

**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, 13-06, 13-07, 13-08

MOTION TO DISMISS FLORES AND CENTENO PETITION FOR REVIEW

EPA Region 2 respectfully requests that the Environmental Appeals Board (“EAB” or “Board”) dismiss the Petition for Review of Waldemar Natalio Flores Flores and Aleida Centeno Rodriguez, filed July 23, 2013, in the above captioned matter (“Flores and Centeno Petition for Review”). EPA Region 2 issued the final Prevention of Significant Deterioration (“PSD”) permit on June 11, 2013, for the construction of the Arecibo Puerto Rico Renewable Energy Project.

Petitions for review of a final PSD permit “must be filed with the Clerk of the Environmental Appeals Board within 30 days” after the Regional Administrator serves notice of permit issuance. 40 C.F.R. § 124.19(a)(3) (2013). “A petition is filed when it is received by the Clerk of the [EAB]...”. *Id.*; 40 C.F.R. § 124.19(i) (“A document is filed when it is received by the Clerk of the [EAB]”). EPA Region 2 issued the PSD permit on June 11, 2013; therefore, any and all petitions for review of that permit must have been filed by July 11, 2013. However, whenever a party is required to act within a prescribed time period after service of notice by mail, three days shall be added to the prescribed time. 40 C.F.R. § 124.20(d). At most, this would extend the filing deadline to July 15, 2013 (due to the weekend) for a petitioner who

received notice by mail. Here, the EAB docket indicates that the Clerk of the EAB received the Flores and Rodriguez Petition for Review on July 23, 2013, well beyond both the actual filing deadline of July 11, 2013 and a possible deadline of July 15, 2013.

Furthermore, EPA Region 2 provided clear instructions about the filing procedures. The letter that served notice on the interested parties states that “any petition for review under this part must be made within thirty (30) days of the service of notice of the final permit decision.” (Exhibit 1). The letter also refers the interested parties to 40 C.F.R. § 124.19 and the Board’s website at <http://www.epa.gov/eab> for “more information on the required contents of the petition and procedures for appeal.” *Id.* EPA Region 2 also included the correct addresses for filing petitions by regular mail and hand-carrier/Federal Express. *Id.* Thus, Petitioners were provided with the information necessary to file their petitions in a timely manner.

The Board strictly construes threshold procedural requirements, such as the timely filing of a petition. *See Order Granting in Part Extension of Time to File Petition for Review* (July 11, 2013) (Docket No. 6) (citations omitted). Furthermore, the “Board’s strict adherence to the appeal deadline prescribed by the regulations is particularly warranted in matters involving the review of PSD permits because, as the Board has previously explained, PSD permits are time-sensitive.” *Id.* (footnote omitted). The Board has observed that it is Petitioner’s responsibility to ensure that filing deadlines are met, and the Board will generally dismiss petitions for review that are received after a filing deadline. *In re: AES Puerto Rico*, 8 E.A.D. 324, 329 (EAB 1999) The Board will relax a filing deadline only where specific circumstances exist. *Id.* The Board’s docket does not indicate that Petitioner has filed any document with the Board seeking leave for additional time or that otherwise attempts to demonstrate the existence of special circumstances in this case.

Region 2 received a copy of the Petitioners' Petition for Review during the week of July 15 and contacted Ms. Centeno by e-mail on July 18 after noticing that the Board had not posted the petition on the Board website as filed. (Exhibit 2). The e-mail informed Ms. Centeno that it appeared that the Board had not received her Petition.¹ Based on the Board website, which was updated sometime after close of business on Friday, July 26, it appears that the Petitioners did not act expeditiously, even after being alerted to the problem, because the docket indicates a July 23 filing date. The Board has previously dismissed as untimely a petition that was initially directed to the Region rather than the Board. AES Puerto Rico, 8 E.A.D. at 329-330.

Where no good cause has been shown to relax the deadline, the Board will adhere to the 30-day deadline for petitions for review. *See Order Granting in Part Extension of Time to File Petition for Review* (July 11, 2013) (Docket No. 6) (citations omitted). Earlier in this instant case, the Board granted a five business day extension to file a petition to the Coalition of Organizations against Incinerators ("the Coalition"). However, unlike here, the Coalition moved for an extension of time to file. Moreover, the Board granted an additional five days due, in part, to the Independence Day Holiday and the Agency-wide furlough day due to sequestration. *See See Order Granting in Part Extension of Time to File Petition for Review* (July 11, 2013) (Docket No. 6). None of those factors are present here.

