

**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
)	
)	
_____)	

**EPA REGION 2’s RESPONSE TO MOTION FOR EXTENSION OF TIME TO FILE
PETITION FOR REVIEW**

EPA Region 2 hereby responds to the Motion for Extension of Time to File Petition for Review of The Coalition of Organizations Against Incinerators (“the Coalition”). Region 2 opposes the Motion to the extent that it requests the Environmental Appeals Board (“Board”) to order EPA to translate the final Energy Answers Arecibo, LLC (“Energy Answers”) Prevention of Significant Determination (“PSD”) permit into Spanish and grant the Coalition 60 days to file its Petition after the date of publication of the translation. Region 2, however, is not opposed to providing the Coalition with an additional 60 days beyond July 11, 2013 to prepare an initial Petition or a supplemental brief in support of a timely Petition for Review. Region 2’s position is, however, conditioned on being provided at least 21 days, as provided by 124.19(b)(1), to file its response after all Petitioners’ briefs on the merits are filed in this matter.

A. The Coalition's Request that EPA be Ordered to Translate the Final PSD Permit into Spanish Should Be Denied

EPA Region 2's longstanding Policy on Translations & Interpretations, Order No. R-1500.1 (Dec. 10, 1997) (Exhibit A), recognizes the importance of communicating effectively with members of the public who do not speak English fluently and, in particular, acknowledges the special situation of Spanish speaking Puerto Rico residents. It is for this reason, and in the interest of effectuating Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (Feb. 11, 1994), that Region 2 held two informal public availability meetings and six public hearing sessions, all with simultaneous translation, published public notices and a fact sheet in Spanish, accepted written comments in Spanish, and translated the public hearing transcripts from Spanish to English. Energy Answers Final Permit, Response to Comments at 67 and 105-106 (June 11, 2013) (Exhibit B). Region 2 also posted an unofficial translation of the Response to Comments document on the Energy Answers permit website.

Notwithstanding Region 2's recognition of the importance of communicating with non-English speaking members of the public, the Region's Policy on Translations & Interpretations states that legally binding documents, including permits, should not be translated because "if documents having legally binding effect are translated, there is heightened potential for introducing ambiguity or confusion about the intended meaning of the document." Thus, even if Region 2 were to translate the final PSD permit into Spanish, the official version would remain in English and Petitioners would have to rely on the English version in writing their Petitions for Review. In addition, the Coalition has not articulated what the basis of the Board's authority would be to compel EPA to translate the final permit. Therefore, Region 2 opposes the Coalition's Motion to order EPA to translate the Energy Answers final permit.

The Coalition's Motion cites to Region 2's translation of certain permit-related documents as support for its position that translation of the final permit would be consistent with EPA's actions in this permit matter. Unlike the final permit, however, the documents referenced by the Coalition are not binding on Energy Answers. One document referenced in the Coalition's Motion as an example of EPA's willingness to translate documents, is the Response to Comments. However, the Response to Comments document contains the following disclaimer specifically because of Region 2's concern about the potential for introducing ambiguity or confusion about the intended meaning:

This informal translation of EPA's 'Responses to Public Comments' is provided for informational purposes only, does not constitute or set forth EPA's official response to any public comment and should not be relied upon in determining EPA's official position with respect to any topic. EPA's official responses and positions are set forth in the English version of the Responses to Public Comments. Moreover, while an effort has been made to ensure the accuracy of this informal translation, translating is an inherently imprecise exercise and thus EPA cannot guarantee the accuracy of this translation.

As reflected in the disclaimer, Region 2 never intended the translated Response to Comments document to be an official document, a basis for appeal, or a signal that the Region would translate additional documents in the permit process. Rather, the document was translated for the purpose of enhanced communication and public outreach consistent with Executive Order 12898 and Region 2's Policy on Translations & Interpretations so that parties who took the time to file comments but lacked English proficiency could understand how we responded to them. Region 2 viewed the translation of the Response to Comments as informal outreach and did not intend to create an expectation of a change from its past practice on translation of documents. In prior permit actions, Region 2 translated permit-related documents for purposes of enhanced public outreach and did not translate legally binding documents. Region 2's actions in the Energy Answers permit process were consistent with this approach. For example, the Region did not translate the draft PSD permit. Even without translation of the draft permit, there was robust

public participation, with nearly 1200 written and oral comments submitted on behalf of over 3200 individual commenters. Response to Comments at 5.

