



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

November 2, 2007

Ms. Eureka Durr
Clerk of the Board
U.S. Environmental Protection Agency
1341 G Street NW, Suite 600
Washington, DC 20005

Re: Deseret Power Electric Cooperative, PSD Appeal No. 07-03

Dear Ms. Durr:

Enclosed for filing with the Environmental Appeals Board in the above-referenced matter is an original and five copies of the EPA Region VIII's Response to Petition for Review, with attached exhibits, and a Notice of Filing of the Certified Index of the Administrative Record. Copies of these documents have been served on all parties in accordance with the enclosed Certificate of Service.

Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Kristi M. Smith".

Kristi M. Smith
U.S. EPA, Air and Radiation Law Office

Enclosures

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ENVIR. APPEALS BOARD

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

In re:

Deseret Power Electric Cooperative

PSD Appeal No. 07-03

ENVIRONMENTAL APPEALS BOARD

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EPA REGION VIII's RESPONSE TO PETITION FOR REVIEW

The Board should deny review in this case because the Petitioner has failed to demonstrate clear error in Region VIII's action to grant a Prevention of Significant Deterioration (PSD) permit to Deseret Power Electric Cooperative (Deseret). On the first issue raised in the Petition for Review, the Region's determination that carbon dioxide (CO₂) is not currently a regulated pollutant under the Clean Air Act (CAA or Act) is consistent with the requirements of the Act, corresponding EPA regulations, and EPA's longstanding interpretation of those regulations. Since the PSD program was established in 1977, EPA has consistently and permissibly interpreted the phrase "pollutant subject to regulation under the Act" to describe air pollutants subject to a provision in the Clean Air Act or regulations promulgated by EPA under the Act that require actual control of emissions of that pollutant. Carbon dioxide is not currently subject to such a provision or regulation, and there is no cause for the Board to reverse the Agency's established interpretation in this case. The Board should also deny review on the Petitioner's second issue because public comments did not address the reasonably

ascertainable alternatives now raised for the first time in the Petition for Review, the document relied upon by Petitioner is not contained in the administrative record, and the Clean Air Act does not require that a permitting authority study alternatives that were not raised in public comments.

Background

This case involves an appeal of a PSD permit issued by EPA Region VIII to Deseret to construct a new waste-coal-fired utility generating unit at an existing power plant near Bonanza, Utah. EPA Region VIII is the permitting authority in this action because the planned 110 megawatt unit will be located on Indian country lands within the exterior boundaries of the Uintah & Ouray Indian Reservation in northeastern Utah. *See* 40 C.F.R. §52.2346; Statement of Basis at 1 (Resp. Exhibit 1). The new unit is designed to utilize an existing waste coal stockpile at Deseret's nearby coal mine. Statement of Basis at 1; Response to Comments at 1 (Resp. Exhibit 2). The stockpile is estimated to be approximately eight million tons and would otherwise be a wasted energy resource. Statement of Basis at 9-10. Deseret plans to use the additional capacity generated by the new unit to supply electricity to several municipalities in Utah. *See, e.g.* Letter from Daniel D. McArthur, Mayor of St. George, Utah (April 25, 2007).

In June of 2006, the Region issued a proposed permit that would require Deseret to meet stringent emission limitations to satisfy the PSD requirements of the Clean Air Act. Statement of Basis at 4; Response to Comments at 1. The proposal was accompanied by a "Draft Statement of Basis," which informed interested members of the public as to the significant features of the proposed project. At the start of public comment period on the proposed permit, EPA published public notices in five

newspapers in the vicinity of the project and submitted Public Service Announcements about the proposed permit action to several local radio stations in Utah. Statement of Basis at 4; Response to Comments at 1-2. In response, EPA received public comments both in support of the Deseret project, including letters from seven Utah municipalities expressing their need for additional electrical power and stating their plan to participate in the project, and in opposition to the project, including a letter submitted by Petitioner and six other groups. Statement of Basis at 4-5; Response to Comments at 2.

Over the next year, EPA Region VIII gave careful consideration to the public comments it received, and on August 30, 2007, the Region issued a final Federal PSD air permit to Deseret to authorize the addition of a 110-megawatt waste-coal-fired boiler to the existing Bonanza power plant (Permit No. PSD-OU-0002-04.00). EPA Region VIII also issued a final "Statement of Basis" on that date, as well as a "Response to Public Comments" formally responding to public questions and comments about the project proposal and proposed permit.