EPA Region 2 has sent email messages to all parties and/or counsel for parties in this matter asking whether they concur or object to this motion. To date, the Permittee, Energy Answers Arecibo, LLL, does not object to this motion. In addition, the Coalition advised it objects to the motion. Others have not yet responded.

¹ EPA also sent an e-mail to Mr. Flores at the same time but it was returned as unreceived.

In conclusion, and for all the foregoing reasons, EPA Region 2 respectfully requests that the Board grant this motion and dismiss the Flores and Rodriguez Petition for Review.

Date: July 31, 2013

Respectfully Submitted,

/S/

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Arecibo Puerto Rico Renewable)
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PSD Appeal Nos.13-05, 13-06, 13-07, 13-08

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Dismiss was served via regular mail on:

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Aleida Centeno Rodriguez
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Arecibo, Puerto Rico 00612

By: / S /

July 31, 2013 at New York, New York

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

**EXHIBITS TO MOTION TO DISMISS
FLORES AND CENTENO PETITION FOR REVIEW**

EXHIBIT 1



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

JUN 11 2013

Re: Notice of a Final Decision to Issue a Prevention of Significant Deterioration (PSD) of Air Quality Permit for Energy Answers Arecibo Puerto Rico Renewable Energy Project

Dear Interested Party:

This letter is to inform you of the U.S. Environmental Protection Agency's (EPA) final decision regarding the approval of the Prevention of Significant Deterioration (PSD) of Air Quality permit for the Energy Answers Arecibo Puerto Rico Renewable Energy Project.

On May 9, 2012, EPA requested public comment on our proposal to issue a PSD permit authorizing the construction and operation of a new resource recovery facility (Energy Answers Arecibo Puerto Rico Renewable Energy Project), which consists of two 1,050 tons per day (each) refuse-derived fuel municipal waste combustors, a 77 megawatt steam turbine electrical-generator, and ancillary equipment, in Barrio Cambalache, Arecibo, Puerto Rico.

During the public comment period for the proposed permit, which was originally scheduled to last 30 days, but which was extended to August 31, 2012, EPA received written comments ("comment letters") and oral comments given at the six public hearings sessions held between June 25, 2012 and August 27, 2012 regarding the proposed PSD permitting action. EPA carefully reviewed all the comments, prepared responses to those comments, and made changes to the draft permit as appropriate. The responses to the comments, including reference to all changes to the permit, can be found in the Responses to Comments document. This final permit also includes EPA initiated revisions to the dioxin and furans emissions performance tests frequency and to the hydrogen chloride emissions monitoring requirements.

EPA concludes that the final permit meets all applicable requirements of the PSD regulations at 40 CFR § 52.21 and the Clean Air Act (the Act). The final permit and the Responses to Comments document are available on the EPA Region 2 website at <http://www.epa.gov/region02/air/permit/energyanswers>. Other key documents relevant to the PSD application and the preliminary determination to approve the PSD permit are on the Interamerican University-Arecibo Campus website at <http://www.arecibo.inter.edu/reserva/epa/epa.htm#>.

The complete Administrative Record for this PSD permit decision, including final permit, Responses to Comments document, comment letters, transcripts from the public hearings, and additional supporting information related to EPA's final permit decision can be viewed in person, by visiting either one of the addresses below, between 9:00 AM and 4:00 PM, Monday through Friday, excluding holidays. Please call the EPA offices at the numbers listed below to arrange a visit at least 24 hours in advance.

Internet Address (URL) • <http://www.epa.gov>

Recycled/Recyclable • Printed with Vegetable Oil Based Inks on Recycled Paper (Minimum 50% Postconsumer content)

Electronic copies of the final permit and Responses to Comments document are also available upon request in writing or by e-mail, to either one of the addresses below:

U.S. Environmental Protection Agency
Region 2
Permitting Section
Air Programs Branch
290 Broadway
New York, New York 10007
Attention: Mr. Steven C. Riva
(212) 637-4074
riva.steven@epa.gov

U.S. Environmental Protection Agency
Region 2
Caribbean Environmental Protection Division
City View Plaza III-Suite 7000
#48 Rd. 165 km 1.2
Guaynabo, PR 00968-8069
Attention: Mr. Jose Font
(787) 977-5870
font.jose@epa.gov

This final permit decision may be challenged under the Consolidated Permit Regulations, codified at 40 CFR Part 124, that apply to EPA's processing of this permit action. Specifically, 40 CFR § 124.19 establishes the following procedures for administrative appeal of the final PSD permit decision. Any person who filed comments on the draft permit or participated in the public hearings may petition the Environmental Appeals Board (EAB) in Washington, D.C. to review any condition of the final permit. In addition, any person who failed to file comments or participate in the public hearing on the draft permit, may petition for review only to the extent of the changes from the draft permit to the final permit.

