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September 11, 2008

Via Federal Express

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 of the Response of Petitioner Sierra Club to EPA's Supplemental Brief for the above-referenced PSD Appeal Case. 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

cc. Counsel of Record

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

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

RESPONSE OF PETITIONER SIERRA CLUB TO EPA'S SUPPLEMENTAL BRIEF

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INTRODUCTION

After oral argument in this case, the Board asked EPA for a supplemental brief to explain two things. First, given EPA's position that Section 821 of the 1990 Amendments is not part of the Clean Air Act, what authority does EPA have to enforce section 821 requirements, and what actions has EPA taken to enforce those requirements? Second, is a facility that emits the requisite amount of CO_2 a "major emitting facility" subject to the PSD requirements of Section 165?

II. EPA's Enforcement History Confirms that Section 821 is Part of the Clean Air Act.

In the course of adopting regulations implementing section 821, EPA consistently took the position that it is part of the Clean Air Act. *See* Petitioner's Opening Br. at 34-35. The documents that EPA has provided with its supplemental brief demonstrate that EPA treated section 821 as part of the Act in its enforcement proceedings as well. These documents confirm that section 821 is both part of the Clean Air Act and enforceable under the Act.

A. EPA Has, Without Exception, Enforced Violations of Section 821 as Violations of the Clean Air Act.

Not surprisingly, EPA has consistently enforced the CO_2 monitoring, reporting and recordkeeping obligations imposed by section 821 and EPA's own Part 75 regulations through the enforcement provisions of the Clean Air Act. *See In the Matter of IES Utilities*, No. VII-95-CAA-111, EPA Supp. Br. Ex. 1 at 3-21; *In the Matter of Indiana Municipal Power Agency*, No. CAA-05-2000-0016, *id.* at 22-46; *In the Matter of City of Detroit*, No. CAA-05-2004-0027, *id.* at 47-61; *United*

States v. Block Island Power Co., CA-98-045 (D.R.I.), *id*. at 62-118; *Sierra Club v. Public Service Co. of Colorado*, No. 93-B-1749 (D. Colo.), *id*. at 119-168. In each of these cases in which EPA has enforced section 821, it has used Section 113 of the Clean Air Act to do so. *See IES Utilities*, EPA Supp. Br. Ex. 1 at 3-7, 16; *Indiana Municipal Power*, *id*. at 22-25, 37; *City of Detroit*, *id*. at 48-49; *Block Island Power*, *id*. at 62-63, 86; *Public Service Co. of Colo., id.* at 126.

In three of those cases, EPA has assessed civil administrative penalties. *See IES Utilities*, EPA Supp. Br. Ex. 1 at 16-18; *Indiana Municipal Power*, *id*. at 38-39; *City of Detroit*, *id*. at 56. Section 113(d)(1)(B) provides that EPA may assess such penalties of up to $25,000 per day of violation when EPA determines that someone:

> (B) has violated or is violating any other requirement or prohibition of this subchapter or subchapter III, IV–A, V, or VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, order, waiver, permit, or plan promulgated, issued, or approved under this chapter, or for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter);

42 U.S.C. § 7413(d)(1)(B). Thus, in those three cases, EPA alleged that violations of section 821 and the implementing regulations were violations of various parts "of this chapter", i.e., the Clean Air Act, and then imposed hundreds of thousands of dollars in penalties for those violations.

EPA also enforced section 821 under section 113(b)(2), wherein the Administrator is authorized "to commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day for each violation, or both":

> (2) Whenever such person has violated, or is in violation of, any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV–A, subchapter V, or subchapter VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, order, waiver or permit promulgated, issued, or approved under this chapter, or for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter).

42 U.S.C. § 7413(b)(2). *See Block Island Power*, EPA Supp. Br., Ex. 1 at 62-63, 86. Thus, consistent with its practice in the administrative penalty cases, in at least one instance of violations of section 821, EPA duly invoked federal court jurisdiction for violations "of this chapter." *Id*.

