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## ARGUMENT

As set forth herein, Energy Answers Arecibo, LLC ("Energy Answers") respectfully opposes the motion of the Coalition of Organizations Against Incinerators (La Coalicion de Organizaciones Anti-Incineration (the "Coalition") for leave to submit a brief in reply to the responses submitted by the United States Environmental Protection Agency, Region 2 and Energy Answers ("Coalition Reply Brief" or "Reply Brief") in the above-captioned matter.

In an appeal of a Prevention of Significant Deterioration ("PSD") permit, the Environmental Appeals Board ("EAB" or the "Board") applies a presumption against the filing of a reply brief. 40 C.F.R. § 124.19(c)(1) (2013). "A petitioner seeking leave to file a reply brief must satisfy a high threshold to overcome this presumption . . . ." *In re Pio Pico Energy Center*, PSD Appeal Nos. 12-04 – 12-06, slip op. at 18 (EAB August 2, 2013). In *Pio Pico Energy Center*, the Board stated that it

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

Id. at 19. The Board will not consider arguments in a reply brief that merely reiterate arguments already contained in the initial petition. Id.

**1. The Coalition Has Not Overcome the Presumption Against Filing a Reply Brief on the Issue of Whether It Demonstrated That Its Argument on Lead Emissions Modeling Was Preserved and The Coalition Has Not Demonstrated That Its Argument Was Preserved**

The Coalition argues that EPA and Energy Answers have erroneously alleged that the Coalition has not preserved for appeal certain of the issues it raised in its Petition for Review and that it should be allowed to file a reply brief to "clarify" or respond to these arguments. In particular, the Coalition asserts that Energy Answers erroneously argued that the Coalition has not preserved the right to argue against the modeling of the impact of lead emissions from the

proposed Arecibo Puerto Rico Renewable Energy Project (the "Project"). Coalition Reply Brief at 4. In its Reply Brief, the Coalition again asserted that "extensive comments on lead emissions were made during the public comment period" and referenced the introductory sections of its Petition for Review which cited to such comments. The Coalition further noted that the proof that it has preserved its right to contest the lead modeling was that it was "challenging statements made by EPA in its Response to Comments." Id. at 4-5. The Coalition concluded that "the comments were sufficient to put EPA and Energy Answers on notice of an issue that the lead modeling was not sufficient." Id. at 5.

In a PSD appeal, the burden of demonstrating that issues have been preserved for review by being raised during the public comment period falls on the petitioner. 40 C.F.R. § 124.19(a)(4)(ii) (2013); *In re Sierra Pacific Industries*, PSD Appeal Nos. 13-01, 13-02, 13-03 & 13-04, slip. op. at 19 n. 10 (EAB July 18, 2013); *In re Buena Vista Rancheria Wastewater Treatment Plant*, NPDES Appeal Nos. 10-05, 10-06, 10-07 & 10-13, slip. op. at 4 (EAB Sept. 6, 2011). EPA's and Energy Answers' arguments that the Coalition has not met this burden are neither new rationales nor new information supporting the underlying decisions made by EPA Region 2 concerning the PSD permit issued to the Project. Rather, they are responses to the Coalition's failure to demonstrate that it has met its burden.

The Coalition's explanation in response to Energy Answers' argument that the Coalition has not preserved its specific challenge to the modeling of lead emissions from the Project misses the mark. The Reply Brief simply reiterates the Coalition's Petition by referencing the sections of the Petition where it noted that comments on lead emissions were made during the public comment period, without indicating whether any of these comments referred to deficiencies in the modeling of lead emissions from the Project. Coalition Reply Brief at 4. To

be even more specific, neither the Coalition's Petition nor the Reply Brief identifies where in the administrative record any person argued that 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. That argument was the sole argument made by the Coalition in its Petition as to the alleged inadequacy of the Project's lead emissions modeling.

In order for an issue to be preserved for appeal, it must be raised with a "reasonable degree of specificity and clarity." *In re City of Palmdale*, PSD Appeal No. 11-07, slip. op. at 51 (EAB Sept. 17, 2012). The purpose of this requirement is to ensure that the permitting authority has an opportunity to address potential problems before a permit becomes final to promote "the longstanding policy that most permit decisions should be decided at the regional level, and to provide predictability and finality in the permitting process." *In re ConocoPhillips Co.*, 13 E.A.D. 768, 800 (EAB 2008) (internal citations omitted); *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 395-396 (EAB 2007). Thus, for example, where a petitioner provided comments with respect to stack testing on averaging times and sampling duration, the petitioner's challenge that a PSD permit did not specify specific stack test methods and source conditions was not preserved for review because those specific issues were not raised in the comments. *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 235 (EAB 2000). The Board stated that the petitioner could not "parley [its concern regarding averaging times] into broader remarks about test methods and test conditions." Id.; see also *In re Russell City Energy Center, LLC*, PSD Appeal Nos. 10-01, 10-02, 10-03, 10-4 & 10-05, slip. op. at 43 (EAB November 18, 2010), aff'd sub nom., *Chabot-Las Positas Community College District v. EPA*, No. 10-73870, 2012 U.S. App. LEXIS (9th Cir. May 4, 2012) (challenge to emissions data was not preserved where commenters had provided

comments based on vendor data from a different facility, but "did not challenge, question or even mention" the data that was the basis for the permitting authority's analysis).

