supports this BACT decision on the biogenic emissions.

I. **A Limited Voluntary Remand is An Appropriate Remedy**

The Board has broad discretion to order a limited voluntary remand, and nothing in 40 C.F.R. Part 124 narrows that discretion. *In re Desert Rock Energy Company, LLC*, PSD Appeal Nos 08-03 thru 08-06, slip op. at 13 (EAB Sept. 24, 2009). The Board's authority to grant a request for a limited voluntary remand is distinguishable from a Region's unilateral authority to withdraw permits. *Id.* at 15. Region 2 is not seeking a withdrawal in this matter. Rather, the Region is asking the Board to exercise its discretion to remand the permit for the limited purpose of allowing Region 2 to amend the permit, as part of the final permit decision under 40 C.F.R. 124.19(l), to include the biogenic CO₂ emissions in the PSD permit, consistent with *Center for Biological Diversity*. If the request is granted, Region 2 will substitute the attached permit language containing revised GHG limitations applicable to biogenic CO₂

¹ Region 2 does not concede here that it is necessary to complete review before the EAB to satisfy its mandatory duty under Section 165(c) of the CAA. However, Region 2 recognizes that one District Court has reached the conclusion that this duty is not satisfied by a final permit decision under 40 C.F.R. 124.15(b), but rather requires a final agency action under what is now 124.19(l) of EPA's regulations. *Avenal Power Ctr., LLC v. U.S. Envtl. Prot. Agency*, 787 F. Supp. 2d 1 (D.D.C. 2011). Given the chance that another District Court could reach a similar conclusion, it is prudent that EPA endeavor to arrive at a final agency action on this permit expeditiously.

² Assuming further that the Board's remand order does not require appeal of the remand decision to exhaust administrative remedies. 40 C.F.R. 124.19(l)(2)(iii).

emissions (Attachment # 2) and issue the final permit decision. *See* 40 C.F.R. §124.19(1)(2)(iii). (Final agency action occurs “upon completion of the remand...unless the Environmental Appeals Board’s remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.)

II. Public Review is Not Required Upon Granting A Limited Voluntary Remand In this Action

It is within the discretion of the Board to not require further public review in this permit matter. The changes that EPA would make to the final permit on remand involve increasing the GHG emissions limit to include the biogenic CO₂ emissions. The procedures for measuring these emissions and determining the relative share of the biogenic and non-biogenic fractions have already been identified in the existing final permit,³ which currently requires a simple subtraction of the measured⁴ biogenic portion from the total (biogenic plus non-biogenic) measured⁵ CO₂ emissions to obtain the non-biogenic portion consistent with EPA’s Deferral Rule. Permit at 47, Condition XIII.A.3.c. Thus, the permit already requires monitoring and identification of the biogenic portion and, therefore, Region 2 only needs to revise the permit to remove the requirement to separately measure the biogenic CO₂ emissions and remove the conditions requiring subtraction of the biogenic emissions. These changes are simple accounting revisions. The amount of actual CO₂ emissions will not change as a result of this permit revision; rather, a greater portion of the actual total CO₂ emissions, already subject to monitoring, will now be counted.

³ The final PSD permit was provided to the Board as an Excerpt of the Record, ER # 1, attached to Region 2’s Response to Petitions.

⁴ The biogenic CO₂ emissions portion is measured every calendar quarter. Permit at 47, Condition XI. A.11.c

⁵ Total CO₂ emissions are measured by continuous emissions monitoring continuous system (CEMS). Permit at 45, Condition XII. 1.c

EPA's regulations at 40 C.F.R. Part 124 do not address modifications or revisions of PSD permits. 40 C.F.R. §124.19(g)(1). No specific requirements exist in Part 124 for an additional public comment period to make the kind of permit revision contemplated by Region 2 under these particular circumstances where there has been an intervening court decision. The Board has discretion to ensure the efficient adjudication of permit proceedings. 40 C.F.R. § 124.19(n). ("In exercising its duties and responsibilities under this Part, the Environmental Appeals Board may do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal...."). The circumstances presented here, specifically, the limited nature of the comments on biogenic emissions, Region 2's ability to address the one comment on this issue⁶ and satisfy the commenter's concerns via a limited remand, Energy Answers' detailed BACT analysis which includes biogenic emissions, and concerns about meeting EPA's obligation to make timely decisions consistent with the one-year deadline in 42 U.S.C. § 7475(c), provide a sound basis for not requiring an additional public comment opportunity upon limited remand.