Finally, in one case, EPA also invoked its right under § 304(c)(2) to intervene in an ongoing citizen suit; in turn, that suit was brought under § 304(a)(1)(A) for violations of "an emission standard or limitation under this chapter." *See Public Service Co.,* EPA Supp. Br. Ex. 1 at 122.

At least five times – and at least twice in federal court – EPA has contended that section 821 is a provision of the Clean Air Act and/or that violations of section 821 are violations of the Clean Air Act. EPA's consistent enforcement history confirms that section 821 is indeed part of the Clean Air Act, that its CO_2 monitoring and reporting requirements are enforceable under the Act, and that CO_2 is therefore regulated under the Act.

B. The CO_2 Monitoring Requirements of Section 821 Are Enforceable Under Sections 113 and 304 Through Title V Permits.

While EPA's supplemental filing supplied documents showing that EPA has enforced section 821 requirements, the agency did not explain how these

CO_2 monitoring requirements are incorporated into facility operating permits issued under Title V of the Clean Air Act, providing an avenue for enforcement.

Title V permits must contain terms and conditions that require compliance with section 821 requirements. Section 502(b) of the Act mandated that EPA promulgate regulations establishing permit program requirements that would assure compliance "with each applicable standard, regulation or requirement under this chapter." 42 U.S.C. § 7661a(b)(5); *see also* 42 U.S.C. § 7661c(a). Accordingly, the regulations in 40 C.F.R. Part 71, which govern the Federal Operating Permit Program, require that Title V permits include all "applicable requirements." *See* 40 C.F.R. §§ 71.1(b), 71.3(c)(1), 71.7(a)(1)(iv). Applicable requirements include "[a]ny standard or other requirement of . . . 40 CFR parts 72 through 78." 40 C.F.R. § 71.2. Because the regulations implementing the CO_2 monitoring requirements imposed by section 821 are contained in 40 C.F.R. Part 75, those requirements constitute "applicable requirements" to be included in Title V permits. *See* 40 C.F.R. §§ 75.1, 75.10(a)(3); *see also* 40 C.F.R. § 72.2 (defining a continuous emission monitoring system for CO_2 emissions). The regulations implementing section 821 are thereby incorporated into Title V permits issued under the Clean Air Act.

The Title V regulations further provide:

> Violations of any applicable requirement; any permit term or condition . . . or any regulation or order issued by the permitting authority pursuant to this part are *violations of the Act and are subject to full federal enforcement authorities under the Act*.

40 C.F.R. § 71.12 (emphasis added); *see also* 40 C.F.R. § 75.5(a) (providing that a violation of CO_2 monitoring and reporting requirements is a violation of the

Clean Air Act). The CO_2 monitoring requirements are therefore enforceable under both sections 113 and 304.

While EPA's supplemental filing offers some information on the section 113 enforcement mechanism, it does not explain enforceability under the citizen suit provision. Section 304 allows citizens to commence a civil action against any person alleged "to be in violation of (A) an emission standard or limitation under this chapter." 42 U.S.C. § 7604(a)(1). For purposes of section 304, "emission standard or limitation under this chapter" includes:

> (4) any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operation
>
> which is in effect under this chapter . . . or under an applicable implementation plan.

42 U.S.C. § 7604(f). Thus citizens may file suit under the Clean Air Act to enforce compliance with terms of Title V permits. Moreover, regulations adopted under the Clean Air Act create duties under the Act enforceable through citizen suits, particularly regulations like those in 40 C.F.R. Part 75, which indicate on their face that they were issued pursuant to the Act. *See Sierra Club. v. Leavitt*, 355 F. Supp. 2d 544, 553-57 (D.D.C. 2005); 40 C.F.R. § 75.1.

C. EPA's Tortuous Attempts to Rationalize Its Enforcement Actions Demonstrate that Section 821 Must Be Part of the Clean Air Act.

