IN THE UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

No. 14-1138

SIERRA CLUB DE PUERTO RICO, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; GINA MCCARTHY, Administrator, United States Environmental Protection Agency,

Respondents.

EPA'S MOTION TO DISMISS PETITION

Respondents United States Environmental Protection Agency and its Administrator (collectively "EPA") move to dismiss the petition for review filed by Sierra Club de Puerto Rico, Ciudadanos en Defensa del Ambiente, Madres de Negro de Arecibo, and Comité Basura Cero Arecibo ("Petitioners"). Part of the petition states that it challenges EPA's "decision granting a Prevention of Significant Deterioration permit to Energy Answers Arecibo, LLC, and the decision of [EPA's] Environmental Appeals Board dated March 25, 2014." Petition for Review, ECF No. 1503791, at 1; *see also* 79 Fed. Reg. 28,710 (May 19, 2014) (notice of permit decision); ECF No. 1508279 (Environmental Appeals Board's decision or "Board Op."). If Petitioners truly intend to challenge these decisions, Petitioners' selection of venue is incorrect. Pursuant to section

307(b)(1) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7607(b)(1), petitions for review of "locally or regionally applicable" final EPA actions "may be filed *only* in the United States Court of Appeals for the appropriate circuit." (Emphasis added.) Because the permittee is located in Puerto Rico, the appropriate circuit in which to challenge the permit and the administrative appeal thereof is the First Circuit.

The remaining part of the petition takes issue with EPA's "final rule at 45 Fed. Reg. 31,307 (May 13, 1980), as codified at 40 C.F.R. § 51.165(a)(2)(i)." Statement of Issues, ECF No. 1508266, at 1. *See also* Petition for Review at 2. Ordinarily, it would be too late for Petitioners to challenge such a longstanding regulation; section 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1), sets forth the default rule that "[a]ny petition for review . . . shall be filed within *sixty days* from the date notice of . . . promulgation . . . appears in the Federal Register." (Emphasis added.) Only one exception exists: "[I]f such petition is based solely on grounds arising after such sixtieth day, then any petition for review . . . shall be filed within sixty days after such grounds arise." *Id.*

Petitioners have not met the narrow exception to the default rule. The regulation Petitioners seek to challenge applies in the context of the Act's Nonattainment New Source Review permit program, not its Prevention of Significant Deterioration permit program. Neither EPA's decision to issue a Prevention of Significant Deterioration permit nor the Environmental Appeals

Board's review of that permit implicated the regulation. Thus, Petitioners do not have a newly ripened challenge to 40 C.F.R. § 51.165(a)(2)(i), and this part of their petition is time barred.

These grounds for dismissal are explained in more detail below.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

Under the Clean Air Act ("Act"), "the States and the Federal Government [are] partners in the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). EPA establishes national ambient air quality standards, 42 U.S.C. § 7409, and states, territories, and tribes with qualifying programs seek to achieve those standards by regulating, *inter alia*, the construction and modification of stationary sources of air pollution. 42 U.S.C. § 7410(a)(2)(C). Such regulation occurs through a preconstruction permitting program known as New Source Review, which has three parts. *See* 73 Fed. Reg. 28,321, 28,323-34 (May 16, 2008).

The first part of New Source Review generally requires that any major stationary emission source obtain and comply with a Prevention of Significant Deterioration ("PSD") permit if, following construction, it would emit substantial quantities of a pollutant regulated by the Act. *See* 42 U.S.C. §§ 7475, 7479(1); *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 471 (2004). The applicability of the PSD preconstruction permit program depends on, *inter alia*, the

pollutant in question; i.e., it could apply only if the source is located in an area that has been designated as "attainment" or "unclassifiable" with respect to such pollutant. Attainment areas meet national ambient air quality standards for a given pollutant; unclassifiable areas lack sufficient data to know whether national standards have been satisfied. 42 U.S.C. § 7407(d)(1)(A).

The second part of New Source Review may require a major source to obtain and comply with an additional preconstruction permit if the source is located in a "nonattainment" area, i.e., an area where national standards have not been met for a particular pollutant. 42 U.S.C. § 7407(d)(1)(A); *see New York v. EPA*, 413 F.3d 3, 12-13 (D.C. Cir. 2005). This program is referred to as Nonattainment New Source Review ("NNSR"), and its air quality control requirements are generally more stringent than PSD.[1]

The third part of New Source Review, known as "minor NSR," may apply to the extent that a stationary source would emit a pollutant below specified levels. 76 Fed. Reg. 38,748, 38,752 (July 1, 2011); 45 Fed. Reg. at 52,712.

