

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SIERRA CLUB DE PUERTO RICO, et al.,)	
)	Case No. 14-1138
Petitioners,)	
v.)	
)	
U.S. ENVIRONMENTAL PROTECTION AGENCY,)	
et al.,)	
Respondents.)	
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PETITIONERS' RESPONSE TO EPA'S MOTION TO DISMISS

The Sierra Club de Puerto Rico, Madres de Negro de Arecibo, Ciudadanos en Defensa del Ambiente, and Comité Basura Cero Arecibo submit this response to the Environmental Protection Agency's ("EPA's") motion to dismiss.

EPA's motion is based on two false premises. The first false premise is that this appeal is based on issues that are merely local, rather than national in importance. This premise is incorrect because this is an appeal challenging a final rule of EPA, which has national applicability. The second false premise is that the granting of a permit to construct and operate by EPA, whose rule allows Energy Answers to avoid Nonattainment New Source Review, does not create a newly ripened challenge for residents of Arecibo, Puerto Rico. In granting the permit to construct and operate an incinerator, EPA and the Environmental Appeals Board

("EAB") have made a final agency action which has created an injury-in-fact for Petitioners. Accordingly, the Court should hear their challenge to the EPA rule.

I. STATUTORY AND REGULATORY BACKGROUND.

The 1977 Clean Air Act Amendments created the New Source Review program. This is a federal permitting program for new or modified stationary sources constructed after August 7, 1977. There are two parts to this program -- the Prevention of Significant Deterioration program ("PSD") (Sections 160-169B of the Clean Air Act) and the Nonattainment New Source Review program ("NNSR") (Sections 171-179B). 42 U.S.C. §§ 7470-7492, 7501-7509a.

For the PSD program, Section 165(a)(1) requires a permit for the construction of a new source in an air quality control region (AQCR) that is in attainment with any of the national ambient air quality standards (NAAQSs). 42 U.S.C. §7475(a)(1). These are uniform national standards that apply to criteria pollutants, which include coarse particulates (PM₁₀) and fine particulates (PM_{2.5}) (collectively, "particulates"), ozone (O₃), nitrogen oxides (NO_x), sulfur dioxide (SO₂), lead (Pb), and carbon monoxide (CO). 40 C.F.R. §50.1 et seq.

For the PSD program, Section 169(1) requires a permit for a "major emitting facility," which includes a new facility with a potential to emit 250 tons per year or more of "any air pollutant." 42 U.S.C. §7479(1). In the case of a listed source, the threshold is lowered to 100 tons per year or more of "any air pollutant." *Id.*

For the NNSR program, Sections 172 and 173 of the Clean Air Act require a permit for the construction of a new “major stationary source” in an air quality control region that is in nonattainment with any national ambient air quality standard. 42 U.S.C. §7502(c)(5) (“Such plan provisions shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section 7503 of this title.”), §7503 (permit requirements).¹ Under Section 302(j), the general definitions section, a facility is a “major stationary source,” if it has a potential to emit 100 tons per year or more of “any air pollutant.” 42 U.S.C. §7602(j). This threshold applies to all facilities, as there is no distinction between listed and nonlisted sources. *See id.* Other than this lack of a distinction, there is no practical difference between a “major emitting facility” that triggers PSD review and a “major stationary source” that triggers NNSR review. Section 302(j) defines the two terms synonymously. *See id.*

But an EPA rule creates a distinction between a major source for the PSD program and a major source for the NNSR program. For NNSR, EPA only considers whether a facility is a “major stationary source” “for the particular

¹ The cross-reference to “Section 7502(b)(6)” in Section 7503(a) should read “Section 7502(b)(5).” Current Section 7502(b)(5) was originally located at Section 7502(b)(6). *See* Pub. L. 95-95, 91 Stat. 685, 747-48 (August 7, 1977). In the 1990 amendments, Congress moved it to Section 7502(b)(5), but failed to amend this cross-reference. *See* Pub. L. 101-549, 104 Stat. 2399, 2414 (November 15, 1990).

pollutant for which the region is in nonattainment.” 45 Fed. Reg. 31,307, 31,312 (May 13, 1980), as codified at 40 C.F.R. §51.165(a)(2)(i). Petitioners challenge this rule.