At oral argument, EPA's counsel opined that enforcement of the CO_2 monitoring provisions under section 113 of the Act would be inconsistent with the interpretation that section 821 is not part of the Act. Transcript of Oral Argument

of May 29, 2008, at 81-82. Faced with the Board's request for information on past enforcement of section 821, EPA now acknowledges that it has indeed been enforcing CO_2 monitoring requirements under section 113.

EPA has its hands full trying to explain how its prior enforcement actions square with its new view that section 821 is not part of the Clean Air Act, especially in light of its recognition that no alternative authority to enforce section 821 exists. *See* EPA Supp. Br. at 23. First, EPA has to explain away another whole series of instances in which the agency has said both that section 821 is part of the Act and that violations of section 821 are violations of the Act. Next, it devises two alternative theories to explain why enforcing section 821 via the Clean Air Act is not inconsistent with its theory that section 821 is not part of the Act. Finally, EPA struggles to explain its rationale for why enforcement via the Act does not make CO_2 "regulated" under the Act.

EPA's arguments that section 821 is not part of the Clean Air Act were convoluted enough before; now the agency has tied itself in knots Houdini could not escape. EPA concedes that even while exacting both administrative and civil penalties for violations of section 821 (under authority it only possesses through section 113), it "has not previously articulated the precise mechanism through which" these requirements are actually legally enforceable. EPA Supp. Br. at 9. EPA now purports to view this as a case where "mistakes were made": "EPA's pleadings in these enforcement actions generally exhibited the same imprecision found in EPA's references to the section 821 CO_2 requirements in the preamble and regulatory text promulgating the CO_2 requirements in the Part 75

regulations." EPA Supp. Br. at 21. "Imprecision" indeed. For example, EPA's supposedly "mistaken" habit of referring to section 821 "of the Act" (*e.g.*, *Indiana Municipal Power*, EPA Supp. Br. Ex. 1. at 23 ¶ 5, 37 ¶2) carried over when EPA said the same thing to the Supreme Court. 2006 WL 3043970 at 26-27. Apparently, EPA now considers its repeated references to "violations" of the Act to have been similarly "imprecise."

According to EPA, none of this matters, because even though section 821 is not part of the Act, it is nevertheless enforceable via Clean Air Act provisions. Yet those provisions explicitly apply solely to violations of the Act. EPA asks the Board to condone flawed theories that conflict with both the statute and the agency's prior statements and practices, which the agency never publicly articulated until it was asked to justify its refusal to apply BACT to CO_2 emissions in proceedings before this Board. The Board should reject EPA's belated and inadequate justifications.

i. The Incorporation Theory Is Not Viable.

The first theory EPA posits is that the reference to section 412(e) in section 821 means that 821 and the implementing regulations "are enforceable using mechanisms identical to those contained in sections 412(e) and 113 of the Clean Air Act, by virtue of the incorporation of the language from sections 113, 304 and other provisions of the CAA into section 821". EPA Supp. Br. at 12. Incredibly, EPA envisions a virtual statute that lies entirely outside of the Clean Air Act but consists of provisions identical to only a subset of Clean Air Act provisions, some of which are not even identified.

EPA cites two cases to support its theory that the section 821 language that "the provisions of [Section 412(e)] shall apply for purposes of this section in the same manner and to the same extent as such provision applies to . . . section [412]" means that "section 821 can be interpreted to incorporate by reference the general prohibition against lack of monitoring contained in CAA § 412(e) and all of the relevant language contained in CAA §§ 113, 304, and other provisions of the Clean Air Act that would be necessary to enforce that prohibition." EPA Supp. Br. at 19. Neither of these cases is even relevant, as each dealt with whether there was an exception *to statutory language making an express and wholesale adoption of another statute.* Here (assuming that section 821 remains adrift in the statutory ether), we have the exact opposite question: can reference to *a single provision* in "another" statute serve to incorporate assorted different provisions of that other statute that are not referenced and are not reasonably identifiable from the statutory language? In other words, does section 821's reference to section 412(e) magically "incorporate" not only CAA sections 113 ("Federal Enforcement") and 304 ("Citizen Suits"), but also "any other" provisions of the Act "necessary" for enforcement? Of course, the statutory language and structure provide no basis whatsoever for this EPA maneuver, and EPA itself is silent as to what "other" provisions it is referring to, leaving this Board and the regulated community to guess what those might be. EPA is not only imagining a virtual, shadow statute; it cannot even identify the content of that fabrication.