Standard of Review and Scope of Review

The Board's review of final PSD permit decisions is discretionary and the Board's exercise of such discretion is circumscribed. A petitioner bears the burden of convincing the Board that review is warranted. 40 C.F.R. Part 124. Under the Board's procedural rules, review may be granted under two circumstances. First, the decision by the Regional Administrator may be reviewed if it is based on a "finding of fact or conclusion of law which is clearly erroneous." 40 C.F.R. §124.19(a)(1). Second, review may be authorized if the permit action involves "an exercise of discretion or an important policy

consideration” which the Board believes, in its discretion, it should review. 40 C.F.R. §124.19(a)(2).

A petitioner who possesses standing to appeal is only permitted to raise issues that have been preserved for appeal through public comments or that were not reasonably ascertainable during the comment period. Under applicable regulations, “all reasonably available arguments” that support a position advocated by the petitioner must have been raised during the public comment period. *See* 40 C.F.R. §124.13. A petitioner is also obliged to allege arguments in a manner that are both specific and substantiated. *In Re Avon Custom Mixing Services, Inc.*, 10 E.A.D. 700, 708 (2002). These requirements ensure that any issues challenged on appeal are well defined and actually represent “bona fide” disagreements between the petitioner and the permit authority.

It is a long-standing EPA policy to favor final adjudication of most permitting decisions at the regional level. *See In re MCN Oil & Gas Company*, UIC Appeal No. 02-03, slip op. at 6 (EAB, September 4, 2002) 2002 WL 31030985. As EPA has repeatedly observed, “most permit conditions should be finally determined at the Regional level” and therefore the power of review will only be employed “sparingly.” *See* 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord In re Zion Energy, L.L.C.*, 9 E.A.D. 701, 705 (EAB 2001). Accordingly, the Board frequently defers to regional permit authorities in its review of permit appeals, especially on matters of a technical nature. *In re Three Mountain Power, LLC*, 10 E.A.D. 39, 54 (EAB 2001).

ARGUMENT

I. **The Clean Air Act and EPA Regulations Do Not Currently Require PSD Permits to Contain Emissions Limitations for Carbon Dioxide.**

The absence of a carbon dioxide emissions limitation in the Deseret PSD permit does not establish grounds for review or remand. The EPA Administrator long ago established that the Agency “lacks the authority to impose [PSD permit] limitations or other restrictions directly on the emission of unregulated pollutants.” *North County Resource Recovery Assoc.*, 2 E.A.D. 229, 230 (Adm’r 1986). EPA is currently exploring options for addressing greenhouse gas emissions in response to the Supreme Court decision in *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007), but the Agency has not yet issued regulations requiring control of carbon dioxide emissions under the Act generally or the PSD program specifically. Thus, carbon dioxide is not currently a pollutant regulated under the Clean Air Act.

A. **Carbon Dioxide Is Not Currently A Pollutant “Subject to Regulation.”**

Carbon dioxide is not currently an air pollutant “subject to regulation” because EPA has not established National Ambient Air Quality Standards or New Source Performance Standard for carbon dioxide, identified carbon dioxide as a Class I or II substance under Title IV, or otherwise required control of carbon dioxide emissions under any other provision of the Act. *See* 40 C.F.R. §52.21(b)(50). Consistent with the Agency’s contemporaneous interpretation of the definition of “regulated NSR pollutant” at the time it was adopted into regulations in 2002, the Board has previously determined in PSD permit appeals that carbon dioxide is not a regulated pollutant. *Inter-power of New York*, 5 E.A.D. 130, 151 (EAB 1994) (finding EPA was not required to examine

technologies aimed at controlling carbon dioxide because it was an unregulated pollutant); *see also Kawaihae Cogeneration Project*, 7 E.A.D. 107, 132 (EAB 1997) (upholding a PSD permit in which the permitting authority found that carbon dioxide was not “a regulated air pollutant for permitting purposes”). These opinions are consistent with several other Agency statements reflecting EPA’s nearly 30-year history consistently interpreting the phrase “pollutant subject to regulation” to describe only those pollutants subject to regulations requiring actual control of emissions.

Given the absence of a definition of the term “regulation” in the Clean Air Act and the context in which this term is used in sections 165(a)(4) and 169(3) of the Act, the Agency’s historic interpretation of these provisions is a permissible one that has been affirmed by the District of Columbia Circuit. Nothing in the 1990 Amendments to the Clean Air Act reflects an intent to change EPA’s interpretation or to require limits on carbon dioxide.