II. FACTUAL AND PROCEDURAL BACKGROUND.

Petitioners are organizations whose members reside in Arecibo, Puerto Rico. Petitioners are opposed to the construction and operation of an incinerator by Energy Answers in Arecibo, because of a number of environmental impacts, including the release of lead emissions from the facility. Exhibit A, Declaration of Luisa Margarita Águila Nieves (member of Madres de Negro de Arecibo); Exhibit B, Declaration of Rafael Bey Nazario (member of Madres de Negro de Arecibo); Exhibit C, Declaration of Wilfredo Vélez (member of Ciudadanos en Defensa del Ambiente); Exhibit D, Declaration of Jessica Seiglie Quiñones (member of Comité Basura Cero Arecibo). Exhibit E, Declaration of Javier Biaggi Caballero (member of Sierra Club de Puerto Rico).

In 2011, EPA designated a part of the municipality of Arecibo as nonattainment for lead. 76 Fed. Reg. 72,097, 72,119 (November 22, 2011) (final rule, to be codified at 40 C.F.R. §81.355).² This designation applies to the “[a]rea bounded by 4 km from the boundaries of the Battery Recycling Company facility.” *Id.* EPA and Energy Answers agree that the proposed incinerator will be in this

² The island of Puerto Rico is one air quality control region. 40 C.F.R. §81.77.

nonattainment area. *See* Exhibit F, EPA Fact Sheet, PSD Draft Permit, p. 3; Exhibit G, PSD Air Quality Modeling Analysis Amendment, p.2. This means that this part of Arecibo is not in attainment with the national ambient air quality standards for lead. *See* 42 U.S.C. §7407(d)(1)(A). Accordingly, the concentration of lead in the air is not protective of public health, under Section 109(b)(1). 42 U.S.C. §7409(b)(1).

It is the position of Petitioners that Energy Answers may not construct and operate the proposed incinerator, because it is not able to obtain the offsets of lead emissions required under the NNSR Program under Sections 173(a) and 173(c) of the Clean Air Act, 42 U.S.C. §§7503(a),(c). This is because the facility would release more emissions of lead than the battery recycling facility that has caused the lead nonattainment problem. This position is based on the following information. Assuming operation for every hour of the year (8,760 hours), Energy Answers lists potential emissions of lead as 0.31 tons per year, from two boilers each having potential emissions of 0.153 tons per year. *See* Exhibit H, PSD Permit Application, page 3-4, Table 3-1. This is equal to 620 pounds per year.³ But the facility will actually operate at 95% availability, or 8,322 hours per year. *Id.*, Section 3.1.1, page 3-1. In addition, each boiler will operate between a range of emissions rates, a minimum rate of 0.028 lbs./hr. and a maximum rate of 0.038

³ 0.31 tons/year x 2,000 pounds/ton = 620 pounds/year.

lbs./hr. *See id.*, Appendix A-Table 2. Therefore, minimum actual emissions from the combined boilers will be 466 pounds per year,⁴ and maximum actual emissions from the combined boilers will be 632 pounds per year.⁵ These are greater than the actual emissions of lead from the battery recycling facility for each of the years 2007-2013. *See* Exhibit I, EPA Envirofacts Report, Battery Recycling Co., Inc., http://oaspub.epa.gov/enviro/tris_control_v2.tris_print?tris_id=00612BTTRYRD2KM (Toxic Release Inventory data) (highlighting added). Petitioners do not anticipate the company obtaining significant reductions from other sources.

