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ENVIR. APPEALS BOARD

January 31, 2008

Via Hand Delivery

Ms. Erika Durr, Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
Colorado Building
1341 G Street N.W. Suite 600
Washington D.C. 20005

Re: Deseret Power Electric Cooperative, PSD Permit Number OU-000204.00,
PSD Appeal No. 07-03

Dear Ms. Durr:

Enclosed for filing is one original and 6 copies of Sierra Club's Opening Merits Brief for the above-referenced PSD Appeal Case. My colleague David Bookbinder submitted the Petition for Review, but we will both be working on this case, so please add my name and contact information to the docket service list for all future filings. If you have any questions about this filing or if I can be of any further assistance please call me at 415-977-5725.

Sincerely,


Joanne Spalding

Enclosures

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**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

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ENVIR. APPEALS BOARD

In the matter of:)	PSD Appeal No. 07-03
)	
DESERET POWER ELECTRIC)	
COOPERATIVE (BONANZA))	
)	
PSD Permit Number OU-000204.00)	
)	

PETITIONER'S OPENING BRIEF

Joanne Spalding
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105
415-977-5725
415-977-5793 (Fax)
joanne.spalding@sierraclub.org

David Bookbinder
Sierra Club
408 C Street, NE
Washington, DC 20002
202-548-4598
202-547-6009 (Fax)
david.bookbinder@sierraclub.org

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INTRODUCTION

The Sierra Club seeks an order remanding the Prevention of Significant Deterioration ("PSD") Permit Number PSD-OU-0002-04.00 ("Bonanza PSD Permit") that EPA Region 8 issued to Deseret Power Electric Cooperative on August 30, 2007, for the purpose of including a best available control technology ("BACT") limit for carbon dioxide (CO₂) in the permit pursuant to Section 165(a)(4) of the Clean Air Act.

Region 8 issued the Bonanza PSD Permit authorizing construction of a new waste-coal-fired electric utility generating unit that would emit 1.8 million tons of carbon dioxide annually without including a BACT limit for CO₂ emissions. Sierra Club submitted comments on the draft permit, noting that it was deficient for failing to include a CO₂ emissions limit. In response, Region 8 stated, "EPA does not currently have the authority to address the challenge of global climate change by imposing limitations on the emissions of CO₂ and other greenhouse gases in PSD permits." Exh. 1, Response to Public Comments, at 5.

In fact, EPA can and must impose emissions limitations on CO₂ in PSD permits for new coal-fired power plants. Section 165(a)(4) of the Clean Air Act requires BACT "for each pollutant subject to regulation under this chapter emitted from . . . such facility." 42 U.S.C. § 7475(a)(4). As recently confirmed by the U.S. Supreme Court, CO₂ is a pollutant under the Clean Air Act. *Massachusetts v. Env'tl. Protection Agency*, 127 S.Ct.

1438, 1462 (2007). It is emitted abundantly by coal-fired generators and is currently regulated under Section 821 of the Act. 42 U.S.C. § 7651k note; Pub. L. 101-549; 104 Stat. 2699. A BACT limit is therefore required.

Ignoring this straightforward obligation, EPA justified its refusal to impose BACT for CO₂ by interpreting "subject to regulation under the Act" as "presently subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant," citing a string of regulatory authorities that utterly fail to support this interpretation. Exh. 1 at 5-6.

The principal regulatory document on which EPA relies to support its interpretation is an internal memorandum that justifies EPA's approach solely on the basis that Congress did not intend regulation of CO₂. Exh. 4, Lydia N. Wegman, Definition of Regulated Air Pollutant for Purposes of Title V, Memo to Air Division Director, Regions I-X (April 26, 1993) ("Wegman Memo"). In concluding that CO₂ was a pollutant, however, the Supreme Court in *Massachusetts* explicitly rejected the exact agency rationale, i.e., EPA's belief that Congress did not intend it to regulate greenhouse gases. Thus, in the wake of *Massachusetts*, any EPA regulatory treatment of CO₂ based on the rationale that Congress did not intend regulation of CO₂ is simply untenable.

