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VIA FIRST CLASS MAIL

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**Re: Environmental Justice Concerns Related to the Energy Answers Arcibo,
LLC Municipal Solid Waste Incinerator Proposed For Arcibo, Puerto Rico**

Dear Madam and Sirs,

We write on behalf of Amigos del Río Guaynabo, Inc., Ciudadanos en Defensa del Ambiente, Comité Basura Cero Arcibo, Madres de Negro de Arcibo, and Sierra Club de Puerto Rico (collectively, the “Citizen Groups”) regarding the pending decision of Rural Utilities Service (“RUS”) whether to provide financial assistance to a proposed municipal solid waste incinerator in Arcibo, Puerto Rico. Pursuant to the National Environmental Policy Act (“NEPA”), RUS issued a draft Environmental Impact Statement (“DEIS”) for the project in July

2015.¹ As outlined in our November 2015 comments, the DEIS is significantly flawed in many respects.² We write separately today to address RUS's erroneous conclusion in the DEIS that the incinerator does not implicate environmental justice concerns.

As you know, federal environmental justice policy is meant to protect minority and impoverished communities from bearing a disproportionate share of impacts from pollution. Despite the fact that the population of Arecibo is overwhelmingly Hispanic and low-income, RUS determined that the incinerator does not implicate environmental justice concerns because the area "that would contain and surround the Project all contain impoverished populations and proportionally high minority populations."³ This simplistic comparison distorts federal environmental justice policy and the commitment of the U.S. Department of Agriculture ("USDA") to environmental justice principles. If RUS's analysis were correct, then no project in Puerto Rico could ever implicate environmental justice concerns. That absurd result contravenes federal environmental justice policy, which applies to Puerto Rico, and flies in the face of common sense.⁴ We therefore ask that RUS properly consider and address the environmental justice issues raised by the proposed incinerator before it finalizes the DEIS and issues a Record of Decision.

Factual Background

Energy Answers Arecibo, LLC ("Energy Answers") is seeking financial assistance from RUS to construct and operate a municipal solid waste incinerator in Arecibo, Puerto Rico.⁵

¹ USDA Rural Utils. Serv., Arecibo Waste-to-Energy and Resource Recovery Project Draft Environmental Impact Statement (July 2015), http://www.rd.usda.gov/files/RUSAreciboDraftEIS_July2015_Eng.pdf ("DEIS").

² We incorporate by reference the public comments on the DEIS filed by the Citizen Groups, <http://earthjustice.org/sites/default/files/files/FINAL%20COMMENTS%20with%20all%20exhibits%20-%20reduced%20size.pdf>. In the DEIS, RUS claims "the analysis has not identified any significant environmental or human health impacts that may directly or indirectly affect people or their activities as a result of the Project." As the Citizen Groups explain in detail in their public comments, RUS failed to take a hard look at the environmental impacts of the proposed project, including cumulative impacts, in reaching this conclusion. The environmental justice principles, as set forth by the Council of Environmental Quality, require that an agency address cumulative impacts when conducting an environmental justice analysis. Council on Env'tl. Quality, *Environmental Justice: Guidance Under the National Environmental Policy Act* (Dec.1997), http://www3.epa.gov/environmentaljustice/resources/policy/ej_guidance_nepa_ceq1297.pdf ("CEQ Guidance"). Given the plethora of environmentally harmful sites already present in Arecibo, it is prudent that environmental justice remain a live issue that is fully analyzed before the issuance of a Record of Decision.

³ DEIS at 3-131.

⁴ Exec. Order No. 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7,629, 7,629 (Feb. 11, 1994).

⁵ Energy Answers is also authorized to burn non-municipal solid waste such as automotive shredder residue, tires or tire-derived fuel, and processed urban wood waste. DEIS at 2-14.

Arecibo is a municipality of 91,540 people.⁶ 99.5% of the Arecibo population are minorities and 47.4% live below the poverty level.⁷ The median household income in Arecibo is \$16,325,⁸ well below the US median income of \$53,657.⁹ The entire island of Puerto Rico is an “extreme poverty area” as defined by the U.S. Census Bureau,¹⁰ and also a persistent poverty area targeted by USDA’s StrikeForce for Rural Growth and Opportunity.¹¹

The facility that RUS is proposing to finance will emit lead and hazardous air pollutants, including cadmium, chromium, nickel, dioxins, and furans, in addition to significant quantities of almost all of the criteria pollutants under the Clean Air Act. The Project also will be situated in an area already substantially burdened by polluting sources. The zip code that covers most of Arecibo contains five facilities that report to the Toxics Release Inventory (TRI).¹² These are facilities within specific industry sectors that manufacture or process more than 25,000 pounds of a TRI-listed chemical or otherwise use more than 10,000 pounds of a listed chemical in a given year.¹³ TRI-listed chemicals are those that cause cancer or other chronic human health effects, significant adverse acute human health effects, or significant adverse environmental effects.¹⁴ In 2014, these five facilities released 16,700 pounds of TRI-listed chemicals into the air of Arecibo and generated another 15,200 pounds of TRI-listed chemicals.¹⁵ Barceloneta, the municipality immediately east of Arecibo, is home to five other facilities that reported 46,400 pounds of TRI-

⁶ Arecibo Municipio, PR, Census Reporter (last visited Feb. 24, 2016), <http://censusreporter.org/profiles/05000US72013-arecibo-municipio-pr> (“PR Census Reporter”).

