

**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 REPLY TO THE PETITIONERS' RESPONSES TO
REGION 2'S MOTION FOR LIMITED VOLUNTARY REMAND AND
RESPONSE TO MOTION TO REQUEST DOCUMENTS**

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INTRODUCTION

On November 14, 2013, EPA Region 2 (“Region 2”) filed a Motion for A Limited Voluntary Remand with the EPA Environmental Appeals Board (“Board”). The Motion requested a narrow remand order directing Region 2 to issue, without further public review, a revised Prevention of Significant Deterioration (“PSD”) permit with conditions for biogenic CO₂ emissions. The Motion attached the revised conditions and requested that the Board order Region 2 to issue the revised permit as part of a final permit decision under 40 C.F.R. § 124.19(f)(2). The Motion also asked the Board to 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. On November 29, 2013, the Coalition of Organizations Against Incinerators (“Coalition”) filed a Response opposing Region 2’s Motion (“Coalition’s Response”). Energy Answers Arcibo, LLC (“Energy Answers”) filed a Brief in Support of EPA Region 2’s Motion on December 2, 2013 (“Energy Answers Brief”) which included responses to the Coalition’s November 29, 2013 Response. On December 3, 2013, Petitioner Aleida Centeno Rodriguez filed a Response to Region 2’s Motion (“Coalition’s Response”) and a Motion to Request Documents.¹

ARGUMENT

I. The Coalition Has Not Demonstrated Any Basis for Denying Region 2’s Motion Based on Its Assertion that the Revised Permit Contains No Meaningful CO₂ Limitations

The Coalition’s Response asserts that the revised permit provides no meaningful limitation on biogenic or non-biogenic CO₂ emissions. Region 2 agrees with the argument presented in Energy Answers’ Response Brief that the Coalition’s assertion represents a post-

¹Although Petitioner Centeno’s Response was not filed in a timely manner, Region 2 is addressing the Response in this Reply.

Petition objection to the Best Available Control Technology (“BACT”) for Greenhouse Gases (“GHGs”) and was not preserved for review. Energy Answers Brief at 2-3. Moreover, the Coalition’s suggestion that there is no meaningful limitation on CO₂ is incorrect and is refuted by the record, which demonstrates that the control techniques selected in the top-down BACT analysis results in meaningful reductions in CO₂ emissions. Region 2 Motion, Attachment 3, p. 18.

a. **The PSD BACT Requirement Does Not Necessarily Require Reductions in Emissions Below the Level of a Source’s Potential to Emit.**

Air pollution control techniques (including both add on controls and inherently lower polluting processes) are considered part of the physical or operational design used in calculating potential to emit. *See* 40 C.F.R. § 52.21(b)(4) (“Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable.”). Thus, when a source described in a PSD permit application is designed to satisfy the BACT requirement, and the final permit makes that level of control legally and practically enforceable, the potential to emit of the source can be based on emissions from the source after application of the control technology determined to be BACT. In this case, the annual emissions limit for Energy Answers also represents the facility’s potential to emit because it was derived after application of control techniques that will reduce CO₂e emissions.

b. Region 2 Agrees with the Coalition that the Potential to Emit of the Facility Should Be 924,750 Tons Per Year

The Coalition also argues that the emissions limitation of 924,825.3 tons per year (“TPY”) in the revised permit is higher than the facility’s potential to emit. Coalition Response at 7-8. The Coalition cites to Table 12 of Attachment 4 of Region 2’s Motion as support for its argument that the 924,825.3 TPY limit exceeds the facility’s potential to emit of 924,750 TPY. Table 12 is indeed the basis used by Region 2 to establish the annual facility CO₂e (biogenic + non-biogenic) emissions limit. Therefore, Region 2 agrees that 924,750 TPY CO₂e should have been listed on page seven of the Draft Revised Permit as the annual facility CO₂e (biogenic + non-biogenic) emissions limit. The fact that a different number appeared on page seven of the Draft Revised Permit, instead of 924,750 TPY CO₂e, is due to an inadvertent mathematical miscalculation. Region 2 has revised page seven of the Draft Revised Permit to include the correct facility annual emissions limit of 924,750 TPY CO₂e. *See* Attachment 2A which updates Attachment 2 of Region 2’s Motion.² Region 2 counsel has consulted with counsel for Energy Answers who indicated that Energy Answers is in agreement with the change to 924,750 TPY CO₂e.

II. Region 2 Agrees with the Coalition’s Request that the Board Decide the Petitions for Review Simultaneously with Region 2’s Motion

Citing to Region 2’s Motion (at 7, footnote 1), the Coalition asks the Board to “reject EPA’s invitation to issue a remand order prior to reaching a decision on the merits of the petition for review.” Coalition Response at 9. Region 2 wishes to clarify its intention in footnote 1. The purpose of the footnote was to make clear that EPA does not concede that

² Note that this is the only change from Attachment 2 to Attachment 2A.

the deadline in Section 165(c) of the Clean Air Act, 42. U.S.C. § 7475(c), mandates not only issuance of the final permit but also completion of the appeals process within one year after a complete PSD permit application. Region 2 agrees with the Coalition that it would be in the interest of all parties if the Board were to issue its decision on the Petitions and the Motion simultaneously to ensure that final agency action occurs expeditiously. As stated in the Coalition's Response, Region 2 has indicated its intention to swiftly issue the final permit decision after the Board's decision.