In an effort to bolster this inadequate rationale, the Region and the Permittee have submitted briefs to the Board that contrive a thirty-year history of supposedly consistent regulatory interpretations supporting the

conclusion that CO₂ is not subject to BACT. Upon close examination, this "longstanding history" is nothing but a house of cards. Each of the authorities cited is irrelevant, equivocal, or unpersuasive. Taken together they demonstrate, at best, a history of inconsistency and avoidance with regard to regulation of CO₂ from stationary sources, to which no deference is owed. Finally, in a desperate attempt to buttress this shaky regulatory history argument, EPA makes the truly specious claim that Section 821 of the 1990 Amendments is not in fact part of the Clean Air Act, and thus the Section 821 regulations are not regulations "under the Act".

Sierra Club also notes that none of the authorities cited by EPA that actually deals with the term "regulation" in general or regulation of CO₂ specifically was the product of the kind of public participation appropriate to a regulatory decision of this magnitude. A ruling from the EAB on the critical issue of how EPA must treat CO₂ as a PSD pollutant would be based upon an inadequate record and opportunity for public participation. The PSD regulatory history shows that EPA does have the authority to regulate CO₂ as a PSD pollutant and its refusal to do so is the result not of any statutory prohibition but rather the agency's exercise of discretion that has never been subject to public examination. At a minimum, EAB should remand to the Region to fully develop the record

related to CO₂ and allow the public the opportunity to respond to EPA's positions.

ISSUE PRESENTED FOR REVIEW

Because carbon dioxide is a "pollutant subject to regulation" under the Clean Air Act, was EPA's failure to include in the Bonanza PSD Permit a best available control technology ("BACT") emission limit for carbon dioxide a clearly erroneous conclusion of law?

THRESHOLD PROCEDURAL REQUIREMENTS

The Environmental Appeals Board has jurisdiction to review this permit appeal under 40 C.F.R. Part 124. Sierra Club has standing because it participated in the public comment period on the draft permit (Exh. 2, comments filed by Tim Wagner on behalf of Sierra Club) and filed a timely petition for review. 40 C.F.R. § 124.19(a). The Board granted review of the first issue in Sierra Club's petition pursuant to 40 C.F.R. § 124.19(c).

STATEMENT OF FACTS

Deseret proposes to construct a "major modification" to its existing Bonanza plant, as defined in PSD rules. See 40 C.F.R. § 52.21(b)(2)(i). The proposed unit would include a circulating fluidized bed boiler, consisting of primary and secondary air fans, a combustor, a cyclone/solids separator, a superheater, an economizer, an air heater and an induced draft fan. Exh. 3, EPA Statement of Basis at 7. The proposed unit would additionally require combustion and generating systems, an emergency

generator, exhaust systems and pollution control equipment, coal and limestone material handling and storage systems, cooling water systems, and ash disposal systems. *Id.* The proposed unit would have a power output of up to 110 megawatts, bringing the overall Bonanza plant's total to approximately 610 megawatts. *Id.* at 6. It would emit 1.8 million tons of carbon dioxide annually. Exh. 2 at 2.

EPA issued a draft PSD permit on or about June 22, 2006. The comment period closed on July 29, 2006. On April 2, 2007, the U.S. Supreme Court handed down *Massachusetts v. EPA*, 127 S.Ct. 1438, holding that "greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant.'" *Id.* at 1462. EPA then issued the final Bonanza PSD Permit and its Response to Comments on August 30, 2007, without reopening the permit for public comment. Sierra Club now urges the Board to remand this permit because EPA failed to establish a BACT emission limit for CO₂.

ARGUMENT

THE BONANZA PSD PERMIT SHOULD BE REMANDED BECAUSE IT LACKS A CO₂ BACT EMISSION LIMIT.

The Clean Air Act prohibits the construction of a new major stationary source of air pollutants in areas designated as in attainment of the National Ambient Air Quality Standards except in accordance with a prevention of significant deterioration (PSD) construction permit. 42 U.S.C. § 7475(a); 40 C.F.R. §52.21(a)(2)(iii). Section 165 of the Act requires that a

PSD permit include a BACT emission limit "for each pollutant subject to regulation under this chapter emitted from, or which results from" the facility. 42 U.S.C. § 7475(a)(4); see also 42 U.S.C. § 7479(3). EPA repeated that language in its implementing regulations: BACT is required for "any pollutant that otherwise is subject to regulation under the Act." 40 C.F.R. § 52.21(b)(50)(iv).