It is significant that Region 2's approach to translation in the Energy Answers final PSD permit matter is consistent with the Region's past practice of translating documents for enhanced communication and public outreach because the Board offered a favorable view of this practice in a prior permit appeal decision. *In re Ecoelectrica, L.P.*, 7 E.A.D. 56 (E.P.A. 1997) (Region 2's translations "are among the kinds of actions specifically encouraged by the environmental justice Executive Order."). In the Energy Answers matter, Region 2 went even beyond its efforts in the *Ecoelectrica* case and all other previous permit actions because the Region produced an informal translation of the Response to Comments. Therefore, the Region's approach to translations regarding the Energy Answers permit should, at a minimum, be viewed in a manner equally favorable to *Ecoelectrica*. In addition, decisions of the Board and the Administrator have not required Clean Air Act permit issuers to provide translation where EPA regulations implementing the Clean Air Act do not require it. *In re Shell Offshore, Inc.*, OCS Appeal Nos. 11-05, 11-06 & 11-07, slip op. at (EAB March 30, 2012) (finding that there is no regulatory requirement to provide an interpreter); *In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC*, Permit No. 3-3309-00101/00001 (Petition No.: II-2000-07) (May 2, 2001). (finding that the Title V rules do not require translation of permit documents).

In deciding whether and in what manner to translate permit-related documents, Region 2 used considered judgment consistent with its Policy on Translations & Interpretations, Executive Order 12898, and past practice. In particular, the Region's decision not to translate the final

permit is supported by the goal in the Policy on Translations & Interpretations of avoiding ambiguity or confusion in legally binding documents.

B. Region 2 Does Not Oppose Providing Petitioners with An Additional 60 Days Beyond July 11, 2013 to Prepare and File an Initial Petition or Supplemental Brief In Support of a Timely Petition for Review

Since Region 2 should not be compelled to translate the final permit, there is no basis to grant the Coalition's specific request for a 60-day extension from the date of publication of a Spanish translation. However, the Coalition's motion states that "[m]any members of the community who have participated in the permit proceedings to this point have limited English speaking abilities." Motion at 1. As discussed above, Region 2 has recognized this fact and the special circumstances of residents of the Commonwealth of Puerto Rico, and has therefore undertaken significant efforts to facilitate public participation in the permit proceeding for individuals with limited English proficiency. In light of the location of this facility in Puerto Rico and the scope of the attendant language challenges for Spanish-speaking residents of this U.S. territory, without prejudice to EPA's position that it should not be ordered to translate the final permit, Region 2 is not opposed to providing the Coalition with an additional 60 days beyond July 11, 2013 to prepare an initial Petition or supplemental brief in support of a timely Petition for Review. An additional 60 days should provide a sufficient opportunity for the Coalition members and their counsel to navigate any language concerns presented by an English-only version of the final PSD permit and craft their arguments and grounds for appeal.

The Board has recently amended its procedural rules, but has not specifically addressed how they would apply to this type of motion. See, 78 Fed. Reg. 5281 (Jan. 25, 2013). Section 124.19(n) of EPA's revised regulations provides that "for good cause, the Board may relax or suspend the filing requirements prescribed by these rules or Board order." Section 124.19(f) of

EPA's regulations addresses motions in permit appeals, but does not indicate whether this provision contemplates the filing of motions before a Petition for Review is filed. Section 124.19(g) addresses the timing of a motion for an extension, but does not specify whether this provision is intended to cover motions for extension of time to file a Petition for Review.

Prior to the enactment of these provisions, the EAB has applied two different approaches to provide Petitioners that have demonstrated cause for such relief additional time to complete arguments in support of a Petition for Review under section 124.19. The first is granting additional time to file the Petition for Review, as Petitioners have requested in this instance. The second is to permit Petitioners to file a summary Petition for Review by the applicable Petition deadline while providing an opportunity to submit a supplemental brief at a later date supporting the Petition.

The Petitioners' motion cites to one example of the first approach, involving a situation where a natural disaster apparently frustrated the ability of the Petitioners to file a Petition of any kind. *In re AES Puerto Rico, L.P.*, 8 E.A.D. 324 (EAB 1999). In that case, the Board said it "will relax a filing deadline only where special circumstances exist." In a subsequent Order citing this case, the Board has also said that it "strictly construes threshold procedural requirements." *Guam Waterworks Authority*, NPDES Appeal Nos. 09-15 & 09-16, at 3 (EAB Nov. 3, 2009) (Order Granting Motion in the Alternative to Timely File Summary Petitions With Extension of Time to File Supplemental Briefs) (citing *In re City & County of Honolulu*, NPDES Appeal No. 09-01, at 2 (EAB Feb. 2, 2009) (Order Granting Alternative Motion for Extension of Time to File Petitions for Review), quoting *In re AES Puerto Rico* 820!at 329. The Board has also recognized that it "has found 'special circumstances' to exist in cases where the permitting authority has made mistakes or provided misleading information that directly lead to delays."