III. Petitioner Centeno's Response Contains New Post-Petition Arguments Unrelated to Region 2's Motion, and A Cumulative Ambient Air Impact Analysis is Not Required for CO₂

Region 2's Motion addresses a narrow issue that arose because of the D.C. Circuit's vacatur, in *Center for Biological Diversity v. EPA*, 722 F. 3d 401(D.C. Cir. July 12, 2013), of EPA's *Deferral for Emissions from Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration and Title V Programs* ("Deferral Rule"), 76 Fed. Reg. 43,490 (July 20, 2011). The timing of the vacatur, after final permit issuance but before conclusion of the Board's appeals process, and subsequent litigation, led Region 2 to indicate in its Response to Petitions that it was premature to provide a response to the portion of the Coalition's Petition that addressed the *Center for Biological Diversity* decision. Region 2's Response to Petitions at 37 – 39. Region 2's Motion therefore addresses the narrow issue of the effect of the *Center for Biological Diversity* decision on the Energy Answers PSD permit. However, Petitioner Centeno's Response goes far afield from the subject of the Motion by raising new post-Petition arguments and facts unrelated to the specifics of incorporating biogenic CO₂ emissions into Energy Answers' PSD permit. As such, the claims by Petitioner Centeno were not preserved for review. Region 2 also notes that much of

Petitioner Centeno's argument appears to be premised on a view that EPA must conduct a cumulative ambient air quality impacts analysis for CO₂ (considering the combined emissions of Energy Answers and other sources in the vicinity). However, because EPA has not established a National Ambient Air Quality Standard ("NAAQS") for greenhouse gases, an ambient air impacts analysis is not required to demonstrate that the source will not cause or contribute to a violation of a NAAQS for this pollutant. EPA, PSD and Title V Permitting Guidance for Greenhouse Gases, at 47-48 (Mach 2011). Petitioner Centeno has provided no authority to show that a cumulative impacts analysis for greenhouse gases is required.

IV. Region 2 Has Addressed Petitioner Centeno's Request for Service of the Certified Index to the Administrative Record

Petitioner Centeno filed an "Informative Motion and to Request Documents" on December 3, 2013 which indicates that Region 2 did not serve Petitioner Centeno with the Certified Index to the Administrative Record ("Index"). Region 2 does not dispute the lack of service and, in response to Petitioner's Centeno's Motion, has addressed the request for the document.

Region 2 filed the Index on July 26, 2013 and served all parties that had filed a petition as of that time. The Region did not understand Petitioner Centeno to be a party in this matter at the time the Index was filed. Petitioner Centeno's petition was not posted on the Board's website until sometime after the close of business on July 26, 2013. *See* Motion to Dismiss Flores and Centeno Petition for Review, at 3. After learning that Petitioner Centeno was a party in this matter, Region 2 served Petitioner Centeno with all the documents filed by the Region after it filed the Index.

In response to Petitioner Centeno's December 3, 2013 Motion regarding the Index, on December 6, 2013, Region 2 sent Petitioner Centeno's counsel, as well as Petitioner Flores, a copy of the Certified Index to the Administrative Record with a certificate of service. For the record, Region 2 has filed with the Board an additional certificate of service for Petitioners Flores and Centeno. Therefore, the Board does not need to issue an order to Region 2 regarding service on Petitioner Centeno.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Region 2's November 14, 2013 Motion, Region 2 respectfully requests that the Board issue a limited remand order directing Region 2 to substitute the revised permit conditions attached to this Reply when issuing its final permit decision and deny review of all other issues raised in the petitions. In addition, because Region 2 has provided the requested document to Petitioner Centeno through her attorney, there is no need for the Board to issue an order directing Region 2 to do so.

Date: December 6, 2013

Respectfully Submitted,

/S/

Joseph Siegel
Senior Attorney
U.S. EPA Region 2
290 Broadway
New York, New York 1007
Siegel.Joseph@epa.gov
(212) 637-3208

Brian L. Doster
Air and Radiation Law Office
EPA Office of General Counsel
1200 Pennsylvania Ave. N.W. (MC 2344A)
Washington, D.C. 20460
202-564-1932
Doster.Brian@epa.gov

STATEMENT OF COMPLIANCE WITH WORD COUNT

I hereby certify that EPA Region 2's Reply to the Petitioners' Responses to Region 2's Motion for Limited Voluntary Remand and Response to Motion to Request Documents (exclusive of the Table of Contents, Table of Authorities, Table of Attachments, this Statement of Compliance, and the attached Certificate of Service) contains 1,767 words, as calculated using Microsoft Word word-processing software.

/S/

December 6, 2013

Joseph A. Siegel
Office of Regional Counsel
U.S. EPA Region 2
New York, New York 10007
212-637-3208
siegel.joseph@epa.gov

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Energy Project) PSD Appeal Nos.13-05, 13-06, 13-07, 13-08, and
) 13-09
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_____))

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing EPA Region 2’s Reply to the Petitioners’ Responses to Region 2’s Motion for Limited Voluntary Remand and Response to Motion to Request Documents 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

Martha G. Quinones Dominguez
P.O. Box 8054
Arecibo, Puerto Rico 00613

Eliza Llenza
P.O. Box 9865
San Juan, Puerto Rico 00908

Cristina Galan
Urb Radioville #121
Ave. Atlantico
Arecibo, Puerto Rico 00612

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

Waldemar Natalio Flores Flores
Quality Assurance Officer
Forest Hills B 20, Calle 4
Bayamon, Puerto Rico 00959-5527

Fermin Arraiza Navas
RUA 10443, PRABA 11702; USDC 215705
Apartado 9023951
San Juan, Puerto Rico 00902-3951

By: /S/

December 6, 2013

Joseph A. Siegel
Office of Regional Counsel
U.S. EPA Region 2
New York, New York 10007
212-637-3208
siegel.joseph@epa.gov