Because the requirements of these programs are pollutant-specific, a major source may be required to obtain both a PSD and a NNSR preconstruction permit

---

[1] For example, the PSD program requires covered sources to operate with "best available control technology," 42 U.S.C. § 7475(a)(4), whereas the NNSR program requires covered sources to meet "lowest achievable emission rate." 42 U.S.C. § 7503(a)(2).

where it proposes to construct in an area that is designated attainment or unclassifiable for some pollutants and non-attainment for others. *See Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 132 (D.C. Cir. 2012), *aff'd in part and rev'd in part on other grounds sub nom., Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014); *Alabama Power Co. v. Costle*, 636 F.2d 323, 350 (D.C. Cir. 1979); 45 Fed. Reg. at 52,711-12. In such an area, the source may also be required to obtain a minor NSR preconstruction permit if its emissions of a particular pollutant are low.

As noted *supra* p. 3, the Act contemplates that states, territories, and tribes will have the primary role in implementing the New Source Review programs. EPA, however, may administer the PSD program where a state lacks an EPA-approved program. 42 U.S.C. § 7410(a)(2)(C) and (c)(1); 40 C.F.R. § 52.21(a)(1). That is the scenario in Puerto Rico, where an EPA regional office, EPA Region 2, issues PSD permits while the Puerto Rico Environmental Quality Board ("EQB") issues separate permits to satisfy applicable NNSR or minor NSR requirements. *See* 40 C.F.R. §§ 52.2722, 52.2723, and 52.2729.

II. FACTUAL AND PROCEDURAL BACKGROUND

Energy Answers Arecibo, LLC ("Energy Answers") proposes to construct a renewable energy facility in Arecibo, Puerto Rico. It applied for a Prevention of Significant Deterioration permit from EPA Region 2. In June 2013, after public notice and comment, EPA Region 2 issued a PSD permit to Energy Answers. The

permit sets forth emission limitations and other requirements of the PSD program with respect to nitrogen oxides, carbon monoxide, sulfur dioxide, and other pollutants for which Arecibo, Puerto Rico is designated "attainment." *See* Board Op. at 55 n.35.

At the initiation of several interested persons, including one or more of the Petitioners, the Environmental Appeals Board reviewed the PSD permit. *See* 40 C.F.R. part 124, subpart A (procedures applicable to administrative appeals of PSD permit decisions). In March 2014, the Board issued a lengthy decision upholding the permit in all relevant respects.[2] EPA Region 2 then issued the final PSD permit in April 2014. *See* 79 Fed. Reg. at 28,711.

In July 2014, Petitioners filed a petition for review in this Court. It begins: "Sierra Club de Puerto Rico, Ciudadanos en Defensa del Ambiente, Madres de Negro de Arecibo, and Comité Basura Cero Arecibo hereby petition the court for review of the U.S. Environmental Protection Agency's decision granting a Prevention of Significant Deterioration permit to Energy Answers Arecibo, LLC, and the decision of the Environmental Appeals Board dated March 25, 2014." Petition for Review at 1.

---

[2] The Board remanded the PSD permit to EPA Region 2 for the limited purpose of incorporating into the permit the regulation of biogenic greenhouse gas emissions. EPA Region 2 had requested the remand in light of this Court's decision in *Ctr. for Biological Diversity v. EPA*, 722 F.3d 401 (D.C. Cir. 2013). This issue is unrelated to 40 C.F.R. § 51.165(a)(2)(i).

The petition goes on to cite 40 C.F.R. § 51.165(a)(2)(i), a regulation that is part of the Nonattainment New Source Review program. *See* Petition for Review at 2. Petitioners assert that this regulation -- promulgated by EPA over three decades ago -- "unlawfully limits the preconstruction review program for nonattainment areas under Sections 172(c)(5) and 173 of the Clean Air Act [42 U.S.C. §§ 7502(c)(5) and 7503] to a new major stationary source 'that is major for the pollutant for which the area is designated nonattainment.'" Petition for Review at 2. *See also* Statement of Issues at 1 (reiterating the assertion).

Currently, a different permitting authority, the EQB, is reviewing Energy Answers' expected emissions of lead, a pollutant for which Arecibo is designated nonattainment, *see* 40 C.F.R. § 81.355, as well as minor NSR issues. *See* Board Op. at 27 (noting that the EQB "determines whether applicability thresholds for NNSR permitting are or will be met"). To date, the EQB has not completed its review.