Guam Waterworks Authority, at 3, citing *In re Hillman Power Co., L.L.C.*, 10 E.A.D. 673, 680 n. 4 (EAB 2002) and *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 123-24 (EAB 1997). In addition, the Board has also relaxed the deadline where “the delay stemmed from extraordinary events, such as natural disasters and response to terrorist threats, or from causes not attributable to the petitioner, such as problems with the delivery services.” *Guam Waterworks Authority*, at 3-4, citing *In re Town of Marshfield*, NPDES Appeal No. 07-03, at 5 (EAB Mar. 27, 2007) (Order Denying Review), *In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 703 n. 6 (EAB 2002), *In re Minergy Detroit, L.L.C.*, PSD Appeal Nos. 02-01 & 02-02, at 1 n. 2 (EAB Mar. 1, 2002) (Order Denying Review), and *AES Puerto Rico*, 8 E.A.D. at 328-29.

Conversely, the EAB has recently emphasized the time-sensitive nature of PSD permit appeals in its Standing Order Governing Petitions for Review of Clean Air Act New Source Review Permits and revisions to 40 C.F.R. 124.19 which impose certain presumptions, tighter deadlines, briefing limitations, and other measures to facilitate expeditious resolution of appeals of PSD and other New Source Review appeals under the Clean Air Act. 78 Fed. Reg. at 5283. In this context, the Board has strictly adhered to the 30-day appeals deadline and noted that this “is particularly warranted in matters involving the review of PSD permits because ... PSD permit appeals are time-sensitive.” *In re Sierra Pacific Industries*, PSD Appeal No. 13-01, at 2-3 (EAB March 21, 2013) (Order Denying Extension of Time to File Appeal Brief).

Where the special circumstances described above were not present to support an extension of the deadline for filing Petitions, the Board has on occasion for good cause shown, granted motions seeking leave to file supplemental briefs to support the issues identified in timely Petitions for Review. *Guam Waterworks Authority*, at 4, citing *In re City & County of Honolulu*, at 2-3, and *In re Desert Rock Energy Col., LLC*, PSD Appeal Nos. 08-03 to -06, at 3-4 & n.2

(EAB Aug. 21, 2008) (Order Granting Desert Rock’s Motion to Participate, Granting a 30-Day Extension of Time, and Denying a Stay of Briefing on Certain Issues). This procedure has also been described as requiring the filing of a “summary petition” with additional time allowed to file a supplemental brief. *In re City & County of Honolulu*, at 2. In one case involving a PSD permit, the EAB granted such relief on the grounds that the permitting record was voluminous and the issues on appeal were numerous and complex. *In re: Desert Rock Energy Co., LLC*, at 3-5.

In the event that the Board decides to grant additional time to the Coalition, Region 2 defers to the Board on selecting the most appropriate approach under the revised version of section 124.19. However, Region 2 respectfully requests that the Board not significantly expand the “special circumstances” under which extensions of the 30-day limit for filing a Petition for Review may be granted. Region 2 also requests that the Board not provide for multiple filings containing substantive arguments by a single petitioner in this matter and not extend the filing deadline for parties who have not requested additional time from the Board in a timely manner. Finally, EPA requests that the approach selected by the Board not prejudice Region 2’s ability to receive at least 21 days, as provided by 124.19(b)(1), to file EPA’s response after final briefs on the merits are filed by all Petitioners in this matter.

For the reasons set forth above, EPA Region 2 opposes the Coalition’s Motion to the extent it seeks an Order requiring Region 2 to translate the final Energy Answers Arecibo final PSD permit. Region 2 therefore also opposes the specific request for an extension until 60 days after it publishes the requested translated final permit. However, Region 2 is not opposed to granting the Coalition an additional 60 days after July 11, 2013 to prepare an initial Petition or a supplemental brief in support of a timely Petition for Review, whichever approach the Board

considers most appropriate in light of its current regulations and past practice prior to enactment of those regulations.

Respectfully submitted,

Date: July 9, 2013

s/

Joseph A. Siegel
Assistant Regional Counsel
EPA Region 2
290 Broadway
New York, New York 10007
212-637-3208
siegel.joseph@epa.gov

Brian L. Doster
Air and Radiation Law Office
Office of General Counsel
1200 Pennsylvania Ave NW (MC 2344A)
Washington, DC 20460
Ph: (202) 564-1932
Fx: (202) 564-5603
Doster.Brian@epa.gov

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing EPA Region 2's Response to Motion for Extension of Time to File Petition for Review was served via regular mail on:

Christopher D. Ahlers
Environmental and Natural Resources Law Clinic
Vermont Law School
P.O. Box 96, 164 Chelsea Street
South Royalton, VT 05068

Henry C. Eisenberg
Skadden, Arps, Slate, Meagher & Flom, LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111

By: s/_____
Joseph A. Siegel
U.S. EPA Region 2
New York, New York 10007
212-637-3208
siegel.joseph@epa.gov

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