The first case that EPA cites in support of this open-ended incorporation by reference is *Director, Office of Workers' Compensation Programs v. Peabody*

Coal Co., 554 F.2d 310 (7th Cir. 1977). According to EPA, in *Peabody* "[t]he court found that, despite references to only specific provisions of the LHWCA, Congress intended to incorporate the entire compensation scheme of the LHWCA into the FCMHSA." EPA Supp. Br. at 14-15. EPA has it completely backwards: the FCMHSA explicitly incorporated *the entire* LHCWA, *except* certain specific provisions. Section 422(a) of the FCMHSA stated that "the provisions of Public Law 803, 69th Congress [the LHWCA] * * * *other than* the provisions contained in sections 1,2, 3, . . . [etc]. shall * * * be applicable to each operator of a coal mine." 554 F.2d at 319, n. 11, 12 (emphasis added). Since the relevant section of the LHWCA (§18(b)) was not on the "excluded" list, the Seventh Circuit found it was therefore incorporated into the FCMHSA. *Id*. at 327-328. EPA apparently equates the language making "the provisions of" an entire statute "applicable to" the claims at issue in *Peabody* with the specific reference in section 821 applying "the provisions of [section 412(e)]". The court's ruling in *Peabody,* rooted in a specific congressional directive, does not support an interpretation of section 821 as a freestanding statute that incorporates a specifically referenced provision of the Clean Air Act along with any other provisions of that statute that EPA asserts are needed to create its shadow enforcement scheme.

The same flaw underlies EPA's reliance on *United States v. Navistar International Transportation Corp.*, 152 F.3d 702 (7th Cir. 1998). The issue in *Navistar* was whether an action under a state statute that expressly adopted CERCLA's liability provisions should be governed by the CERCLA statute of

limitations or the state's "residual" statute of limitations, *i.e.,* the period applicable in the absence of any specified period. As the Seventh Circuit pointed out:

> We think it likely, *given the wholesale adoption of federal CERCLA law* necessary to effectuate the Indiana statute as it is written, that if Indiana had decided to employ a statute of limitations other than that contained in CERCLA, it would have done so explicitly.

Id. at 714 (emphasis added). Another significant distinction between *Navistar* and the instant case is that *Navistar* addresses incorporation of a federal statute into an entirely separate state statute. Similarly, the *Peabody* decision involves two entirely distinct federal statutes. The logic of those cases does not apply to two provisions — section 412 and section 821 – enacted together in the very same statute.

EPA's position unravels even more when it admits that its theory of incorporation might not work with regard to enforcement of section 821 under section 113(c), the Clean Air Act's criminal enforcement provision. EPA Supp. Br. at 13, n. 4. Even though EPA repeatedly states that the reference to 412(e) by definition includes section 113, it concedes that criminal enforcement may not be available under that theory. *Id.* This omission would mean that, contrary to clear congressional intent evident in the plain language of the statute, the provisions of section 412(e) would not "apply for purposes of [section 821] in the same manner and to the same extent as such provision applies to the monitoring and data referred to in section [412]." 42 U.S.C. § 7651k note. EPA's incorporation theory conflicts yet again with the plain language of the statute.

ii. The Expanding Statute Theory Conflicts with the Text of the Clean Air Act.