While the recent Supreme Court decision in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), held that carbon dioxide and other greenhouse gases are “air pollutants” under the CAA, that opinion did not make carbon dioxide a regulated NSR pollutant or a pollutant subject to regulation under the Clean Air Act. The Supreme Court did not address EPA’s interpretation of sections 165(a)(3) or 169(3) of the Act, alter the requirements of the current PSD permitting program, or provide grounds to change EPA’s longstanding and permissible interpretation these provisions.

1. Region VIII’s Based Its Action on Applicable Regulations and EPA’s Established Interpretation of Those Regulations.

The Region appropriately based its permitting decision on the applicable PSD regulations and the Agency’s established interpretation of those regulations. The Clean

Air Act requires PSD permits to contain technology-based emissions limitations for “each pollutant subject to regulation under the Act.” CAA §§ 165(a)(4), 169(3).¹ In accordance with that statutory provision, EPA regulations specify that PSD emissions limits are required “for each regulated NSR pollutant” emitted by the facility. 40 C.F.R. § 52.21(j). The Deseret permit was based on the regulatory definition of “regulated NSR pollutant” in section 52.21(b)(50) and the agency’s established interpretation of this definition and the Clean Act provision on which the definition is based. Response to Comment at 5-6 (Response #1 a.).

As discussed in the Region’s response to comments, EPA’s PSD permitting regulations define a “regulated NSR pollutant” to include those pollutants for which emission control measures are required under three principal program areas – pollutants for which national ambient air quality standards (NAAQS) have been promulgated (and their precursors), pollutants subject to a section 111 New Source Performance Standard (NSPS), and class I or II substances regulated under title VI of the Act.² 40 C.F.R. § 52.21(b)(50)(i)-(iii). There is no dispute that carbon dioxide is not regulated under any of these three programs.

Consistent with the text of the Clean Air Act, the definition of “regulated NSR pollutant” also covers any “pollutant that otherwise is subject to regulation under the Act.” 40 C.F.R. § 52.21(b)(50)(iv). However, EPA has never interpreted this phrase in the definition to cover pollutants subject only to monitoring and reporting requirements,

¹ The United States Code refers to a “pollutant regulated under this chapter,” which is a reference to Chapter 85 of Title 42 of the Code, where the Clean Air Act is codified. See, 42 U.S.C. §7475(a)(4); 42 U.S.C. §7479(3). For simplicity, this Response generally uses “the Act” and the Clean Air Act section numbers rather than the U.S. Code citation.

² Class I or II substances are specific categories of ozone depleting emissions.

such as those applicable to carbon dioxide under section 821 of the 1990 Amendments to the Clean Air Act and the Part 75 regulations that implement that provision. At the time EPA adopted its definition of “regulated NSR pollutant,” the Agency listed in the preamble to the rule each pollutant that was “currently regulated under the Act” and “subject to Federal PSD review and permitting requirements.” 67 Fed. Reg. 80186, 80240 (Dec. 31, 2002).³ This list did not include carbon dioxide or any other pollutant that was not subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant. Through the contemporaneous adoption of the regulatory language and publication of a definitive list of pollutants subject to regulation at the time, EPA established its interpretation of the phrase “pollutant that otherwise is subject to regulation” in section 52.21(b)(50)(iv).

Petitioner and other interested parties had an opportunity to contest EPA’s interpretation of section 52.21(b)(50)(iv) at the time it was adopted, and they are barred under section 307(b)(1) of the Clean Air Act from collaterally attacking EPA’s interpretation of that regulation in this proceeding. *See* 42 U.S.C. 7601(b)(1) (requiring that challenge to nationally-applicable rules be brought in the D.C. Circuit within 60 days of publication in the Federal Register). The Board has no grounds to now change the interpretation established in the 2002 rulemaking, especially when it is consistent with two of the Board’s own opinions holding that carbon dioxide is not a regulated pollutant after the 1990 Amendments of the Clean Air Act.

³ EPA listed CO, NO_x, SO₂, PM and particulate matter less than 10 microns in diameter (PM-10), Ozone (VOC), Lead (Pb) (elemental), Fluorides (excluding hydrogen fluoride), Sulfuric acid mist, H₂S, TRS compounds (including H₂S), CFCs 11, 12, 112, 114, 115, Halons 1211, 1301, 2402, Municipal Waste Combustor (MWC) acid gases, MWC metals, and MWC organics.