ARGUMENT

I. IF PETITIONERS CHALLENGE THE PREVENTION OF SIGNIFICANT DETERIORATION PERMIT OR THE ADMINISTRATIVE APPEAL THEREOF, THEY ARE IN THE WRONG COURT

Petitioners are in the wrong court with respect to the initial part of their petition that purports to challenge EPA Region 2's permit decision, including the

Board's review of that decision.[3] Any such challenge can only be heard by the United States Court of Appeals for the First Circuit. Section 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1), provides that petitions for review of "locally or regionally applicable" final EPA actions "may be filed *only* in the United States Court of Appeals for the appropriate circuit." (Emphasis added.) EPA determinations with respect to pollutant emissions from Energy Answers' proposed facility in Puerto Rico are locally or regionally applicable, and are therefore properly reviewable only in the First Circuit (which encompasses Puerto Rico).

Because EPA is lodging this timely objection to Petitioners' erroneous selection of venue, the Court is left with two options: dismissal or transfer. *See Texas Mun. Power Agency v. EPA*, 89 F.3d 858, 867 (D.C. Cir. 1996). Transfer is appropriate "only 'if it is in the interests of justice.'" *Independent Producers Grp. v. Library of Cong.*, No. 13-1132, __ F.3d __, ___, 2014 WL 3674672, at *8 (D.C. Cir. July 25, 2014) (quoting 28 U.S.C. § 1631). EPA is not aware of any such circumstances here. Petitioners should not have had any confusion that the proposed facility is located in Puerto Rico and that the First Circuit is the proper venue.

---

[3] Although the petition purports to take issue with the PSD permit and administrative appeal thereof, Petitioners' non-binding statement of issues does not identify any such challenge. *See* ECF No. 1508266.

Accordingly, in the absence of some adequate showing from Petitioners in response to this motion demonstrating that a transfer would serve the interests of justice, their petition should be dismissed insofar as it challenges EPA's Prevention of Significant Deterioration permit and administrative appeal decision.

II. PETITIONERS DO NOT HAVE A NEWLY RIPENED ABILITY TO CHALLENGE A NONATTAINMENT NEW SOURCE REVIEW REGULATION PROMULGATED IN 1980

Petitioners have failed to properly invoke the Court's limited subject matter jurisdiction with respect to their purported challenge to 40 C.F.R. § 51.165(a)(2)(i). As Petitioners acknowledge, EPA promulgated this regulation in 1980. *See* Petition for Review at 2. Under the Clean Air Act, any petition for review of this regulation was due long ago. *See* 42 U.S.C. § 7607(b)(1); *supra* p.2. To qualify for the narrow exception to the Act's short review window, Petitioners must identify a recent "event that ripens a claim." *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 129 (D.C. Cir. 2012), *aff'd in part and rev'd in part on other grounds sub nom., Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014). Both the default rule and its exception are jurisdictional in nature. *See Medical Waste Inst. & Energy Recovery Council v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011).

Petitioners have failed to identify a recent event that ripens any challenge to 40 C.F.R. § 51.165(a)(2)(i). Petitioners rely on EPA's issuance of a Prevention of Significant Deterioration permit to Energy Answers and the Board's decision

respecting that permit decision. But these events regard only the Act's PSD program, whereas the regulation Petitioners seek to challenge regards, as Petitioners themselves acknowledge, "the preconstruction review program for *nonattainment* areas[.]" Petition for Review at 2 (emphasis added). Not surprisingly, throughout its 106-page opinion, the Board references this particular regulation only once, and only for the purpose of providing background information on the NNSR permit program. *See* Board Op. at 17 n.8 (stating that 40 C.F.R. § 51.165(a)(2) "set[s] forth the applicability provisions for NNSR programs"). Neither EPA acting as the PSD permitting authority in Puerto Rico nor the Board during its review of the PSD permit had occasion to construe or apply in any substantive way the NNSR regulation Petitioners seek to overturn.[4]

Nor do Petitioners have a newly ripened challenged to 40 C.F.R. § 51.165(a)(2)(i) based on any recent action by the NNSR and minor NSR permitting authority in Puerto Rico, the Puerto Rico Environmental Quality Board. As noted *supra* p.8, a final decision from the EQB regarding Energy Answers' proposed facility remains pending.

---

[4] To the contrary, the Board explained that any NNSR issues were beyond the scope of the PSD permit and the Board's review of that permit. *See* Board Op. at 26-28.

CONCLUSION

For the forgoing reasons, the petition for review should be dismissed.

Dated: September 12, 2014

SAM HIRSCH
Acting Assistant Attorney General

___/s/ Andrew J. Doyle_____
ANDREW J. DOYLE, Attorney
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 514-4427 (p)
(202) 514-8865 (f)
andrew.doyle@usdoj.gov

OF COUNSEL:

BRIAN DOSTER
ELLIOTT ZENICK
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

JOSEPH A. SIEGEL
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway
New York, NY 10007

Attorneys for Respondents