The Bonanza PSD Permit must include a BACT emission limit for carbon dioxide because it is a pollutant subject to regulation under the Act emitted from the facility. Carbon dioxide has been regulated under the Clean Air Act since 1993, when EPA adopted regulations implementing Section 821 that require monitoring, recordkeeping and reporting of CO₂ emissions by certain covered sources. See 42 U.S.C. § 7651k note; Pub. L. 101-549; 104 Stat. 2699; 40 C.F.R. § 75.1 *et seq.* On April 2, 2007, the Supreme Court held that carbon dioxide and other greenhouse gases are "pollutants" under the Clean Air Act. *Massachusetts v. EPA*, 127 S.Ct. at 1460. Now having been definitively ruled a *pollutant*, CO₂ is accordingly a *regulated pollutant* under the Act, and EPA is required to impose a CO₂ BACT emission limit in the Bonanza PSD permit.

A. The Supreme Court's Holding in *Massachusetts v. EPA* that Carbon Dioxide is a Pollutant Undermines EPA's Entire Approach to CO₂ Regulation.

In ruling that "greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant,'" the Supreme Court completely undermined EPA's rationale for failing to regulate greenhouse gases under the Clean Air Act. *Massachusetts v. EPA*, 127 S.Ct. at 1460. The flaw that the Court identified in EPA's position pervade the agency's approach to CO₂ regulation under other provisions of the statute, including the agency's refusal to require a BACT analysis for CO₂ in this case. EPA's interpretation of the language of the Clean Air Act was influenced by its mistaken belief about congressional intent:

Because EPA believes that Congress did not intend it to regulate substances that contribute to climate change, the agency maintains that carbon dioxide is not an "air pollutant" within the meaning of the provision.

127 S.Ct. at 1460.

Here, the cornerstone of EPA's legal house of cards is a 1993 internal agency memorandum that addresses regulated air pollutants under Title V. See Exh. 4, Lydia N. Wegman, Definition of Regulated Air Pollutant for Purposes of Title V, Memo to Air Division Director, Regions I-X (April 26, 1993)("Wegman Memo"). The Wegman memo defines "air pollutant" in Section 302(g) narrowly to include only pollutants subject to those regulations under the Act that require actual control of emissions. *Id.* at 4-5. It explicitly states that the decision to narrowly define "air pollutant" was based on the agency's view that Congress intended it to do so,

specifically with respect to CO₂. *Id.* at 4. The memo also acknowledges that EPA was exercising discretion in arriving at this definition. *Id.* at 5.

In other words, the very same rationale that was rejected in *Massachusetts* is the basis of the Wegman memo that EPA and Deseret rely on so heavily. In a Section titled "Definition of 'Air Pollutant' Pursuant to Section 302," the Wegman memo interprets "air pollutant" narrowly with the explicit purpose of excluding carbon dioxide and methane from Title V requirements:

Although Section 302(g) can be read quite broadly, so as to encompass virtually any substance emitted into the atmosphere, ***EPA believes that it is more consistent with the intent of Congress to interpret this provision more narrowly.*** Were this not done, a variety of sources that have no known prospect for future regulation under the Act would nonetheless be classified as major sources and be required to apply for title V permits. ***Of particular concern would be sources of carbon dioxide*** or methane.

Memorandum from Lydia Wegman to Air Division Director, Regions I-X, Definition of Regulated Air Pollutant for Purposes of Title V, Exh. 4, p. 4 (emphasis added). This language demonstrates that Wegman's conclusion is based on the mistaken belief that Congress did not intend to regulate CO₂.

The next paragraph of the memo makes it clear that EPA's belief that it should exclude carbon dioxide and methane sources from Title V requirements was its motivation for exercising its discretion to limit

“pollutants subject to regulation under the Act” to those pollutants subject to actual control of emissions:

As a result, EPA is interpreting “air pollutant” for Section 302(g) purposes as limited to all pollutants subject to regulation under the Act. . . . It should be noted that the 1990 Amendments to the Act did include provisions with respect to carbon dioxide (Section 821) and methane (Section 603), but these requirements involve actions such as reporting and study, not actual control of emissions. Therefore, these provisions do not preempt EPA’s discretion to exclude these pollutants in determining whether a source is major.

Id. at 4-5. This interpretation is dead wrong because it was driven by the same mistaken view of congressional intent – the belief that Congress did not intend to regulate greenhouse gases – that the Supreme Court identified in *Massachusetts v. EPA*.