Recognizing difficulties with its incorporation theory, EPA offers an alternative. It posits that the phrase "in the same manner and to the same extent" and the reference to section 412(e) found in section 821 have the effect of expanding the reach of sections 412, 113 and whatever additional but unspecified provisions of the Clean Air Act might be necessary to enforce the prohibition. EPA Supp. Br. at 19. This alternative theory has the advantage of explaining EPA's use of section 113 to enforce section 821 requirements. Moreover, it would mean that section 821 is at least enforceable under the Act and therefore regulated under the Act even if it is not part of the Act. *See* Petitioner's Reply Br. at 18. Yet EPA's theory of an elastic Clean Air Act creates undue complications because it would mean that a provision that is allegedly not part of the Act nevertheless has the effect of changing the scope of the Clean Air Act.

Under this theory, section 113 would apply to violations of some completely separate statute that has not even been incorporated into the Clean Air Act by reference, notwithstanding the fact that section 113 by its terms applies only to violations of various provisions of "this chapter" or to plans, permits or regulations adopted pursuant to the Clean Air Act. *See, e.g.,* 42 U.S.C. §§ 7413(a)(3), (b)(2), (c)(1), (d)(1)(B).

The same logic would apply to section 304, which EPA notably omitted from its discussion of expanding Clean Air Act enforcement authority. Yet if the provisions of section 412(e) are to "apply for purposes of [section 821] in the

same manner and to the same extent as such provision applies to the monitoring and data referred to in section [412]," 42 U.S.C. § 7651k note, they must be comparably enforceable via citizen suits. EPA's reading would allow citizens to enforce (and federal courts to exercise jurisdiction over) legal requirements that lie entirely outside of the Clean Air Act. Under section 304, however, citizen suits are limited to requirements imposed "under this chapter" (i.e. under the Clean Air Act), including implementation plans and permits issued pursuant to the Act. *See* 42 U.S.C. §§ 7604(a) & (f).

Similarly, EPA's theory would expand section 412(e) to apply to a separate statute even though it explicitly applies only to noncompliance "with the requirements of this section, and any regulations implementing this section." 42 U.S.C. § 7651k(e). Of course, if section 821—which Congress intentionally codified as a note to section 412, *see* 104 Stat. 2699—is in fact part of the Clean Air Act and indeed part of section 412, then no uncomfortable stretching of Clean Air Act provisions is required.

iii. EPA Cannot Justify Its Flawed Theories Based On Congressional Intent.

According to EPA, Congress intended that section 821 not be part of the Act, but nevertheless intended to have section 821 be enforced via at least three sections of the Act (§§ 113, 304 and 412(e), except maybe not section 113(c)) and possibly some other parts of the Act, but EPA fails to specify what those might be. Following this convoluted analysis, EPA concludes that enforcement of section 821 and the Part 75 regulations via sections 412(e), 113, 304 (and "any

other specific provisions of the CAA necessary") does not make CO_2 "regulated under the Act":

> However, enforcement of the CO_2 monitoring requirements under either of these readings of section 821 of the Public Law does not make carbon dioxide regulated "under the Act," because such a result would be inconsistent with the clear Congressional intent to exclude the requirements of Section 821 of Public Law 101-549 from the Clean Air Act.

EPA Supp. Br. at 24. In other words, enforcing the CO_2 requirements in section 821 via the enforcement mechanisms of the Clean Air Act does not make CO_2 "regulated" under the Clean Air Act because EPA asserts that Congress did want to regulate CO_2 under the Act.