⁷ DEIS at 3-129.

⁸ PR Census Reporter.

⁹ Carmen DeNavas-Walt & Bernadette D. Proctor, U.S. Census Bureau, *Income and Poverty in The United States: 2014* at 5 (Sept. 2015), <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p60-252.pdf>.

¹⁰ DEIS at 3-129.

¹¹ *USDA StrikeForce for Rural Growth and Opportunity*, USDA (last modified Feb. 22, 2016), http://www.usda.gov/wps/portal/usda/usdahome?navid=STRIKE_FORCE.

¹² *2014 TRI Factsheet: ZIP Code – 00612*, EPA (Oct. 2015), http://iaspub.epa.gov/triexplorer/tri_factsheet.factsheet?pzip=00612&pyear=2014&pParent=TRI&pDataSet=TRIQ1 (“2014 TRI Factsheet 00612”).

¹³ 40 C.F.R. §§ 372.22, 372.25; *see generally* Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11021-23.

¹⁴ *TRI-Listed Chemicals*, EPA (last updated Dec. 29, 2015), <http://www2.epa.gov/toxics-release-inventory-tri-program/tri-listed-chemicals>.

¹⁵ 2014 TRI Factsheet 00612.

listed chemicals emitted into the air in 2014.¹⁶ In addition, there are eight active Superfund sites in Arecibo¹⁷ and six in Barceloneta.¹⁸

The Enforcement and Compliance (ECHO) database maintained by EPA identifies a total of 59 EPA-permitted facilities in Arecibo, including twelve facilities with violations in the last three years.¹⁹ One of these facilities is the Battery Recycling Company, a secondary lead smelter located within one mile of the proposed Energy Answers incinerator. This smelter has been primarily responsible for causing air lead levels in Arecibo to exceed EPA's National Ambient Air Quality Standards (NAAQS) for lead.²⁰ A 2011 study by the Centers for Disease Control and Prevention (CDC) found that, among the children of employees at the battery recycling facility who were voluntarily screened, a devastating 57% of children under six years of age had blood lead levels above 5 µg/dL, CDC's reference value.²¹ Additionally, 85% of vehicle dust samples and 49% of home dust samples exceeded EPA's level of concern of 40 µg/square feet.²² Notably EPA's Clean Air Scientific Advisory Committee has recognized that even this 40 µg/square feet dust lead cleanup level is "insufficiently protective of children's health."²³

The proposed incinerator for which RUS is considering federal financing will be a new source of lead emissions in an area that is plainly already overburdened by lead, among other toxic pollution. The significance of this fact cannot be understated. It is well understood that there is *no safe level of lead exposure*.²⁴ Lead's neurotoxic effects are particularly harmful to

¹⁶ 2014 TRI Factsheet: ZIP Code – 00617, EPA (Oct. 2015), http://iaspub.epa.gov/triexplorer/tri_factsheet.factsheet?pzip=00617&pyear=2014&pParent=TRI&pDataSet=TRIQ1.

¹⁷ Search Superfund Site Information, EPA (Nov. 10, 2015), <http://cumulis.epa.gov/supercpad/Cursites/srchsites.cfm> [enter 00612 for Zip Code and click Search].

¹⁸ *Id.* [enter 00617 for Zip Code and click Search].

¹⁹ Enforcement and Compliance History Online (ECHO), EPA (last visited Mar. 21, 2016), <http://echo.epa.gov/?redirect=echo> [use zip codes 00612 and 00688 to search].

²⁰ Green Book: Lead (2008) Nonattainment Areas, EPA (last updated Feb. 22, 2016), <http://www3.epa.gov/airquality/greenbook/mnp.html>; Air Quality Designations for the 2008 Lead (Pb) National Ambient Air Quality Standards, 76 Fed. Reg. 72,097, 72,119 (Nov. 22, 2011) (amending 40 C.F.R. § 81.355).

²¹ CDC, *Take-Home Lead Exposure Among Children with Relatives Employed at a Battery Recycling Facility — Puerto Rico, 2011*, 61 Morbidity & Mortality Wkly Rep. 967 (Nov. 30, 2012), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6147a4.htm>.