Any petition for review under this part must be made within thirty (30) days of the service of notice of the final permit decision. The petition for review shall include a statement of the reason (s) for requesting the review, including a demonstration that any issues being raised were raised during the public comment period to the extent required by the regulations at 40 CFR Part 124 and a showing that the conditions in question are based on (1) a finding of fact or conclusion of law which is erroneous, or (2) an exercise of discretion or an important policy consideration which the EAB should, in its discretion, review.

Please see 40 CFR§ 124.19 and visit <http://www.epa.gov/eab/> for more information on the required contents of the petition and procedures for appeal of a PSD permit decision to the Environmental Appeal Board.

All persons petitioning for administrative review must file the original and one (1) copy of the petition with EAB at the following address:

For Regular Mail:
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1200 Pennsylvania Avenue, NW
Mail Code 1103M
Washington, DC 20460-0001

For Hand-Carrier and Federal Express Mail:

Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
U.S. EPA East Building, Room 3334
Washington, DC 20004
Phone number: (202) 233-0122

Any petitions for review filed with the EAB must also be served on EPA Region 2 and the permit applicant at the following addresses pursuant to the filing and service requirements at 40 CFR § 124.19(i) (as amended January 25, 2013):

John Filippelli, Director
Clean Air and Sustainability Division
U.S. EPA Region 2
290 Broadway
New York, New York 10007

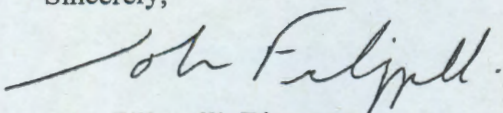
Mr. Patrick Mahoney, President
Energy Answers, LLC
79 North Pearl Street
Albany, NY 12207

For purposes of judicial review under the Act, final Agency action does not occur until after administrative review procedures are exhausted and EPA Region 2 issues a final permit decision. Notice of the Agency's final action with respect to this permit will be published in the Federal Register. Judicial review of this final action is available by filing a petition for review in the United States Court of Appeals for the appropriate circuit within sixty (60) days of the date of the Federal Register notice. Only those persons who petitioned EPA under the administrative procedures of 40 CFR Part 124 may petition for review in the Court of Appeals. Under Section 307(b) of the Act, a final Agency action shall not be subject to judicial review in civil or criminal proceedings for enforcement.

Since comments requesting changes to the draft permit were received and changes were made to the draft permit, this final permit will become effective thirty (30) days after the service of notice, unless review is requested under 40 CFR §124.19. If a petition for review of the final Agency action is filed, the permit will not become effective until after the Environmental Appeals Board renders a decision on the petition.

If you have any questions regarding this letter, please call Mr. Steven C. Riva, Chief, Permitting Section, Air Programs Branch, at (212) 637-4074.

Sincerely,



John Filippelli, Director
Clean Air and Sustainability Division

cc: Luis Sierra, Puerto Rico Environmental Quality Board
Jose Font, EPA Region 2, Caribbean Environmental Protection Division

EXHIBIT 2

Siegel, Joseph

From: Siegel, Joseph
Sent: Thursday, July 18, 2013 6:38 PM
To: 'karsicamontuna@yahoo.com'; 'wnff1949@hotmail.com'
Cc: Doster, Brian
Subject: Petition to EPA Environmental Appeals Board

Dear Ms. Centeno Rodriguez and Mr. Flores Flores:

EPA Region 2 is in receipt of your Pétition in the Energy Answers PSD permit matter. I noticed that your Petition is not posted on the EPA Environmental Appeals Board website. I attempted to contact the Clerk of the Board by phone to find out if the Board had received your petition but have not connected with them (although I did leave a message informing them that we had received the petition).

In your petition, you certify that you submitted the petition by e-mail, but it appears that there may have been a problem with the filing because the Board has not yet posted it. You might want to contact the Clerk of the Board to inquire about the Petition and provide information regarding your e-mail filing. The Clerk of the Board's contact information is as follows:

e-mail: Durr.Eurika@epa.gov
Tel.202-233-0122

Sincerely,

Joseph A. Siegel
Senior Attorney
U.S. EPA Region 2
290 Broadway
New York, NY 10007
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fax:212-637-3199