Thus EPA's entire argument rests on circular reasoning that requires this Board to ignore the statutory language and structure; it assumes the conclusion, namely that Congress intended to exclude section 821 requirements from the Clean Air Act. But that conclusion is wrong. Congress enacted section 821 as a part of the Clean Air Act Amendments, applied those requirements to sources identified by their status under the Clean Air Act (those subject to Title IV), required monitoring of CO_2 emissions according to the same timetable as in section 412 of the Act, and made section 821 requirements enforceable under the Clean Air Act by mandating that the "prohibition" provisions of section 412(e) apply to violations of section 821. 42 U.S.C. § 7651k note. While Respondents and their amici have made much of the fact that section 821 refers to "the Clean Air Act" rather than "this Act", that language choice is needed to distinguish the Clean Air Act from the Clean Air Act Amendments of 1990, both of which are referenced in section 821. It does not imply that section 821 is not part of the

Clean Air Act. Moreover, codification as a note to the Act is not an indication of an intent to exclude it from the Act. *See* 104 Stat. 2699. Rather, it is simply a logical way to relate two provisions that have different purposes but the same implementation and enforcement mechanisms. The language and structure of the statute as a whole indicate that Congress intended section 821 to be part of the Clean Air Act.

iv. EPA's New Interpretation Would Impermissibly Revise Existing Agency Interpretations of the Clean Air Act and EPA Regulations.

Even if EPA's reading of the Clean Air Act to exclude Section 821 from the statute were credible, the position is not one that EPA may freely take. EPA has interpreted section 821 as part of the Clean Air Act and violations of section 821 requirements as violations of the Act in published rules. *See, e.g.,* 40 C.F.R. §§ 75.1, 75.5; *see also* 40 C.F.R. § 71.12. The agency has repeatedly affirmed that interpretation in enforcement proceedings. *See* Section I.A *supra*. The agency cannot change that interpretation by fiat in this proceeding. Adopting the view that Section 821 is not part of the Act would substantively amend and revise EPA's authoritative interpretation of the statute and existing Clean Air Act enforcement regulations, rules that were created through notice and comment procedures. Under the doctrine laid out by the D.C. Circuit in *Paralyzed Veterans of America v. D.C. Arena L.P.,* 117 F.3d 579 (D.C. Cir. 1997), if the agency wishes to adopt the position it has taken in this case, it is required to do so first through notice and comment rulemaking.

In *Paralyzed Veterans*, the D.C. Circuit held that once an agency issues an "authoritative interpretation" of its own regulations, the agency cannot freely amend that interpretation without first offering proper opportunities for notice and comment:

> Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to "*repeals*" or "*amendments.*" *See* 5 U.S.C. § 551(5). To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements. That is surely why the Supreme Court has noted (in dicta) that APA rulemaking is required where an interpretation "adopt[s] a new position inconsistent with ... existing regulations."

Id. at 586 (quoting *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, ___, 115 S.Ct. 1232, 1239 (1995)). As EPA concedes, its new interpretation could render section 821 requirements unenforceable under the criminal enforcement provisions of the Clean Air Act. EPA Supp. Br. at 13 n.4. It could also have the effect of limiting or eliminating citizen enforcement. Indeed, taking the view that the regulations implementing section 821 requirements are not "under the Act" and that violations of those regulations are not "violations of the Act" could even preclude EPA enforcement of these regulations under the administrative and civil enforcement provisions of the Act, which by their terms apply only to violations of the Act. *See* 42 U.S.C. §§ 7413(a)(3), (b) & (d). The agency is not entitled to adopt that interpretation at all because it is contrary to the plain language of section 821, but it certainly cannot do so without undertaking notice and comment rulemaking. *See, e.g., Environmental Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005)(vacating EPA monitoring rule under *Paralyzed Veterans* due to EPA failure to allow for notice and comment).

D. EPA's Position on Section 821 Has, and Continues to Be, Dependent on Where EPA Appears in the Caption

EPA would have this Board believe that all of the agency's extensive history of treating Section 821 as a part of the Clean Air Act was simply a matter of inattention. EPA implies that this question simply had never arisen before, and now, having been brought to the agency's attention for the first time, it has allowed EPA the opportunity to carefully examine the Act and explain how and why Section 821 is some sort of free-floating provision in the statutory ether.