As a municipal incinerator capable of charging more than 50 tons of waste per day, the facility is a listed source, and it is therefore subject to the lower 100 tons per year threshold for review under the PSD program. Board Op. at 17, fn. 8. Under the final permit, the facility has allowable emissions greater than the 100 tons per year threshold, for a number of air pollutants. Exhibit J, Final Permit, page 7 (listing annual emissions limitations of 357 tons per year for carbon monoxide, 352 tons per year for nitrogen oxides, 260 tons per year for sulfur dioxide, 124 tons per year for hydrogen chloride, and 104 tons per year for coarse particulates). Therefore, the potential emissions of a number of air pollutants make it a “major emitting facility” under the PSD program. Data submitted by Energy

⁴ 2 boilers x 8,322 hour/year x 0.028 pounds/hour = 466 pounds/year.

⁵ 2 boilers x 8,322 hour/year x 0.038 pounds/hour = 632 pounds/year.

Answers in its permit application are consistent with this conclusion. Exhibit H, PSD Permit Application, p. 3-4, Table 3-1.

In 2011, Energy Answers filed its application for a permit to construct and operate an incinerator under the PSD program. EPA is the permitting agency because it has not approved Puerto Rico's authority for this program. Board Op. at 17. In approving Energy Answers' application, EPA asserted that the facility was not subject to NNSR, despite the fact that it will be located in a lead nonattainment area. Exhibit K, EPA Response to Comments, p. 99, Comment 5 ("In addition, Energy Answers is not subject to the nonattainment permit regulations since it would have to emit 100 tons per year of lead. Since the facility will emit less than this major source threshold it is also not subject to nonattainment permit requirements.").⁶ This conclusion was based on the EPA rule Petitioners are challenging.

⁶ EPA also concluded that the facility is not subject to NNSR because its projected lead emissions of 0.31 tons per year are less than the Significant Emission Rate of 0.6 tons per year. See Exhibit K, EPA Response to Comments, pp. 107-108, Comment 2. Although not relevant to this motion to dismiss, it is Petitioners' position that this is incorrect. The Energy Answers facility is a new facility and not a modified facility. Board Op. at 5, 23. For the PSD Program, the Significant Emission Rate limits the applicability of new source review for modified facilities, but not the applicability for new facilities. See 40 CFR §51.166(b)(1)(i) (definition of "major stationary source"), §51.166(b)(2)(i) (definition of "major modification"), §51.166(b)(23)(i). The rules are similar for the NNSR program. See 40 CFR §51.165(a)(1)(iv)(A) (definition of "major stationary source"), §51.165(a)(1)(v)(A) (definition of "major modification"), §51.165(a)(1)(x)(A).

Following hearings, EPA granted a permit to Energy Answers. Petitioners filed a Petition for Review with the EAB, which included a challenge to EPA's rule. Exhibit L, Petition for Review to EAB, pp. 21-33. On March 25, 2014, the Environmental Appeals Board denied the petition for review, with respect to this challenge. Board Op. at 26-28. On May 19, 2014, EPA published notice of its final agency action granting a final permit to Energy Answers. 79 Fed. Reg. 28,710, 28,712. Within sixty days, Petitioners filed a petition for review in this Court, on July 17, 2014.

Under 40 C.F.R. §51.165(a)(2)(i), EPA limits the preconstruction review program for nonattainment areas to a new major stationary source “that is major for the pollutant for which the area is designated nonattainment.” In this appeal, Petitioners assert that EPA's rule is invalid under the two-step test of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984).