By including the biogenic CO₂ emissions in EA's annual GHG emissions limit upon limited remand, Region 2 would be providing precisely the relief sought by Mr. Rosario in his comment. Given that no other public comments raised concerns about the exclusion of biogenic CO₂ emission from the permit limits, it is not apparent that an additional opportunity for the public to comment on this aspect of the BACT limitations for GHGs would add substantial value.

Furthermore, no commenters addressed Region 2's selection of the CO₂ control technique even though the record contains an analysis of control techniques for both biogenic and non-

⁶ Region 2's attached draft revised conditions will satisfy Mr. Rosario request for an annual limit that includes biogenic CO₂ emissions. EPA will also include the biogenic CO₂ emissions portion in the existing permit short term emission limit expressed as pounds of CO₂ equivalent per megawatt-hour. Permit at 35, Condition X.14.b

biogenic CO₂. EA's GHG emissions BACT analysis ranked carbon capture and sequestration (CCS)⁷ as the first option in the Top-Down process and utilization of biomass fuel and maximizing energy efficiency (i.e., high thermal efficiency)⁸ as the second and third options. Attachment #3 at 5.⁹ In Step 4 of the Top-Down analysis, EA eliminated CCS based on costs. In doing so, EA considered the total costs of combined (or total) biogenic and non-biogenic CO₂ emissions because it is not possible to remove only the non-biogenic emissions in the CCS process. *Id.* at 20, Table 3.2.3. EA concluded that the \$57,608,112 cost per year of CCS for the combined biogenic and non-biogenic emissions would be prohibitive. *Id.* Further, EA concluded that both remaining options, respectively, combustion of municipal solid waste and high thermal efficiency¹⁰ are economically feasible options for minimizing the project's GHG emissions. *Id.* at 21. In reaching this conclusion, EA examined both biogenic and non-biogenic emissions.¹¹ *Id.* During the public comment period, no commenter challenged EA's BACT conclusions regarding CCS and MSW combustion/high thermal efficiency with respect to either the non-biogenic or biogenic emissions even though the information was clearly in the record. Moreover, given EA's consideration and documentation of the biogenic CO₂ emissions in the

⁷ CCS can only remove CO₂ emissions, and not other GHG (i.e., methane, and N₂O) emissions. However, CO₂ emissions represent more than 98 % of the project's GHG emissions.

⁸ A high thermal efficiency of EA's municipal waste combustors represents a highly efficient combustion process, which in turn, requires less fuel to generate the same amount of electricity.

⁹ Portions of the document contained in this attachment, Supplemental to Application: Additional Information for the PSD Application, dated September, 2011, were already included as an Excerpt of the Record, # 21, in EPA's Response to Petitions. However, the attached pages were not included in the excerpt to EPA's Response to Petitions so they are now included as Attachment #3 of this Motion.

¹⁰ The Permit at 35, Condition X.A.14.c establishes a heat rate (or thermal efficiency) limit for EA's project of 13.25 million British Thermal Units (MMBTU) per megawatt hour (MW-hr). The existing 13.25 MMBTU/MWhr thermal efficiency limit will remain unchanged after including the CO₂ biogenic portion in the project's allowable GHG emissions.

¹¹ EA also provided detailed information about EA's biogenic CO₂ emissions. Attachment #3; *see also* Attachment #4 (Supplemental Project and BACT information-E-mails. E-mail dated November 30, 2011, from Energy Answers Consultant (Kevin Scott) to EPA (Viorica Petriman): information related to the GHG emissions, AR I.B.6.7.)

LIST OF ATTACHMENTS

(With Citations to Certified Index to the Administrative Record ("AR"))

1. August Public hearings Sessions-Translations including the List of the Speakers, dated August 25, 2012, 1-4 PM, AR IX.2 (pages 1-2, 13-19, and 89-94 only)
2. Draft Revised Permit [(permit conditions (Enclosure 1)], dated October 28 , 2013
3. Supplemental to Application: Additional Information for the PSD Application, dated September, 2011, AR I.B.3.a (pages 1,3, i, pages 1-28 of Appendix B, Energy Answers-GHG BACT Emissions Calculations, Table 10.1, 10.2, 11 through 16 of Appendix C, and Exhibit A, Table 1 to 5)
4. Supplemental Project and BACT information-E-mails/E-mail dated November 30, 2011,from Energy Answers Consultant (Kevin Scott) to EPA (Viorica Petriman): information related to the GHG emissions, AR I.B.6.7
5. Order, Case No. 11-1101 (D.C. Cir. Nov. 14, 2013).

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing EPA Region 2’s Motion for a Limited Voluntary Remand was served via regular mail on:

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