²² *Id.*

²³ Letter from Dr. Rogene Henderson, Chair, Clean Air Scientific Advisory Committee, to Stephen Johnson, Administrator, EPA 3 (Aug. 30, 2007), [http://yosemite.epa.gov/sab%5Csabproduct.nsf/96CFAD50E89BE5638525734D00452675/\\$File/casac-07-006.pdf](http://yosemite.epa.gov/sab%5Csabproduct.nsf/96CFAD50E89BE5638525734D00452675/$File/casac-07-006.pdf).

²⁴ EPA, *Integrated Science Assessment for Lead* lxxxviii (2013), http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=518908.

children and can cause lifelong, irreversible effects, including “attention–related behavioral problems, greater incidence of problem behaviors, and decreased cognitive performance.”²⁵ These impacts are all the more troubling in light of recent research by a consortium of authors, including researchers from Johns Hopkins Bloomberg School of Public Health, indicating that the degree to which lead exposure resulted in cognitive detriment was greater among populations with a lower socio-economic status than among the general population.²⁶

Environmental Justice Concerns

Arecibo is a low-income, minority community that is already burdened with unhealthy levels of pollution: precisely the kind of community that environmental justice policies are meant to protect. Nevertheless, RUS has concluded that the proposed Energy Answers incinerator does not implicate environmental justice concerns because the area “that would contain and surround the Project all contain impoverished populations and proportionally high minority populations.”²⁷ This “analysis” ignores fundamental environmental justice policies and principles, and would lead to an absurd conclusion that environmental justice concerns cannot exist anywhere in Puerto Rico.

Executive Order No. 12,898 requires that “each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing . . . disproportionately high and adverse human health or environmental effects of its programs, policies, and activities, on minority populations and low-income populations in the United States and its territories . . . [including] the *Commonwealth of Puerto Rico*.”²⁸ A Presidential memorandum that accompanied the Executive Order instructed the heads of all agencies to “analyze the environmental effects, including human health, economic and social effects, of Federal actions, including effects on minority communities and low income communities, when such analysis is required by [NEPA].”²⁹

The Council on Environmental Quality (“CEQ”) has oversight of the federal government’s compliance with Executive Order No. 12,898 and NEPA.³⁰ In a guidance

²⁵ U.S. Dep’t of Health & Human Servs., *NTP Monograph: Health Effects of Low-Level Lead* xviii (June 2012), https://ntp.niehs.nih.gov/ntp/ohat/lead/final/monographhealtheffectslowlevellead_newissn_508.pdf (emphasis original).

²⁶ See Ramya Chari et al., *Integrating Susceptibility into Environmental Policy: An Analysis of the National Ambient Air Quality Standard for Lead*, 9 Int’l J. Env’tl. Research & Pub. Health 1077 (Apr. 2012), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3366601>.

²⁷ DEIS at 3-131.

²⁸ 59 Fed. Reg. 7,629 (emphasis added).

²⁹ Memorandum from William Clinton, President, to the Heads of All Departments and Agencies (Feb. 11, 1994), http://www3.epa.gov/environmentaljustice/resources/policy/clinton_memo_12898.pdf.

³⁰ CEQ Guidance at 1.

document addressing environmental justice under NEPA, CEQ defines key terms used in the Executive Order. Relevant here, CEQ defines the term “minority” to include Hispanics and defines “minority populations” to exist

where either: (a) the “minority population of the affected area exceeds 50 percent or (b) the minority population percentage of the affected area is meaningfully greater than the minority population percentage in the general population or other appropriate unit of geographic analysis.³¹

Here, whether the affected area is defined as a smaller area in and around Arecibo or the entire island of Puerto Rico more broadly, a minority population plainly exists because the population is more than 50 percent Hispanic. The CEQ Guidance further identifies the three factors to be considered “to the extent practicable” in determining whether human health effects on the minority population are disproportionately high and adverse:

(a) Whether the health effects, which may be measured in risks and rates, are significant (as employed by NEPA), or above generally accepted norms. Adverse health effects may include bodily impairment, infirmity, illness, or death; and

(b) Whether the risk or rate of hazard exposure by a minority population, low-income population, or Indian tribe to an environmental hazard is significant (as employed by NEPA) and appreciably exceeds or is likely to appreciably exceed the risk or rate to the general population or other appropriate comparison group; and

(c) Whether health effects occur in a minority population, low-income population, or Indian tribe affected by cumulative or multiple adverse exposures from environmental hazards.³²

As the Citizen Groups’ comments on the DEIS demonstrate, and as the preceding section summarizes in brief, the record before RUS reflects that these factors weigh strongly in favor of a finding that the proposed incinerator would in fact have a “disproportionately high and adverse” impact on a low-income, minority population. Even focusing on the health effects of lead alone (setting aside the host of other air pollutants with human health impacts that will be emitted by the incinerator), it is evident that environmental justice is a serious concern. The health effects of lead, a neurotoxin with no safe level, are indeed significant. The fact that Arecibo is one of the few areas in the country already in non-attainment for lead indicates that the risk to the minority, low-income population there exceeds the risk to the general population. Finally, the existing panoply of polluting industry in and around Arecibo demonstrates the extent to which cumulative and multiple adverse exposures from environmental hazards exist.