The Court’s analysis invalidating EPA’s gloss on the motor vehicle provisions of the statute demonstrates that the agency was again unduly constrained by its view of congressional intent related to climate change:

While the Congresses that drafted §202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of §202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.

127 S.Ct. at 1462.

This logic applies equally to the PSD provisions, which have similarly broad language covering “each pollutant subject to regulation” under the Act. The interpretation that EPA espouses is influenced by a

constrained view of congressional intent in establishing BACT requirements. EPA contends that it can limit the pollutants subject to BACT to only those pollutants covered by the types of regulations it had authority to adopt at the time the BACT provisions were enacted in 1977. Region 8 Resp. to Pet., p.12. This construction ignores the Supreme Court's directive to give effect to the congressional intent to promote regulatory flexibility that can address changing circumstances and scientific developments.

EPA's misguided belief that it should not regulate greenhouse gases under the Clean Air Act has led the agency to adopt cramped interpretations of numerous provisions, not just the definition of "pollutant" under Section 302(g). The Supreme Court's decision in *Massachusetts v. EPA* compels the agency to rethink entirely its statutory obligations.

B. Carbon Dioxide is Subject to Regulation.

Carbon dioxide is regulated under Section 821(a) of the Clean Air Act, which provides:

Monitoring. – The Administrator of the Environmental Protection Agency **shall promulgate regulations** within 18 months after the enactment of the Clean Air Act Amendments of 1990 **to require that all affected sources subject to Title V of the Clean Air Act shall also monitor carbon dioxide emissions** according to the same timetable as in Sections 511(b) and (c). **The regulations shall require that such data shall be reported to the Administrator.** The provisions of Section 511(e) of Title V of the Clean Air Act shall apply for purposes of this Section in the same manner and to the same extent as such

provision applies to the monitoring and data referred to in Section 511.¹

42 U.S.C. 7651k note; Pub.L. 101-549; 104 Stat. 2699 (emphasis added). In 1993, EPA promulgated the regulations required by Section 821. They require CO₂ emissions monitoring (40 C.F.R. §§ 75.1(b), 75.10(a)(3)); preparing and maintaining monitoring plans (40 C.F.R. § 75.33); maintaining records (40 C.F.R. § 75.57); and reporting such information to EPA (40 C.F.R. §§ 75.60 – 64). The regulations prohibit operation in violation of these requirements and provide that a violation of any Part 75 requirement is a violation of the Act. 40 C.F.R. § 75.5.²

The statutory language is clear: In Section 821 Congress ordered EPA “to promulgate regulations” requiring that hundreds of facilities covered by Title IV monitor and report their CO₂ emissions, and in Section 165, Congress required a BACT limit for “any pollutant subject to regulation” under the Act. The combined effect of these two statutory mandates is that BACT limits are applicable to CO₂ pursuant to Section 165.

1. EPA’s Interpretation of “Regulation” is Unduly Narrow.

¹ According to the Reporter’s notes, these references to Title V are meant to refer to Title IV, and the references to Section 511 are meant to refer to Section 412.

² Because violations of Section 821 are subject to the enforcement provisions of the Act, CO₂ is regulated under both the enforcement provisions of the Act and Section 821.

According to EPA, "regulation" in Section 165 of the Act does not mean regulation; rather, it means "a statutory or regulatory provision that requires actual control of emissions of that pollutant." Resp. to Public Comments, Exh. 1 at 5-6; Region 8 Resp. to Pet. at 6. In other words, regulations that require monitoring and reporting do not count as regulations. This narrow interpretation runs contrary to the plain language of the statute, and contravenes the Supreme Court's admonition to give full effect to the broadly-worded provisions of the Clean Air Act. See *Massachusetts v. EPA*, 127 S.Ct. at 1462 (finding that Congress deliberately used broad language in the Clean Air Act to render it flexible enough to avoid future obsolescence.)

a. The Plain Meaning of "Regulation" Encompasses Monitoring and Reporting Regulations.

The most basic canon of statutory interpretation is that words should be given their plain meaning. *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). Webster's defines "regulation" as "an authoritative rule dealing with details or procedure; (b) a rule or order issued by an executive authority or regulatory agency of a government and having the force of law." Merriam-Webster's Collegiate Dictionary 1049 (11th ed. 2005). While Black's Law Dictionary includes as one definition of regulation "the act or process