Argument

POINT I

BECAUSE PETITIONERS ARE CHALLENGING AN EPA RULE OF NATIONAL APPLICABILITY, THE PROPER VENUE FOR THIS APPEAL IS THE PRESENT COURT, AND NOT THE FIRST CIRCUIT

In asserting that this appeal belongs before the First Circuit, EPA misconstrues the nature of the case. It cites the second sentence of Section 307(b)(1), which provides that petitions for review of "locally or regionally

applicable" final actions of EPA under the Clean Air Act are reviewable in the appropriate circuit. *See* 42 U.S.C. 7607(b)(1). But that rule does not apply here. For an EPA rule of national applicability, the first sentence of Section 307(b)(1) makes the present Court the exclusive forum for judicial review:

(b) Judicial review

(1) *A petition for review of* action of the Administrator in promulgating any national primary or secondary ambient air quality standard, ... or *any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter* [the Clean Air Act] *may be filed only in the United States Court of Appeals for the District of Columbia.*

See 42 U.S.C. 7607(b)(1) (emphasis added). It is axiomatic that challenges to EPA rules are made in the present Court. *See e.g., White Stallion Energy Center v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014) (challenge by business and industry to EPA rule for hazardous air pollutants from the utility industry); *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2013) (challenge by business and industry to EPA rule for interstate transport of air pollutants); *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (challenge by business and industry to EPA rules for greenhouse gases and new source review).

In their petition for review, Petitioners made it clear they are challenging an EPA rule of national applicability:

This petition seeks judicial review of the nationally applicable final rule of the Environmental Protection Agency entitled *Requirements for Preparation, Adoption, and Submittal of SIPs; Approval and Promulgation of State Implementation Plans*, 45 Fed. Reg. 31,307, 31,312 (May 13, 1980) (to be codified at 40 C.F.R. §51.18(j)), attached as Exhibit 2. This rule is now codified at 40 C.F.R. §51.165(a)(2)(i).

Petition for Review dated July 16, 2014, p. 2. Indeed, if Petitioners had filed this appeal in the First Circuit, EPA would have made a motion to dismiss on the grounds that the appeal belongs before the present Court.

EPA undermines its own argument in a footnote, where it acknowledges that Petitioners have not identified any issues in their Statement of Issues, other than the issue of the validity of the EPA rule. *See* EPA Motion at 8, fn. 3. Contrary to EPA's assertion, Petitioners are in fact taking issue with the PSD permit and the administrative appeal thereof, and they are properly doing this before the present Court. *See id.* While EPA attempts to downplay the role of the issue of the validity of the EPA rule in the proceedings below, Petitioners argued before the EAB that EPA's rule was inconsistent with the statute, and that EPA's interpretation of the Clean Air Act should be rejected. *See* Exhibit L, Petition for Review to EAB, part IV, pp. 21-33. This argument was rejected by the EAB, which spent three pages of its Decision on this issue, which EPA acknowledges in a footnote. *See* Board Op., pp. 26-28. *See* EPA's Motion, p. 10, fn. 4. Now, Petitioners may appeal this issue to the present Court.

Finally, the legal authority cited by EPA for the proposition that local cases belong in the local Circuit, contains an exception for "a determination of nationwide scope or effect," which is exactly the nature of this appeal. *See* 42 U.S.C. 7607(b)(1) (second sentence). Even if the second sentence were to apply, if EPA publishes a determination that an action involves "a determination of nationwide scope or effect," then the appeal must be filed in the present Court. *Id.*⁷ Consistent with the spirit of that provision, Petitioners requested that the EAB make a determination whether its decision was "a determination of nationwide scope or effect." Board Op. at 95, fn. 97. In response, the EAB refused to make a determination one way or another, stating that the statute speaks for itself. *Id.* Because the EAB refused to make a determination in response to Petitioners' request, the Court should accept the position of Petitioners that their challenge to the EPA rule is a matter of "nationwide scope or effect," which would make the local Circuit an inappropriate venue.

In any case, Petitioners need not rely on the second sentence of Section 307(b)(1), for this appeal to proceed. Appellate jurisdiction is based on the first sentence of Section 307(b)(1), which requires that all challenges to EPA rules under the Clean Air Act must be made in the present Court.

⁷ Petitioners do not concede that a published determination is necessary for finding venue in the present Court.

