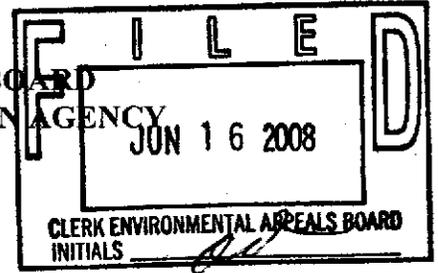


BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.



In re: )

Deseret Power Electric Cooperative )

PSD Permit No. PSD-OU-0002-04.00 )

PSD Appeal No. 07-03

**ORDER REQUESTING FURTHER BRIEFING**

On August 30, 2007, the United States Environmental Protection Agency, Region 8 ("Region") issued a prevention of significant deterioration ("PSD") permit (number PSD-OU-0002-04.00) to Deseret Power Electric Cooperative ("Deseret") for the construction of a new waste-coal-fired electric generating unit at Deseret's existing Bonanza Power Plant, located near Bonanza, Utah. On October 1, 2007, Sierra Club filed a petition, pursuant to 40 C.F.R. § 124.19(a), requesting that the Environmental Appeals Board review the Region's decision to issue the PSD permit.

By Order dated November 21, 2007, the Board granted review of one of the two issues raised in Sierra Club's petition for review. Sierra Club's petition raised two issues: first, Sierra Club argued that the Region erred by failing to require a best available control technology ("BACT") limit for control of CO<sub>2</sub> emissions; and, second, Sierra Club argued that the Region erred by failing to consider certain "alternatives" to the proposed facility that are similar to alternatives recommended by U.S. EPA Region 9 in another proceeding. The Region's response

to public comments regarding the first of these two issues included a discussion of the U.S. Supreme Court's decision in *Massachusetts v. EPA*, \_\_ U.S. \_\_, 127 S.Ct. 1438 (2007). The Board granted review of only the first issue.<sup>1</sup>

The Board's November 21 Order also set forth a briefing schedule to allow briefing and argument from interested persons as provided in 40 C.F.R. § 124.19(c). Pursuant to that briefing schedule (as extended by subsequent order), the Board received briefs from Sierra Club and several amici in support of Sierra Club's contention that the Region erred in not requiring a CO<sub>2</sub> BACT limit, and the Board also received briefs from the Region in which EPA's Office of Air and Radiation ("OAR") joined, the permit applicant Deseret, and several amici in opposition to Sierra Club's contention. The Board also received reply briefs from Sierra Club and one supporting amicus, and the Board held oral argument in this matter on May 29, 2008.

At this time, the Board requests further briefing from the Region and OAR, filing jointly, on the two following matters:<sup>2</sup>

- 1) At oral argument,<sup>3</sup> the Region/OAR indicated that the CO<sub>2</sub> monitoring requirements implementing section 821 of Public Law 101-549, set forth inter alia in 40 C.F.R. §§ 75.1(b), 75.10(a)(3), may not be enforceable under the Clean Air Act, but might instead be enforceable under other law. While indicating that the he was "not in a position to weigh in on that in a definitive way," counsel for the

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<sup>1</sup> The Board continues to hold Sierra Club's second issue under advisement.

<sup>2</sup> In preparing this brief, the Region and OAR shall consult with both the Office of General Counsel and Office of Enforcement and Compliance Assurance.

<sup>3</sup> Transcript of Oral Argument of May 29, 2008, at 66-68, 81-82.

Region/OAR, when asked about whether the carbon dioxide monitoring requirements were enforceable under the Clean Air Act, stated “I am saying [that] consistent with our interpretation advocated to you here today that that would not be appropriate.” Transcript of Oral Argument of May 29, 2008, at 82. The Region/OAR’s brief on this issue shall address whether the carbon dioxide monitoring requirements springing out of or resulting in whole or in part from section 821 of Public Law 101-549, including but not limited to the requirements of 40 C.F.R. § 75.10(a)(3), are enforceable under the Clean Air Act. The brief shall identify the basis for the Region/OAR’s position, and the relevance, if any, of the statement in section 821 that the provisions of section 412(e) of Title IV of the Clean Air Act shall apply for the purposes of section 821 “in the same manner and to the extent as such provision applies to the monitoring and data referred to” in section 412 of the Clean Air Act.<sup>4</sup> The Region/OAR shall further identify any applicable law, other than the Clean Air Act, authorizing federal court jurisdiction and authorizing remedies or penalties for a violation of the CO<sub>2</sub> monitoring requirements. The Region/OAR shall identify whether and where this position, or any alternative position, as to the enforceability of section 821 under the Clean Air Act has been heretofore publically articulated. The Region/OAR shall include

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<sup>4</sup> Section 412(e) of the Clean Air Act provides: “Prohibition - It shall be unlawful for the owner or operator of any source subject to this title to operate a source without complying with the requirements of this section, and any regulations implementing this section.” 42 U.S.C. § 7651k(e).

within this identification the case name and number of every administrative or judicial enforcement action taken to date, if any, to enforce any requirements springing out of or resulting in whole or in part from section 821 of Public Law 101-549 or 40 C.F.R. part 75 (as they relate to CO<sub>2</sub>) and the basis on which the jurisdiction of the court or Agency was invoked in each case.

- 2) For purpose of understanding Congressional intent as to the scope of the permitting requirement for the PSD program (as opposed to the BACT requirement in particular),<sup>5</sup> the Region/OAR shall address whether, under section 165(a) of the Clean Air Act, 42 U.S.C. § 7475(a), a facility with the potential to emit at least the requisite number of tons per year, as specified in section 169(1) of the Clean Air Act, 42 U.S.C. § 7479(1), of carbon dioxide is a major emitting facility requiring a PSD permit. In this regard, the Region/OAR shall address the provision of the definition in section 169(1) defining a “major emitting facility” by reference to potential emissions of “any air pollutant” and the effect of the Supreme Court’s decision in *Massachusetts v. EPA*, \_\_ U.S. \_\_, 127 S.Ct. 1438 (2007), confirming that carbon dioxide is an “air pollutant.” The Region/OAR’s brief on this issue shall discuss, among other things, the applicable regulatory history including the Agency’s 2002 rulemaking and the Agency’s statement in proposing the PSD regulations in 1977 that “[a]s required in the Act amendments, the proposed regulation will require a PSD preconstruction permit for any major stationary source if the source is a major stationary source of any

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<sup>5</sup> See Transcript of Oral Argument of May 29, 2008, at 55-61.

pollutant *regulated under the Act.*" 42 Fed. Reg. 57479, 57481 (Nov. 3, 1977)

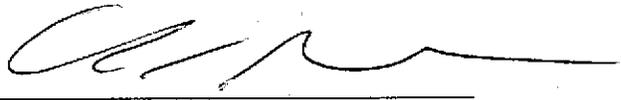
(emphasis added).

The Region/OAR's brief shall be due on or before Wednesday, July 16, 2008. Any party, or interested person that has previously participated in this proceeding as an amicus, may file a response to the Region/OAR's brief on or before Friday, August 15, 2008.

So ordered.

Dated: June 16, 2008

ENVIRONMENTAL APPEALS BOARD

By: 

Edward E. Reich  
Environmental Appeals Judge

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Requesting Further Briefing in the matter of Deseret Power Electric Cooperative, PSD Appeal No. 07-03, were sent to the following persons in the manner indicated:

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