The final 2002 rules were not the first time EPA had articulated its interpretation of “subject to regulation.” The 1996 PSD rule proposal upon which the 2002 regulations are based also listed each of the pollutants that the Agency considered subject to regulation at the time, and that list also did not include carbon dioxide. 61 Fed. Reg. 38250, 38310. The proposal provided notice of EPA’s intent to update its PSD regulations to exclude hazardous air pollutants⁴ from the PSD program and to add ozone depleting substances on the basis the 1990 Amendments to the Clean Air Act. 61 Fed. Reg. at 38,307-11. Commenters that believed EPA should read “subject to regulation” broader and expand the definition of “regulated NSR pollutant” to include carbon dioxide by virtue of the enactment of section 821 of the 1990 Amendments had the opportunity to present their views to the Agency more than 10 years ago, but there is no indication that any commenters did so.

When EPA proposed regulations in 1996 to update its list of pollutants subject to the PSD program based on the 1990 Amendments, its interpretation of the statutory language “subject to regulation under the Act” was apparent to the regulated community and other stakeholders. In April 1993, shortly after the Part 75 Acid Rain Program regulations relied on by Petitioner were finalized (*see* 58 Fed. Reg. 3590 (Jan. 11, 1993)), the Office of Air and Radiation issued an interpretation that specifically considered section 821 of the 1990 Amendments and concluded that carbon dioxide was not “subject to regulation” because section 821 only called for reporting and study of carbon dioxide.

⁴ In the 1990 amendments, Congress adopted section 112(b)(6) of the Clean Air Act, which excludes hazardous air pollutant (HAPs) from PSD. 42 U.S.C. §7412(b)(6); Pub. L. No. 101-549, § 301. Congress did not need to include an additional exemption for carbon dioxide because EPA’s prevailing interpretation of “subject to regulation” did not include pollutants that were not subject to controls, whereas HAPs were clearly subject to controls under section 112 of the Act, as amended.

Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, entitled *Definition of Regulated Air Pollutant for Purposes of Title V*, at 5 (April 26, 1993). The Wegman memo described those pollutants “subject to regulation under the Act” for title V permitting purposes, but it noted that the approach reflected in the memo was similar to the one used in PSD permitting.⁵ Shortly after that, in 1994, the Board issued its decision in the *Inter-Power* case, which also recognized that carbon dioxide was not a regulated pollutant. 5 E.A.D. at 132.

Furthermore, while the 1996 proposal was still pending, EPA issued two additional documents concluding that carbon dioxide was not a regulated pollutant. In 1997, the Board issued its decision in the *Kawaihae* case, which upheld the Hawaii Department of Health’s determination that carbon dioxide was not considered a regulated pollutant for permitting purposes because there were no regulations or standards prohibiting, limiting, or controlling the emissions of greenhouse gases from stationary sources at that time. 7 E.A.D. at 132. In 1998, the Agency’s General Counsel issued an opinion concluding that carbon dioxide qualified as an “air pollutant” under the definition of section 302(g) of Act, but he also made clear that he did not consider carbon dioxide to be regulated under the Act at that time. The opinion plainly stated that:

EPA’s regulatory authority under the Clean Air Act extends to air pollutants, which, as discussed above, are defined broadly under the Act and include SO₂, NO_x, CO₂, and mercury emitted into the ambient air. EPA has in fact already

⁵ Since the Wegman Memorandum defines a CAA “air pollutant” more narrowly than the definition recently afforded by the Supreme Court, the first premise of that memorandum may not continue to be viable. *Compare* Wegman Memo. at 4, *with Massachusetts v. EPA*, 127 S. Ct. 1438, 1460 (2007). However, the *Massachusetts* decision did not address the second premise of this portion of the Wegman memorandum -- the explanation of which air pollutants are considered “subject to regulation under the Act” for permitting purposes. As a result, the second premise of the memorandum remains viable, and it is reinforced by subsequent agency actions described earlier.

regulated *each of these substances under the Act, with the exception of CO₂*. While CO₂ emissions are within the scope of EPA's authority to regulate, the Administrator has made no determination to date to exercise that authority under the specific criteria provided under any provision of the Act.

Memorandum from Jonathan Z. Cannon, General Counsel to Carol M. Browner, Administrator, entitled *EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources* (April 10, 1998) (emphasis added).