The Coalition does not even point to specific comments regarding the lead emissions modeling, but rather to general comments on lead which it claims put EPA on notice that the lead modeling was insufficient. Coalition Reply Brief at 5. Such general comments clearly do not satisfy the requirement that issues be raised with a level of specificity and clarity allowing the permitting authority to respond to a problem before issuing a final permit. See *ConocoPhillips*, 13 E.A.D. at 801 ("[t]he fact that Petitioners' comments expressed 'extensive concern' regarding greenhouse gas emissions . . . does not by itself reflect the requisite level of specificity required to properly preserve the issue of whether BACT for CO<sub>2</sub> and methane was required").

The Coalition also argues that because it is challenging statements regarding lead emissions made by EPA in its Response to Comments ("RTC"), the RTC demonstrates that "issues regarding the amount of lead emissions were raised during the public comment period." Coalition Reply Brief at 5. The comments that EPA responded to on page 108 of the RTC were that the lead issues caused by the Battery Recycling Company facility were causing a disproportionate impact and asking EPA what it was doing to resolve that issue. Administrative Record V.3, RTC at 107. Although EPA's response to these comments included a discussion of the modeled impact of lead emissions from the Project, EPA did not address comments regarding deficiencies in the lead emissions modeling, or respond to a comment that the lead modeling must be wrong because the lead emissions from the Project would be allegedly higher than the emissions from the Battery Recycling Company facility, because no one submitted such

comments. The RTC does not demonstrate that the Coalition's specific challenge to the modeling of lead emissions was preserved. See *ConocoPhillips*, 13 E.A.D. at 803.

**2. The Coalition Has Not Overcome the Presumption Against Filing a Reply Brief on the Issue of Whether It May Challenge EPA's PSD and Nonattainment New Source Review Regulations in a Permit Appeal**

The Coalition also argues that EPA and Energy Answers cited *Sierra Pacific Industries* in an effort to avoid a challenge to EPA regulations in a PSD permit appeal and that because *Sierra Pacific Industries* was decided two business days before the Coalition filed its Petition for Review, it should be allowed to respond in the Reply Brief.

*Sierra Pacific Industries* is only the most recent of many Board decisions to declare that the Board does not consider challenges to EPA regulations absent exceptional circumstances. See Brief of Energy Answers Arcibo, LLC in Response to Petitions for Review at 9 (citing *In re Woodkiln, Inc.*, 7 E.A.D. 254, 269 (EAB 1997) and *In re USGen New England, Inc. Brayton Point Station*, 11 E.A.D. 525, 557 (EAB 2004)). See also *In re Tennessee Valley Authority*, 9 E.A.D. 357, 427 (EAB 2000), appeal dismissed for lack of jurisdiction, *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236 (11<sup>th</sup> Cir. 2003), cert. denied sub nom., *Leavitt v. Tennessee Valley Authority*, 541 U.S. 1030, 124 S. Ct. 2096 (2004) (a Board decision cited by the Coalition in its Petition and cross-referenced in the Reply Brief at 3). As much of the Coalition's Petition was predicated on its challenges to decades-old EPA regulations, the Coalition had ample opportunity to address the Board's long-standing precedents on this point.

The Coalition's contention that the present case satisfies the "exceptional circumstances" requirement has no merit. As the Board has recently noted:

The only Agency case in which administrative review of an underlying regulation has been permitted is a pre-Board administrative enforcement case decided by the Administrator in 1980. In *In re 170 Alaska Placer Mines, More or Less*, 1 E.A.D. 616 (Adm'r 1980), the Administrator overruled an administrative enforcement decision that had relied on an NPDES procedural rule governing burden of proof

that the Administrator had determined was 'wholly contrary to the [Clean Water Act's] allocation of the burden of persuasion.' 1 E.A.D. at 626-627. The Administrator previously had rejected the procedural rule at issue, and the rule was revised after the appeal.

*In re Peabody Western Coal Company*, CAA Appeal No. 12-01, slip. op. at 17 (EAB January 25, 2013). The Board itself has never entertained the review of an EPA regulation in a permitting or enforcement case.

The Coalition argues that the present case is "exceptional." However, its case for exceptionality is based simply on its disagreement with a routine application of EPA's decades-old regulations regarding the regulation of a pollutant emitted by a facility subject to the PSD program that is located in a nonattainment area for that pollutant. There simply is no comparison between the routine nature of the circumstances of this case and the one truly "exceptional" situation, described above, in which the EPA Administrator disregarded a regulation on appeal in an enforcement case. Thus, the Coalition has identified no valid basis that would permit the Board to consider a challenge to an EPA regulation.

## CONCLUSION

For the reasons set forth above, Energy Answers respectfully requests that the Board deny the Coalition's motion for leave to file a reply brief.

Dated: September 10, 2013

Respectfully Submitted

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**CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMITATION**

Pursuant to 40 C.F.R. § 124.19(d)(3), I hereby certify that the Opposition to Motion of the Coalition of Organizations Against Incinerators for Leave to Submit a Reply Brief contains 1,884 words, as calculated using Microsoft Word software.

/s/ Henry C. Eisenberg  
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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2013, a true and correct copy of the foregoing OPPOSITION TO MOTION OF THE COALITION OF ORGANIZATIONS AGAINST INCINERATORS FOR LEAVE TO SUBMIT A REPLY BRIEF was served, by first class mail, on:

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