³¹ *Id.* at 25; *see also* DEIS 3-128 (“A minority population exists where the percentage of minorities in an affected area either exceeds 50 percent or is meaningfully greater than in the general population.”).

³² CEQ Guidance at 26. The guidance identifies similar factors to be considered to the extent practicable in identifying “[d]isproportionately high and adverse environmental effects.”

RUS undertook none of this environmental justice analysis in its DEIS, unfortunately. Instead, it dismissed the possibility of environmental justice concerns altogether by concluding that the region of influence and census tracts “that would contain and surround the Project all contain impoverished populations and proportionally high minority populations. Indeed, Puerto Rico as a nation is demographically 99.2 percent minority”³³ RUS’s interpretation defies common sense and would exclude Puerto Rico from any EJ analysis, ever, based on the fact that the island is largely homogenous, i.e. Hispanic and low-income. Rather, Executive Order 12,898, which explicitly included Puerto Rico, and the CEQ Guidance, which calls for the consideration of the three factors identified above “to the extent practicable” to ascertain whether environmental justice concerns are raised, demand a far less rigid conception of “disproportionality.” The approach taken by the U.S. Department of Transportation (“DOT”) is instructive in asking simply whether “an adverse effect . . . is predominantly borne by a minority population and/or a low-income population.”³⁴ Here, plainly, it is.³⁵

Conclusion

The USDA states in its Environmental Justice Strategic Plan that “environmental justice refers to meeting the needs of . . . underserved communities by reducing disparate environmental burdens.”³⁶ As part of the agency performance measures, USDA requires the incorporation of environmental justice in Environmental Impact Statements, as well as research to ensure that the

³³ DEIS at 3-131.

³⁴ Fed. Transit Admin., DOT, *Environmental Justice Policy Guidance for Federal Transit Administration Recipients* 8 (Aug. 15, 2012), http://www.fta.dot.gov/documents/FTA_EJ_Circular_7.14-12_FINAL.pdf.

³⁵ Even assuming that RUS must compare Arecibo to a broader reference area in order to designate Arecibo as an environmental justice community—which it does not—RUS’s simplistic analysis in the DEIS fails to uncover a number of relevant disparities between Arecibo and the broader area. For example, a 2013 study of Puerto Rican municipalities found that Arecibo had lower educational attainment, per capita income, and household income than the surrounding region, while its poverty rates and instances of public assistance were higher. Shanshan Wu & Matthew T. Heberling, *The distribution of pollution and environmental justice in Puerto Rico: a quantitative analysis*, 35 *Population & Env’t* 113 (2013). Those differences suggest disproportionate environmental impacts, requiring RUS to conduct a thorough environmental justice analysis. Indeed, this is the approach taken by the Federal Energy Regulatory Commission (“FERC”) in its Final EIS for a Puerto Rican energy project. Instead of concluding that no environmental justice concerns are raised because all of Puerto Rico is Hispanic and low-income, FERC instead compared poverty and unemployment indicators in the project area with the surrounding areas and Puerto Rico as a whole. FERC, Aguirre Offshore GasPort Project Final Environmental Impact Statement 4-140 to 4-141 (Feb. 2015), <http://energy.gov/sites/prod/files/2015/02/f20/EIS-0511-FEIS-Volume1-2015.pdf> (finding Central Aguirre has a substantially lower mean household and per capita income and substantially higher percentages of families below the poverty line than surrounding areas).

³⁶ USDA, *Environmental Justice Strategic Plan: 2012-2014*, at 4 (2012), http://www.dm.usda.gov/hmmd/FinalUSDAEJSTRATScan_1.pdf.

USDA program does not have disproportionately high and adverse environmental and human and health impacts.³⁷

On behalf of our clients, we call on USDA to comply with its own Environmental Justice Strategic Plan and with the plain intent of Executive Order 12,898. The “analysis” of environmental justice impacts in the DEIS for the Arecibo incinerator cannot stand. We understand that while the recognition of environmental justice concerns arising from the proposed Arecibo incinerator does not necessitate termination of the project, it is critical that “the identification of such an effect should heighten agency attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the affected community or population.”³⁸ In light of the gravity of the environmental justice concerns raised, we request a meeting at your earliest convenience to discuss our concerns in greater detail.



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³⁷ *Id.*

³⁸ CEQ Guidance at 10.