Each of the rulemakings, adjudications, and interpretive statements described above reinforced, and in the case of the regulations codified, the Agency's original interpretation of the term "subject to regulation" adopted by Administrator Costle nearly 30 years ago when he promulgated the first PSD regulations implementing sections 165(a)(4) and 169(3) of the Clean Air Act. In the 1978 preamble to these rules, the Administrator observed that a pollutant "subject to regulation under the Act" means any pollutant regulated in EPA regulations for any source type. 43 Fed. Reg. at 26,397 (June 19, 1978). To illustrate what he meant, the Administrator listed criteria pollutants subject to a NAAQS, pollutants regulated under a New Source Performance Standard, and pollutants regulated under Title II of the Act for mobile sources. *See id.* This was the same interpretation proposed by the Administrator in 1977. 42 Fed. Reg. at 57481 (Nov. 3, 1977).⁶

⁶ Although the Administrator also stated that he considered "any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations" to be "subject to regulation under the Act," at that time Subchapter C of Title 40 of the C.F.R. only covered pollutants subject to a statutory or regulatory provision that required actual control of emissions. Moreover, the reference to Subchapter C of Title 40 of the C.F.R. was not repeated in any of the Agency's interpretative statements or rulemakings after the 1990 Amendments and the adoption of the monitoring and reporting requirements for carbon dioxide in Part 75 of EPA's regulations, which is consistent with the Agency's view that "subject to regulation" describes only pollutants subject to regulations requiring actual control of emissions.

As almost 30 years of history illustrates, actual emission controls are necessary before a pollutant is considered "subject to regulation" for PSD permitting purposes under applicable EPA regulations. Section 821 of the 1990 Clean Air Act amendments requires only that certain sources monitor and report carbon dioxide emissions and that EPA make such emissions data publicly available. 42 U.S.C. § 7651k note (found at Pub. L. No. 101-549, 104 Stat. 2699). This provision and the implementing regulations in Part 75 do not impose any limitations on carbon dioxide emissions or require sources to install carbon dioxide emissions controls. Thus, since Section 821 of Public Law No. 101-549 and the Part 75 regulations do not establish emissions control requirements on carbon dioxide, it is not a pollutant "subject to regulation" under the Act and Region VIII did not err in its decision to exclude emissions limits on carbon dioxide from the Deseret permit.

2. EPA's Longstanding Interpretation of The Clean Air Act is Permissible.

Since the term "regulation" is not defined in the Clean Air Act and the phrase "pollutant subject to regulation" is used in the PSD provisions requiring control of emissions, it is reasonable in this context to construe "subject to regulation" to refer to pollutants actually subject to limitations and controls on emissions. Petitioner's preference for a different (and even broader) interpretation than the one adopted and applied by EPA for decades does not illustrate that EPA's interpretation is contrary to the plain meaning of the Act. Rather, at best, it merely illustrates that the phrase "subject to regulation" under the Act used in sections 165(a)(4) and 169(3) is ambiguous and susceptible to more than one interpretation.

Congress did not define "regulation" in the 1977 or 1990 Amendments to the Clean Air Act or provide any direct statement of its intended meaning of the term in the

legislative history. Black's Law Dictionary (8th Ed.) defines regulation as "the act or process of controlling by rule or restriction," which is consistent with EPA's historic interpretation of the term in the context of sections 165(a)(4) and 169(3) of the Act. Petitioner's citation of a different definition from Webster's dictionary simply illustrates the ambiguity of the term rather than establishing a plain meaning. Pet. at 6. Since Congress adopted neither the Black's nor the Webster's definitions, Congress clearly left a gap for EPA to fill in defining the meaning of the term "regulation" as used in the phrase "pollutant subject to regulation."

The interpretation that EPA has chosen to fill that gap is permissible in the context of the Clean Air Act provisions in which it appears. The "pollutant subject to regulation" language appears in the context of a requirement to establish emissions limitations for new and modified sources based on Best Available Control Technology (BACT). Thus, it is reasonable to interpret the BACT requirement as intended to apply to those pollutants that are presently controlled under other parts of the Act based on a previous determination by the Administrator or Congress that such emissions should be controlled. The BACT requirement was adopted at a time when EPA's principal responsibilities under the Clean Air Act were to promulgate NAAQS, review and approve State Implementation Plans for achieving the NAAQS, promulgate categorical emissions limitations under the NSPS and hazardous air pollutant programs, and reduce emissions from mobile sources under Title II. In this context, it was appropriate for EPA to construe "subject to regulation under the Act" to refer to pollutants covered by the types of regulations EPA had the authority to adopt under other provisions of the Clean Air Act at that time. As EPA observed in its 1980 PSD rules, the BACT requirement of