POINT II

PETITIONERS HAVE ESTABLISHED A FACT-BASED CONTROVERSY THAT CREATES A RIPE CLAIM FOR CHALLENGING EPA'S RULE

1. The appeal is ripe under the Court's decision in *Coalition for Responsible Regulation v. EPA*.

EPA's second false premise is that there is no newly ripened ability to challenge EPA's rule. In general, Section 307(b)(1) of the Clean Air Act requires a party to make a challenge to a rule within sixty days of promulgation of the rule, which would be July 12, 1980 for the final rule being challenged here. *See* 42 U.S.C. §7607(b)(1). But there is an exception to this requirement. A party may make a legal challenge after the statutory sixty day period, “if such petition is based solely on grounds arising after such sixtieth day.” *Id.* In such a case, the petition for review “shall be filed within sixty days after such grounds arise.” *Id.*

The grounds for Petitioners' challenge arose on May 19, 2014, when EPA published notice of the final permit for the construction and operation of an incinerator by Energy Answers, under the PSD program. The sixty-day period started on May 19, 2014 and ended on July 18, 2014. Petitioners timely filed their petition for review on July 17, 2014. Therefore, they may proceed with the appeal.

This conclusion is consistent with decisions of the Court allowing a party to challenge an agency action beyond the applicable limitations period, based on a new fact-based controversy over the agency action. The Court has long assured

petitioners that they will not be foreclosed from their day in court, when a challenge to an agency action becomes ripe as to them. *See Baltimore Gas & Elec. Co. v. ICC*, 672 F.2d 146, 148 (D.C. Cir. 1982). In that case, the parties had agreed no imminent harm confronted the company as a result of an interpretive order, but the company filed a legal challenge to it during the short 60-day limitations period. *Id.* at 147-48. The Court assured the petitioner it could make a legal challenge, when a fact-based controversy arose. *Id.* ("Because review is not available now, BG&E and other similarly situated shippers will not be barred, if and when a fact-based controversy eventuates, from challenging the Commission's interpretation."). *Accord, Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 473 (D.C. Cir. 1998) ("our finding of unripeness gives petitioners the needed assurance" that they will not be foreclosed from judicial review when the appropriate time comes.").

Specifically addressing the exception to the 60-day rule under Section 307(b)(1) of the Clean Air Act, the Court recently held that "[t]he exception encompasses the occurrence of an event that ripens a claim." *Coalition for Responsible Regulation*, 684 F.3d at 129-130. To satisfy the requirement of ripeness in such a case, an injury-in-fact need only be impending:

"Ripeness, while often spoken of as a justiciability doctrine distinct from standing, in fact shares the constitutional requirement of standing that an injury in

fact be certainly impending.” *Nat'l Treasury Emp. Union v. United States*, 101 F.3d 1423, 1427 (D.C.Cir.1996).

Id. at 130-131. The Court held that business and industry petitioners could challenge EPA rules regarding the applicability of the PSD program that had been promulgated in 1978, 1980, and 2002, despite the passage of decades of time. *Id.* at 129-132 (Part IV of the opinion). The petitioners included the National Association of Home Builders and the National Oilseed Processors Association, which were now impacted by EPA rules, where they formerly were not. *Id.* at 130-131. Under EPA rules dating back to 1978, they were now subject to a permit requirement for their greenhouse gas emissions under the PSD program, because greenhouse gases were now subject to regulation under the mobile source program of the Clean Air Act. *See id.* Consequently, the Court held they had ripe claims that were validly filed within sixty days of the Tailoring Rule. *Id.* at 131-32.

The Court should reach a similar result here. Just as those business petitioners established an injury-in-fact in being subject to a permit requirement to which they had not previously been subject, Petitioners suffered an injury from EPA's granting of a permit to Energy Answers for the construction and operation of an incinerator whose air emissions will adversely affect them. Exhibits A-E, Petitioners' Declarations.