On the contrary, it is clear that EPA has been aware of this claimed "ambiguity" for more than a decade, and has intentionally and consistently interpreted section 821 as part of the Act in promulgating and enforcing the Part 75 regulations. It is only when section 821's status may be used against agency policy that EPA both reverses its position – as it has done at least once before – and makes the disingenuous claim that it never considered this issue previously.

In the original briefing before this Board, amici Utah and Western Non-Governmental Organizations cited *New York v. Browner*, 1998 WL 213708 (N.D.N.Y. April 21, 1998). In *Browner,* the plaintiff alleged EPA failure to comply with the requirements of section 404 of the 1990 Amendments that – just like section 821 – was codified as a note to part of Title IV; this as a note to section 401. 42 U.S.C. 7651, note. EPA's response to amici's argument was that, "there is no indication that the court was asked to address the specific question of whether section 404(2) of the 1990 CAA Amendments was a part of the Act." EPA Br., March 21, 2008, at 50, n.18.

But there is more to the story. In fact, in its motion for summary judgment (which EPA has courteously provided to Sierra Club during this briefing process), EPA specifically reserved the right to appeal "the additional jurisdictional argument that Plaintiffs' suit may not be brought under the citizen suit provision of the CAA because Section 404 was never incorporated into the CAA." Memorandum in Support of EPA's Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, July 27, 1998 (relevant excerpts annexed hereto as Exhibit A), at 7, n.1.

Thus ten years ago EPA was explicitly taking the position – in a federal court filing, no less – that some provisions of the 1990 Amendments codified as notes to Title IV were not incorporated into, or considered requirements of, the Clean Air Act for purposes of judicial review. So on the one hand, when EPA is the defendant, and is seeking to avoid responsibilities imposed by such notes, they are **not** part of the Clean Air Act. On the other hand, when EPA is the plaintiff and is seeking to enforce those provisions – in at least those five enforcement cases, and perhaps others – then they **are** part of the Clean Air Act.

EPA cannot have it both ways, and in the case of section 821, the agency has adopted a definitive position that the provision is indeed part of, and enforceable under, the Clean Air Act. The language and structure of the statute support that interpretation, and EPA must abide by it.

II. The Board Need Not Reach the Definition of "Major Emitting Facility"

Because the Bonanza facility is indisputably a "major emitting facility" under section 169(1) of the Act, 42 U.S.C. § 7479(1), the regulations interpreting

that provision are not before the Board in this case. While the issues related to the Board's second question in its Request for Further Briefing are thought-provoking, the Sierra Club respectfully suggests that the Board need not reach them.

The Sierra Club believes that the Supreme Court's decision in *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007), does indeed require EPA to completely rethink its approach to regulation of greenhouse gases under the Clean Air Act, *see* Petitioner's Opening Br. at 6-10, but this case does not require the Board to invalidate any existing regulation. On the contrary, because CO_2 is regulated under the Clean Air Act, the Board need merely apply the existing EPA regulation mandating a BACT analysis for "any pollutant . . . subject to regulation under the Act." 40 C.F.R. § 52.21(b)(50)(iv). To the extent that the agency determines it necessary to deal with issues related to new sources that are now subject to PSD requirements solely as a result of CO_2 emissions, those issue are best addressed by this Board in a case that squarely raises those issues or by the policymaking entities within the agency. *See* Advance Notice of Proposed Rulemaking, Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44354 (July 30, 2008).

Because the "major emitting facility" definition is not at issue here, the Sierra Club respectfully declines to offer a detailed response to EPA's brief on this issue. That does not mean, however, that the Sierra Club concurs in EPA's analysis. On the contrary, EPA's argument fails to carry the heavy burden required to show that the statute should be interpreted contrary to its plain

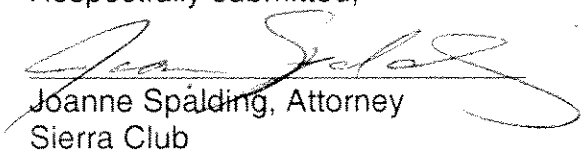
meaning, and similarly fails to show that the doctrine of administrative necessity justifies its interpretation of the statute. *See Alabama Power v. Costle*, 636 F.2d 323, 356-61 (D.C. Cir. 1979). Most importantly, EPA's efforts to limit the impact of the *Massachusetts v. EPA* decision ignore the sweeping language of that decision. *See* Petitioner's Opening Br. at 6-10.