Petitioners' challenges have ripened because there is a "substantial probability" of injury to them. *Coalition for Responsible Regulation*, 684 F.3d at 131 ("The NAHB and NOPA challenges ceased to be speculative when EPA promulgated the Tailpipe Rule regulating greenhouse gases and their challenges ripened because of the "substantial probability" of injury to them."). According to the statute, the NNSR program requires Energy Answers to obtain offsets against its lead emissions, from other source of lead emissions in this nonattainment area. 42 U.S.C. §§7503(a),(c). It cannot do this because the incinerator will release more lead emissions than those from the battery recycling facility that has caused part of Arecibo to be a lead nonattainment area. *See* pages 5-6, *supra*, Exhibit H, Exhibit I. Because the EPA rule allows the company to avoid NNSR and its offset requirements, Petitioners are equally injured by the EPA rule.

The Court's doctrine allowing for a newly ripened challenge to an agency action is available not only to businesses that are subject to permits, but also to residents who are affected by permits. If a business faces a "substantial probability" of injury when EPA requires it to obtain a permit, then residents opposing a project face a "substantial probability" of injury when EPA grants a permit that affects them. *See Coalition for Responsible Regulation*, 684 F.3d at 131. In either case, there is a ripe, fact-based controversy.

The narrow issue presented in this case--the validity of an EPA rule limiting the air pollutants whose potential to emit may trigger NNSR--only arose after EPA designated part of Arecibo as a nonattainment area and granted Energy Answers a permit to construct and operate an incinerator. As such, the problem with the EPA rule could not possibly have come to light in the context of lead in the specific case of the Arecibo nonattainment area, until recently. Before those events occurred, Petitioners did not have a ripe challenge to the EPA rule. In this unique case, it is important that lead is the only air pollutant for which part of Arecibo is in nonattainment, and that lead tends to be emitted in volumes much less than the 100 tons per year threshold for a "major emitting facility" and a "major stationary source." While the facility's potential to emit lead of approximately 630 lb./year might appear low compared to the "major stationary source" threshold of 100 tons per year, that is irrelevant and immaterial, for several reasons.

First, lead is different from other criteria pollutants. While it tends to be released in low concentrations and small amounts by a few stationary sources (e.g., incinerators and battery recycling facilities, the latter being secondary lead smelters), it is a toxic chemical that causes harm to human health at low levels. In that respect, it is more like mercury, which is a hazardous air pollutant under Section 112 of the Clean Air Act. 42 U.S.C. §7412(b). Indeed, both lead and mercury are considered persistent, bioaccumulative, and toxic (PBT) chemicals

under the reporting program of the Emergency Planning and Community Right-to-Know Act of 1986, subjecting it to more stringent reporting thresholds under that program. 64 Fed. Reg. 58,666 (October 29, 1999) (identifying mercury and mercury compounds as PBT chemicals); 66 Fed. Reg. 4500 (January 17, 2001) (identifying lead and lead compounds as PBT chemicals). It is only for historical reasons, that lead was listed as a criteria pollutant. EPA listed lead as a criteria pollutant under Section 108(a)(1)(B) because it resulted from “numerous or diverse sources” in the 1970s. *See* 42 U.S.C. §7408(a)(1)(B), 42 U.S.C. §7412(b)(7). Those sources were cars and trucks using leaded gasoline.

Second, the fact there is a lead nonattainment area in Arecibo means that lead emissions already present a danger to public health, even at low amounts. The nonattainment problem was caused by a neighboring battery recycling facility (that is, a secondary lead smelter), whose emissions from 2007 to 2013 have actually been *less than 1 ton per year*, and less than those contemplated by the Energy Answers facility. *See* pages 5-6, *supra*, Exhibit H, Exhibit I. Therefore, existing concentrations in the air are not protective of public health, despite historical emissions of lead that were much less than the “major stationary source” threshold of 100 tons per year. *See* 42 U.S.C. §7409(b)(1).