To the extent that the EPA's interpretation of section 169(1) and the potential impact of *Massachusetts v. EPA* on that interpretation informs the Board's decision in this case, it would be valuable to consider the Supreme Court's admonition to interpret the broad language of the Clean Air Act to give full effect to the congressional intent to address changed circumstances and scientific developments. 127 S.Ct. at 1462. EPA has already narrowed the reach of the PSD program by interpreting it to apply to only sources of regulated air pollutants. In light of the statutory language, to further narrow its scope by interpreting "regulated" to mean "subject to actual control of emissions" would contravene both the language of the Act and the direction of the Supreme Court.

CONCLUSION

The documents submitted by EPA in response to the Board's request for further briefing demonstrate that the CO_2 monitoring requirements of section 821 are both part of the Clean Air Act and enforceable under the Act. CO_2 is clearly regulated under the Clean Air Act, and the Bonanza PSD permit must therefore include a BACT emissions limit. The Sierra Club respectfully requests that the Board remand to permit with instructions to include a CO_2 BACT limit.

Respectfully submitted,



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Dated: September 11, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response of Petitioner Sierra Club to EPA's Supplemental Brief were served by United States First Class Mail on the following persons this 11th of September, 2008:

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EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK Plaintiff, v. CAROL M. BROWNER, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and the ENVIRONMENTAL PROTECTION AGENCY, Defendants.	)	Civil Action No. 97-1028 (TJM; RWS)

MEMORANDUM OF LAW IN SUPPORT
OF EPA'S CROSS-MOTION FOR SUMMARY JUDGMENT
AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

ARGUMENT

The Court should enter judgment in EPA's favor for the following reasons. First, EPA fulfilled its nondiscretionary duty under section 404 of the 1990 CAA Amendments when it issued its Acid Deposition Report that included the requisite consideration of possible acid deposition standards. Second, to the extent EPA had a duty to provide a description of possible deposition standards, that duty was clearly met because the Report itself actually describes the nature and numerical value of such standards. Finally, to the extent Plaintiffs' challenge is to the substance of the Report, such a challenge cannot be maintained in the context of a mandatory duty suit.[1]

I. EPA FULFILLED ITS NONDISCRETIONARY DUTY UNDER SECTION 404 OF THE CLEAN AIR AMENDMENTS OF 1990 WHEN IT ISSUED ITS ACID DEPOSITION REPORT.

A. EPA Fulfilled Its Mandatory Duty Under Section 404 Of The Clean Air Act Amendments Of 1990 Because It Considered The Topics Enumerated In The Statute.

1. Mandatory Duty Claims Are Very Narrowly Defined By Statute.

Plaintiffs' filed this action under CAA section 304. 42 U.S.C. § 7604(a)(2). Under section 304 (a)(2) of the CAA, a citizen can sue only to compel action where the EPA

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[1] Before reaching the merits of this case, EPA expressly reserves the right to appeal jurisdiction on the grounds contained in its Motion to Dismiss as well as any other jurisdictional grounds. This includes the additional jurisdictional argument that Plaintiffs' suit may not be brought under the citizen suit provision of the CAA because section 404 was never incorporated into the CAA. The CAA citizen suit provision explicitly limits suits to those brought against the Administrator "under this chapter." CAA section 304(a)(2). Because section 404 was never incorporated into the CAA, it is not a part of "this chapter" for purposes of review. This is also the case for suits brought pursuant to the CAA judicial review provisions which limits claims to "final action taken, by the Administrator under this chapter." See CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1).