The fact that Petitioners are injured by both the granting of the permit and by the EPA rule does not make this case less ripe. Rather, they both contribute to the

harm that Petitioners suffer, making this case ripe. The Court should allow the parties to proceed to a briefing on the merits of the challenge to EPA's rule.

2. The Court should reject any additional arguments by EPA.

In a display of circular reasoning, EPA argues that EAB's conclusion that it did not have authority to address the validity of EPA's rule somehow precludes this appeal. *See* EPA's Motion at 10, fn. 4. But EPA may not rely on a conclusion of law in the very decision being appealed, as a basis for making this motion to dismiss. EPA is simply arguing the merits of the issue presented in this appeal. The proper procedure for addressing the validity of the EPA rule is through the submission of briefs on the merits of the case, and not through a motion to dismiss. Moreover, under Section 307(b)(1), the Court has the authority to invalidate and vacate EPA's rule, even if the EAB refused to do so. Finally, if Petitioners had not raised the issue of the validity of the EPA rule before the EAB, EPA would be arguing that Petitioners are barred from raising it on appeal.

EPA's speculation that Petitioners should wait for some ripening action of the Commonwealth permitting agency also fails. *See* EPA's Motion at 10. As discussed above, Petitioners have established a "substantial probability" of injury, making this case ripe. Based on its regulation at 40 C.F.R. §51.165(a)(2)(i), EPA has concluded that the Energy Answers facility is not subject to NNSR, despite the

fact that it is a major stationary source. Exhibit K, EPA Response to Comments, pp. 99, 108. Energy Answers is not expected to file an application for a NNSR permit, where EPA's rule allows it to avoid that program. Moreover, Petitioners' dispute properly lies with EPA, the federal agency that promulgated the rule that Petitioners are challenging, and not with the Commonwealth agency.

It would make even less sense to wait for any *minor* new source review permitting decision of the Commonwealth agency, as EPA suggests. *See id.* The issue in the present appeal involves the validity of an EPA rule for new source review for major sources, not a Commonwealth rule for new source review for non-major sources. It is the position of Petitioners that the facility is a major source for both the PSD program and the NNSR program, and that EPA's rule allowing it to avoid NNSR should be invalidated and vacated.

Denying EPA's motion would serve the interest of efficiency for all parties. The dispute arose from an application for a permit to construct and operate filed with EPA. The appeal properly went to the EAB, and then to this Court. The Clean Air Act requires challenges to EPA rules to be made in this Court. All the interested parties are before the Court. Petitioners consented to Energy Answers' motion to intervene, because it is clearly impacted by Petitioners' challenge to EPA's rule. The Court granted the motion to intervene. ECF No. 1513017. Now it is appropriate to proceed to a briefing schedule on the merits of the case.

EPA's attempt to defer this appeal is inconsistent with Energy Answers' stated interest in an efficient resolution of this dispute, made in its motion to intervene, which the Court granted. ECF No. 1508085, p. 7 ("Permittee also has an interest in the prompt resolution of this appeal," but that "EPA has no interest in the speed with which this matter is resolved."). Noticeably absent from EPA's motion is any meaningful explanation as to why judicial review of this rule should be delayed, or as to what point in the future Petitioners' challenge would be ripe.

Conclusion

Because the Court is the proper venue for this challenge to EPA's rule, and because EPA's granting of a PSD permit creates a newly ripened claim for Petitioners, the Court should deny EPA's motion to dismiss. The Court should proceed with a briefing schedule that allows Petitioners, EPA, and Energy Answers to brief the case on the merits, under F.R.A.P. 28.

Dated: September 25, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2014, I have served the foregoing **Petitioners' Response to EPA's Motion to Dismiss** on all registered counsel through the Court's electronic filing system (ECF).

Dated at Williamsville, New York on September 25, 2014.

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